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Australian Institute
of Criminology

GOVERNMENT ILLEGALITY

Edited by
Peter Grabosky

Assisted by
Irena Le Lievre

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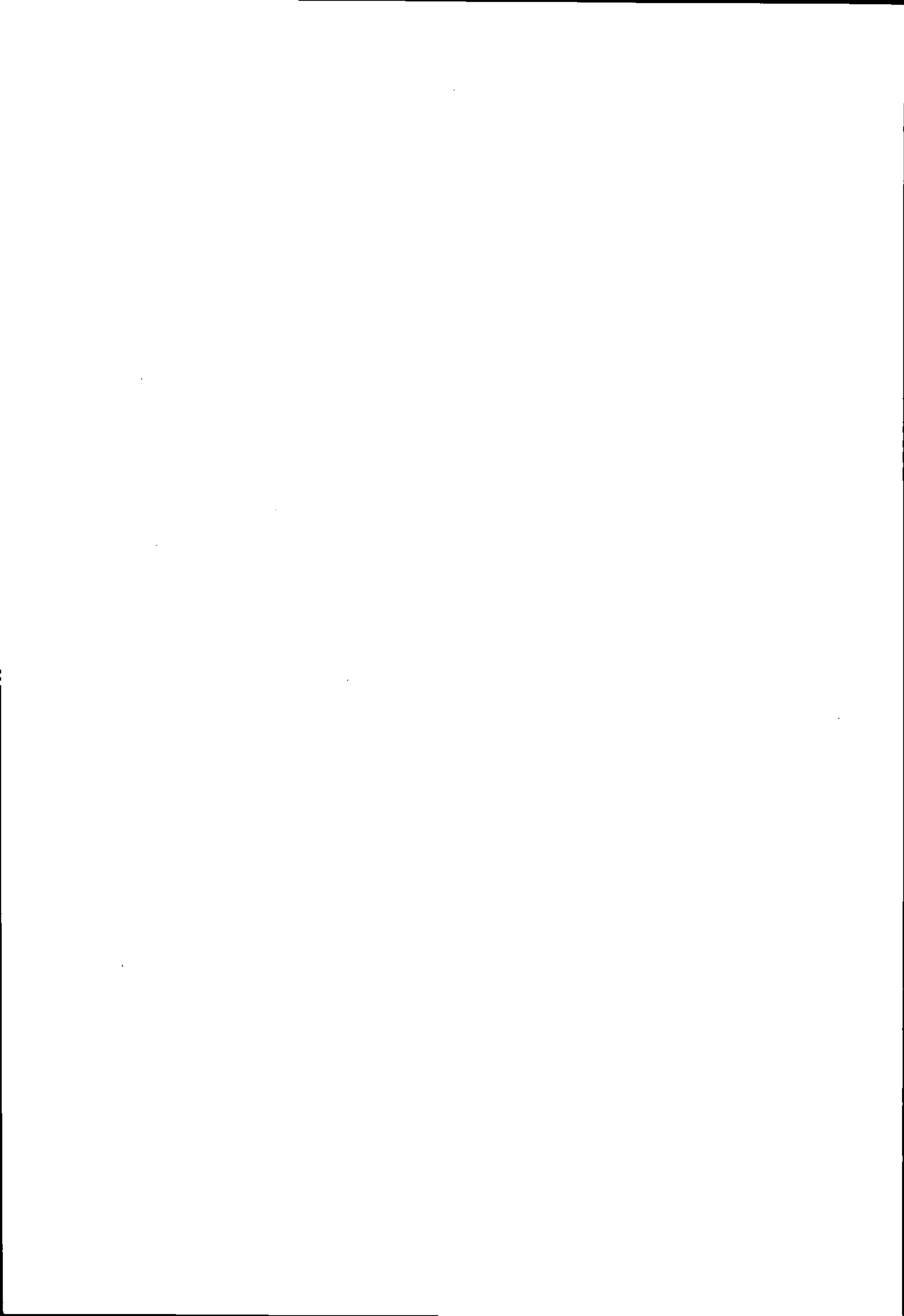

INTRODUCTION

David Biles
Acting Director
Australian Institute of Criminology
Canberra

A great deal has been said in recent years about governmental corruption in Australia. To most people, this connotes the acceptance of some consideration in return for favourable action or inaction. But this seminar will look beyond the use of public ofice for private gain, and focus primarily on illegal conduct by government agencies and officers in furtherance of government policy.

On a continuum of culpability, this may range from extreme malevolence to less heinous transgressions arising from excessive zeal, gross negligence, poor judgment, or honest error.

Examples from recent Australian history abound:

- The systematic abuse of prisoners in NSW over more than thirty years.[1]

- Illegal telephone interceptions by the NSW police over a period of fifteen years, with the knowledge of five successive Police Commissioners.[2]

- The collection of political intelligence by State police agencies and the deliberate concealment of these operations from the elected government.[3]

- The use of excessive force against civilians by security intelligence agents in the course of a training exercise.[4]

Illegality is by no means the monopoly of criminal justice - or intelligence agencies. Recent years have seen:

- Gross financial mismanagement or acquisition of land for public housing in Victoria.

- An untold number of deaths and injuries in public sector workplaces arising from violations or occupational health and safety standards.

- Significant pollution of the environment by public authorities.

- Discriminatory practices by government departments against employees or members of the public.

The relevance of these issues to the programs of this Institute should be obvious. The concern of the Institute is not limited to the crimes of the powerless.

If any individuals or agencies should be held to the highest standards of conduct it should be government officers and public authorities. In the words of Mr Justice Brandeis:

> In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law. It invites every man to be a law unto himself. It invites anarchy.[5]

Both corruption and crime 'in the line of duty' are linked, and may arise from common organisational pathologies. Similarly, they may be prevented by common remedies and countermeasures.

Ours is not a society of angels. Given the size of the public sector in Australia, some degree of misconduct is inevitable. It is the task of this seminar to explore means of ensuring that this is minimised.

Not all oficial misconduct is criminal, but the Australian Institute of Criminology still has a role to play in confronting these questions. The line between criminal conduct and tortious conduct is not always clear, and both types of illegality may flow from the same antecedent circumstances.

In keeping with this wider perspective, the seminar will explore countermeasures and remedies for government illegality which go beyond the traditional boundaries of criminal justice. The criminal justice system has been, and remains, a very imperfect instrument of social control. It is costly, often cumbersome, and not always effective.

If criminal conduct, not to mention other wrongful acts, can be more readily discouraged or more justly and effectively dealt with by civil or administrative remedies, this is worth knowing.

These proceedings will begin with a section on the various institutions which may have a role to play in the prevention and control of government illegality. These include the office of ombudsman, auditors-general, public service boards, royal commissions, and parliamentary committees of inquiry.

The following section will focus specifically on the control of illegality by police and prisons departments. Central to these discussions will be the complementarity of internal compliance procedures and mechanisms of external oversight.

The latter half of the proceedings will address a number of issues. One might surmise that governments which are more open with, and accessible to, the publics which they serve, are less likely to betray their trust. To this end, discussions will focus upon freedom of information, investigative journalism, and whistle blowing as means of controlling errant governments, in addition to internal accountability structures and remedies at civil law.

Corrective response to official misconduct should meet a variety of goals. The first of these is deterrence, both general and specific. Simply stated, lawbreakers should be discouraged from future lawbreaking, and others should be discouraged from following an offender's example.

The second, is rehabilitation. The wayward organisation and its principals should be encouraged to modify those policies and procedures which led to the harm in question.

The third is victim compensation. Those suffering as a result of official misconduct should be entitled to equitable recovery.

The fourth, in keeping with Brandeis' dictum, is moral condemnation. The misconduct in question should be forcefully denounced, and the values of society reaffirmed.

At the same time, means of controlling official misconduct should not excessively reinforce the existing self-protective inclination of bureaucrats. Vigorous and open public administration should not be discouraged.

To this end, issues to be addressed will include the choice of civil or criminal remedies and individual or collective liability. Some of the key questions are:

When should the criminal process be invoked?

Should individuals, or organisations be prosecuted, or both?

Would other remedies be more effective or efficient?

What kinds of organisational structures or management practices are least conducive to lawbreaking?

It is hoped that in entering this arena, the Australian Institute of Criminology can make a constructive and useful contribution to the quality of public administration in Australia.

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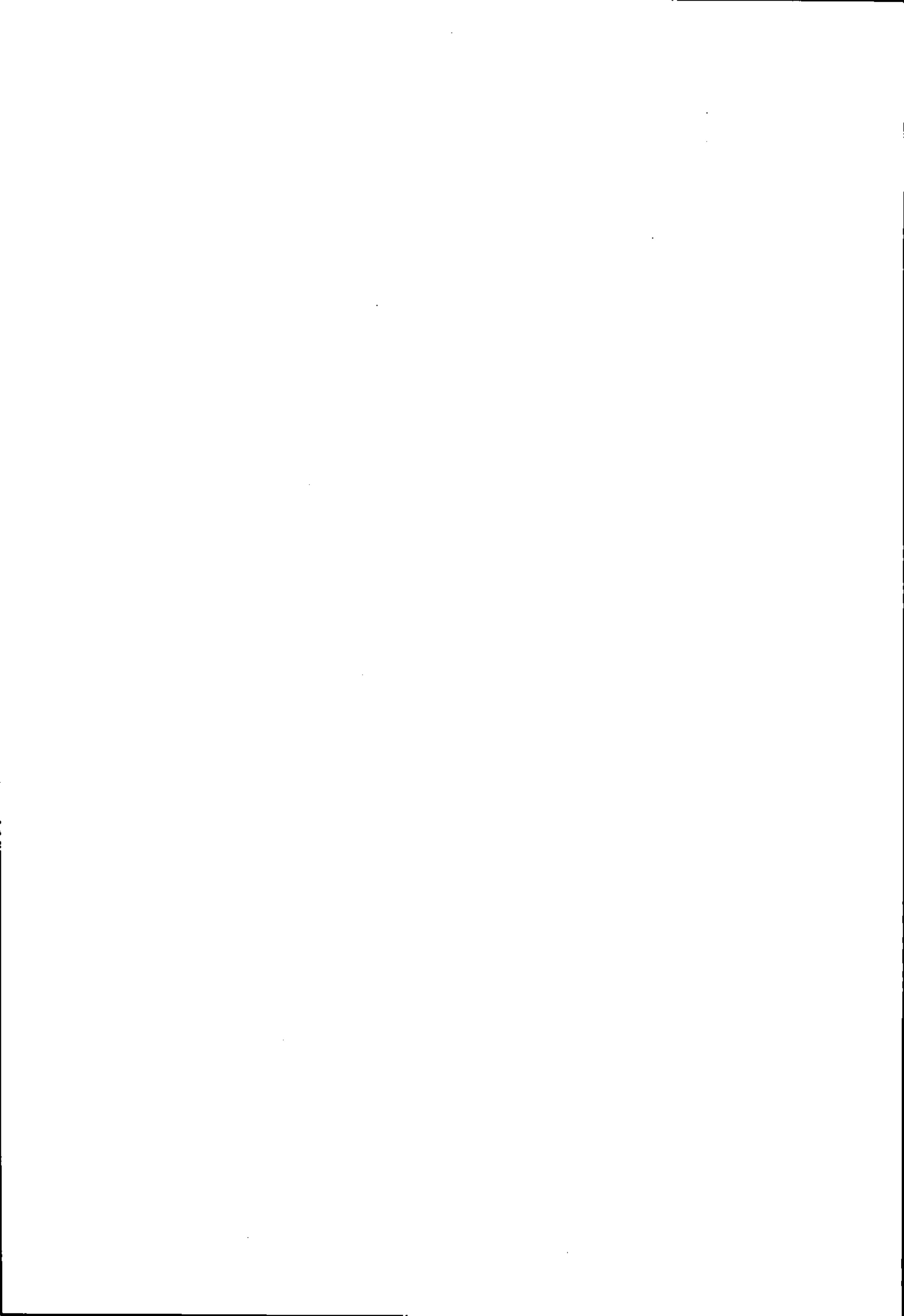

THE ROLE OF AN OMBUDSMAN IN CURBING GOVERNMENT ILLEGALITY

Professor Jack Richardson
Formerly Commonwealth Ombudsman
Canberra

The role of the Ombudsman is known to most. It is to receive complaints from members of the public and to investigate them using all the resources at his disposal. With the present Government there are not many. The powers that the Ombudsman has are no less than those of a Royal Commission. You can be required by the Ombudsman Act to answer to the Commonwealth Ombudsman, even though the answer might incriminate you. The saving grace of the provision is that the evidence received cannot be used in any legal proceedings. But an Ombudsman is not usually concerned about legal proceedings.

The Ombudsman has to decide whether there is defective administration or not. The criteria for defective administration are set out in section 15 of the Ombudsman Act, for example, that the action complained about is 'unreasonable' or 'unjust'. The Ombudsman revels in the use of this terminology more than any other criteria in the Act. We all hear about the concept of the reasonable man in law. He is the person who rides on the Clapham omnibus in England or mows the lawn on weekends in Australia. The Commonwealth Ombudsman's office applies standards not dissimilar to those of the Courts. Other criteria are that an action seems to be contrary to law and that irrelevant considerations are taken into account in making a decision. There is also a handsome dragnet provision in section 15, namely that in all the circumstances the action is wrong. These are the criteria against which the Ombudsman gauges actions taken in the Australian Public Service at large including all the departments and most Federal statutory authorities. Among the statutory agencies there are those which have a vast array of dealings with the public, for example Telecom, Australia Post and the Commissioner of Taxation. Some agencies are excluded, mainly commercial bodies such as TAA. TAA is excluded on the ground that it is in ostensible competition with Ansett and an Ombudsman inquiry would, according to the argument, interfere with the competitive process.

If he makes a finding of defective administration, the role of the Ombudsman is not to change decisions but instead to induce the agency to give effect to a recommendation, for example, that

a decision be changed, a matter be reheard, an apology given, or compensation paid. If an agency is reluctant to accede to his recommendations, the Ombudsman has to decide what to do next. This is the stage at which the personal qualities and approach of an Ombudsman become quite important. The Ombudsman cannot be all things to all people. The occasion sometimes arises where he must take a stand however offended the head of an agency may be. For the most part, however, in an Ombudsman's office you are trying to convince the authority under enquiry that it has acted defectively and ought to acknowledge it. I am happy to say that in most instances, this is the result and in my time an agency rarely rejected a recommendation. Where it does, however, the Ombudsman can report to the Prime Minister. I went to Prime Minister Fraser on a handful of occasions and fortunately for me he was able in the end to influence his ministers sufficiently to obtain acceptance of the Ombudsman's recommendations. It was never necessary to move to the final step in the Ombudsman's armoury, the supposed in terrorem weapon which is to table a report in Parliament in the event of the Prime Minister not agreeing with the view of the Ombudsman or being unable to move an agency such as an independent statutory authority like the Australian Broadcasting Corporation to comply with the Ombudsman's wishes.

There are two reports of the Commonwealth Ombudsman currently before Parliament. Whether Parliament turns out to be the weapon that the framers of the legislation supposed is, I think, open to question at the moment. As far as I can see there are not many heroes in Parliament willing to take up the cudgels for the Ombudsman, especially when one of the subjects of report is a powerful media organisation such as the Australian Broadcasting Corporation. Politicians like to appear on such ABC productions as the Carleton-Walsh Show and there are not many I fear who would speak in favour of the Ombudsman's recommendation when by so doing they would incur the displeasure of the Corporation's journalistic fraternity. Still, hope lies with the Senate Standing Committee on Legal and Constitutional Affairs which has expressed its willingness to look at the Ombudsman's two reports. Nothing is likely to happen in the House of Representatives.

At the onset I have a small problem in talking about actual cases. Although the Ombudsman can make public statements in the public interest about his investigations without placing himself in breach of the secrecy provisions of the Ombudsman Act, as an ex-Ombudsman I am in no such position. I cannot therefore talk with as much particularity as I should wish. At the risk of being misunderstood because of the short time available, I will try and take cases from different areas including police. The Commonwealth Ombudsman has jurisdiction over the actions of the Australian Federal Police - an arrangement which I believe has worked well. Some of the State Ombudsmen also have a police jurisdiction. Maybe one day we will even have an Ombudsman for judicial administration.

I will mention an old favourite - Telecom. Telecom is a commercial organisation with continuous public contact. It is in the public eye for better or for worse and naturally enough its activities are a ready subject for Ombudsman stories. One, frequently told, is about the complaint from a lady who phoned from Rosedale in Victoria to Melbourne using a public telephone. She was asked by the operator to put 80 cents in the phone box which she did. In Melbourne one day, she wanted to phone someone in Rosedale, and she went to a suburban post office, found a phone box outside, rang and was told she had to put a dollar in the box in 20 cent pieces. After making the call she thought: 'This is odd - 80 cents Rosedale to Melbourne, a dollar Melbourne to Rosedale?'. She went into the post office, found a captive clerk, and said: 'Young man, how is it that it cost me 80 cents to ring from Rosedale to Melbourne, but when I am in Melbourne and ring Rosedale, it costs me a dollar'. He replied: 'Lady it is like this. When you are calling from Melbourne to Rosedale, you are telephoning up hill!'. The effectiveness of the Ombudsman's office is demonstrated by the same story because it obtained an apology from Telecom and a 20 cents refund.

Allegations are remarkably few in the Ombudsman's office about the commission of crimes by public servants, and I emerged after eight years satisfied as to the overall integrity of the Australian Public Service and the major statutory authorities with whom I came into contact. Of course, there are illegalities, some serious, but overall there is honesty. That is not to say that there are not plenty of mistakes made, and duties not properly performed but that is another question.

Telephone tapping has been the source of various complaints, and I will mention one case. A state police force had one of its policemen under investigation. A member of the force approached the regional office of Telecom and asked for what I will call a telephone interception - a call record printer placed on the telephone service to the policeman's home. In fact his wife was the subscriber to the service. Ostensibly, the telephone interception was authorised by the Telecommunications (Interception) Act on the ground that the policeman was reasonably suspected of making harrassing phone calls to a fellow member of the police force who had him under investigation. The real reason was, however, in my conclusion, to ascertain whether the policeman under investigation was involved in other forms of misconduct including SP betting. How did the complainant know about the tap? Because, of all things it was the subscriber's brother working for Telecom who was told to install the call record printer! We found that the officer authorising the tap had acted in breach of duty. We also asked Telecom whether there was

any arrangement, standing or otherwise, with police forces throughout Australia by which interceptions were made, even though they were not authorised by the Interception Act. The Act provides only for interception for harrassing and obscene phone calls or drug related matters. It is not available for general enforcement of the criminal law by the police, whether Federal or State. We received the assurance of Telecom that whatever might have happened in the past, it would make certain, by office instruction throughout Australia, that police requests which did not genuinely satisfy the Interception Act would not be granted. We accepted Telecom's word on the situation. With a system as vast and as complex as the telephone system of Australia, tapping is, of course, possible without Telecom being aware of it. There is a case for widening the Interception Act to allow interceptions where there is good reason for believing serious crimes are being committed. There should, however, be safeguards. Approval and supervision should be vested in higher level officials than district telephone officers and the like.

In the police investigation area, a person may complain to the Ombudsman about police behaviour in a situation which results in a criminal charge being made, for example, assault. The accused person may complain that so far from being the assailant, the police were the assailants and any blows he happened to land on a member of the police force were purely in self defence. It would be open to the accused to make these allegations before a court. The Australian Federal Police at first took the view that such a matter was sub-judice once they had instituted a prosecution and hence they ought not to respond to an Ombudsman enquiry. The ACT branch of the Australian Government Solicitor had advised the AFP, and inferentially ourselves, that for the Ombudsman to conduct an investigation in these circumstances, offended the sub-judice doctrine. Too often 'sub-judice' becomes a legal aphorism. Just because a matter is before the courts does not spell the end of any alternative enquiry. Sub-judice means that the matter is subject to judicial proceedings and that the court must be protected against abuse of the legal process. How does it interfere with the legal process when the accused approaches the Ombudsman's office and wants to put a case that the police were victimising him or were themselves guilty of offences? It does not affect the processes of the court in hearing the charges against the complainant. I am glad to say that the Attorney-General's Department reversed the opinion given earlier. Indeed during most of the lengthy time the so-called Greek conspiracy cases were being heard in Sydney, the Ombudsman's office was investigating complaints from a psychiatrist on behalf of her patients about wrongful official conduct by officers of the Department of Social Services. The facts which gave rise to the legal proceedings were also at the core of the Ombudsman's investigations.

Every now and again a complaint comes from a public servant alleging defective administration, or worse, by fellow public servants. One such case - I can talk about it more directly because I made a public report on it - involved very serious allegations made against some members of the Department of Foreign Affairs arising out of service abroad as diplomats. They included the Secretary. These allegations were investigated by the Australian Federal Police. The AFP reported that there were no breaches of the law. The police report went as far as to show that there did not appear to be any breaches of the Public Service regulations either. The complainant in this case, who was also a member of Foreign Affairs, complained to the Ombudsman's Office about the standard of the police investigation. We spent enormous resources trying to determine whether the AFP had done a proper investigation which led us to examine the allegations themselves. We found in favour of the police. In this case, because the allegations were so serious, and so much had been made of them in Parliament, I took the exceptional course, in the public interest, of furnishing a report by way of a letter to the Minister for Foreign Affairs which he tabled in the House of Representatives.

Shortly after the Ombudsman's office began to function there was a complaint from a Commonwealth prisoner who sought release on licence from gaol in New South Wales. He had been found guilty of murder in the ACT. His allegation was that the Attorney-General's Department was not taking steps to have his application properly considered by the ACT Parole Board. It was clear that there was no sympathy for the man in the Attorney-General's Department. We called for the departmental file. Someone happened to notice a handwritten note amongst a mass of badly filed papers. The note said that if the Department delayed the case long enough the prisoner's term will have expired anyway! We had the file for about a day when the Department sought its return for further action. The file was returned to us shortly afterwards with the papers numbered by folio but the note was no longer there. We took the matter up with the Attorney-General's Department and eventually the note found its way back to the file.

There are also state ombudsmen, and a Northern Territory Ombudsman. The performance of state ombudsman offices varies. As I have said my view is that much depends on the person of the ombudsman himself. There are very few means by which you can enquire into what the ombudsman does - almost none. I recall a case of a prominent consultant who approached our office some years ago. He was acting for a client who had been seeking an exploration permit from a State department for an off-shore oil area under the Commonwealth-State off-shore petroleum scheme. The application failed whereas the complainant believed it should have succeeded. The information given to me

suggested maladministration within the administering department in the state but since the issue of exploration permits was in the hands of the state and not the Commonwealth, I suggested to the complainant that he approach the state ombudsman, which he did. The state ombudsman's office dealt with the matter by writing to the agency concerned asking in effect, if there was any truth in the allegations. The agency replied in substance that there was not and then the enquiry virtually ended with not even a file being called for. The case demanded an office examination of files and witnesses. In similar circumstances the Commonwealth Ombudsman would not hesitate to satisfy himself first hand as to the facts and circumstances involving his statutory powers if necessary.

Though he is in the background rather than the forefront of the avenues of investigation of illegalities the Ombudsman should not be forgotten especially since by use of his statutory powers an Ombudsman's enquiry may bring to light facts and circumstances which would escape attention or cannot be produced under other processes. I hope no ombudsman's office in Australia would hesitate to intervene where there is a serious complaint with at least a prima facie basis for making it, but as I have said, the outcome may depend rather more on the attitude of the ombudsman and his office than under alternative processes of review where enquiries proceed on less flexible lines than are available to an ombudsman.

ROLE OF AUDITORS GENERAL

Peter L. Lidbetter
First Assistant Auditor-General
Australian Audit Office
Canberra

I am pleased to say that the organisers of this Seminar have told me that I should not interpret the topic as relating to any illegal activities of the Government. The Australian Audit Office (AAO) has enough trouble with its departmental and other Commonwealth agency auditees without entering into what I initially had interpreted to be a political debate.

Rather, my task is to look at programs and activities administered by government departments and instrumentalities and comment on the Auditor-General's role in identifying inefficiencies in program management or maladministration generally. In other words, I am to talk about efficiency or performance auditing and the part that it plays in reducing 'government illegality'.

Because of the wide background of this audience it might be helpful to commence by defining the role of an auditor. The specific duties and powers of an auditor are prescribed in statute (in the Commonwealth it is the Audit Act, enabling legislation for statutory authorities or the Companies Act, as the case may be) and his professional responsibilities are laid down in the Statement of Auditing Standards and Statement of Auditing Practices promulgated by the Australian Society of Accountants and the Institute of Chartered Accountants. The AAO considers that the public sector auditor has a wider sphere of responsibility and has published recently its own auditing standards[1] which embrace also the standards promulgated by the professional institutes.

The exercise of these duties and responsibilities requires skill and judgement built on the foundation of tertiary qualifications, usually with a major in accounting.

As Lopes LJ said in the Kingston Cotton Mill case of 1896[2]

> An auditor is not bound to be a detective or ... to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound.

> The duties of auditors must not be rendered too onerous. Their work is responsible and laborious and the remuneration moderate ... Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion ... [3]

Like many professions, however, the role of the auditor has changed.

At one time the Audit Act gave the Auditor-General a power to surcharge a person who

- wilfully or negligently omitted to collect or receive any money, or
- for virtually any reason caused a deficiency or loss of public moneys or stores.

You may be interested to learn that surcharging had been in use since the time of William the Conqueror. The King's 'Accomptants' were required to account to the Treasury for their disbursements. If there was a loss through fraud, negligence or error then obviously the King couldn't suffer the loss and the 'Accomptants' were surcharged.

From 1901 to 1910, the Auditor-General's Reports disclose that 348 people were surcharged, mostly from the Postmaster-General's Department. During the period four suicides were committed apparently because of the disclosure of defaults and irregularities.

The surcharge provisions also caused a number of legal problems. Moreover, it placed a responsibility on the Auditor-General akin to that of a judge, which he is not.

Nevertheless it was not until 1979 that the provisions were abolished. They have been replaced with a new Part XIIA of the Audit Act which gives a departmental secretary power to take action to recover from an officer losses of public moneys or the cost of damage to Commonwealth property where the loss or damage has occurred through the officer performing his duties in a grossly negligent manner.

In the event Part XIIA was not proclaimed until 1 June 1985 and the first year's results will be included in the 1985-86 Report of the Auditor-General on the Minister for Finance Statements, expected to be tabled in November 1986. The preliminary figures suggest that the numbers judged liable will not reach double figures.

As a matter of interest the NSW, Queensland and Western Australian Parliaments have repealed the surcharge provisions in their legislation with Western Australia adopting also the equivalent of the Commonwealth's Part XIIA provision. Victoria, Tasmania and South Australia still have a surcharge power although I understand that in the latter State the legislation will be repealed shortly.

As the public sector has grown in size and complexity in recent years, parliaments in a number of countries have sought to extend the traditional avenues of scrutiny available to them and to ensure that government-created agencies are made more accountable for their activities. The public sector auditor generally has been well placed to respond to this need. Commonly the powers of public sector auditors have been extended by statute to put beyond doubt that their role encompasses performance auditing.

Against this background, the essential role of the modern day Auditor-General is to improve the economy, efficiency, administrative effectiveness and accountability of the public sector through comprehensive auditing of Commonwealth agencies and the public reporting thereof.

The AAO describes the comprehensive auditing mandate as one which encompasses:

(a) regularity auditing -

this includes the attest audit of government departments, authorities and companies to enable the Auditor-General to express an opinion on the financial accountability; and also covers attesting for legal compliance, probity and propriety of the auditee, and

(b) performance auditing -

this is an evaluation of economy, efficiency and effectiveness of the management of Commonwealth agencies including the review of

- utilisation of human, financial and other resources
- information systems, performance measures and monitoring arrangements, and
- procedures followed by auditees for remedying identified deficiencies and improving existing operations.

Performance auditing includes formally designated efficiency audits conducted under Part VI of the Audit Act, as well as smaller 'project' audits conducted under other legal provisions. Project audits are not designated as efficiency audits but are still directed at issues of efficiency and management effectiveness.

The mandate for performance auditing stops short of a review of government policy decisions. We do, however, consider it appropriate to audit the information leading to policy decisions and whether policy objectives have been met.

The audit mandates in the Australian States to undertake efficiency audits are not so clear cut.

In New South Wales the responsibility for efficiency audits is given to the Public Service Board. Nonetheless the State Auditor-General is not deterred from conducting performance audits under his general powers.

Tasmania has no special provisions but, as with NSW, the Auditor-General does not see his powers being confined to regularity audits.

In Victoria a similar situation obtains.

Queensland seems to have put its faith in its Internal Operational Audit Service although the Auditor-General has the opportunity for input to the process through a steering committee of which he is a member.

South Australia relies on its general legislative powers to undertake performance audits.

Western Australia recently amended its legislation to allow the Auditor-General to carry out efficiency and effectiveness audits of departments and statutory authorities and he is now preparing to undertake this expanded charter.

To revert to the AAO, I should first put our task in perspective by explaining that we are responsible for auditing -

33	Departments (including 5 Parliamentary Departments)
67	Outrider organisations (eg. Australian Taxation Office)
16	Departmental commercial undertakings
107	Statutory authorities
69	Companies
292	

An analysis (unaudited!) of the annual reports of these auditees show that in aggregate they -

- employ in excess of 500,000 staff
- have a revenue/expenditure turnover of $95 billion a year
- operate about 330 separate revenue or expenditure programs in excess of $10 million a year, and
- maintain about 650 large data processing installations.

The professional staff in the AAO available to audit these activities is a little below 500.

In round figures about 65% of audit resources are applied to regularity auditing and 35% to performance auditing.

Developments in performance auditing

For many years now the AAO has been undertaking relatively small project audits devoted to efficiency and effectiveness issues in departments and agencies. It was not until 1979 that the Audit Act was amended to allow the Auditor-General to undertake formally designated efficiency audits in departments and statutory authorities and in other agencies, such as the Taxation Office, where hitherto his access powers had been limited.

This expansion of the audit mandate stemmed from a recommendation of the 1976 Royal Commission on Australian Government Administration. The Royal Commission linked efficiency with accountability and saw a need for agencies to be subject to regular and independent assessment of performance. In introducing the amending legislation the then Government noted that the development of efficiency auditing would be a gradual process; the AAO envisaged a five year gestation period.

The learning period to June 1984 was certainly not without its problems. In that time the Office managed to finalise 13 formal efficiency audits. Although the findings and recommendations for most of the reports were reasonably well received the reports drew widespread criticism because the focus of the audits was too broad with a consequence that the final reports were not published in a timely manner. Indeed the typical time taken from commencement of the audit to publication was about two and a half years.

Clearly, delays of this order are inefficient. Staff turnovers, for instance, in both the AAO and the auditee, add to the cost of the audit. As well, any legislative, technological or policy changes that occur during the period cause a continual re-assessment of the audit findings and recommendations.

We have, however, learnt from these criticisms.

Efficiency audits are now undertaken in accordance with a management plan with -

- clearly defined objectives
- arrangements for progress reviews, and
- procedures for monitoring critical time milestones including the completion date.

We now aim to have reports completed within a year.

Eight efficiency audit reports were tabled in 1984-85, 10 in 1985-86 and we expect to table about 15 in 1986-87.

In addition we have been undertaking each year up to 40 project audits of varying scope and complexity but devoted to efficiency and effectiveness issues and reported in the Auditor-General's half-yearly reports.

We now have a pool of about 100 staff with experience in conducting efficiency audits or major project audits.

We believe that the quality and timeliness of our efficiency audits have increased significantly over the last few years. So much so that the AAO is recognised internationally as a leader in this field although I will not pursue that aspect further today.

There is little doubt that more than ever before the interest of top management is being given to AAO reports. This has occurred through a number of concurrent developments in recent years.

First, as I mentioned earlier, there has been the improvement in the quality of AAO reports - not only in formal efficiency audits but also in project audits included in the Auditor-General's half yearly reports to Parliament.

Second, the issue of a media release with Auditor-General's reports has helped to generate much wider media attention to audit findings and recommendations. As an aside, I could mention the salutory effect that an adverse report has on the auditee's senior management and the Minister responsible. It might be taken as read that no senior manager or Minister wishes to see a repetition of bad publicity. This is particularly true in the Canberra environment.

Third, agencies invariably face the prospect of an inquiry by a Parliamentary Committee. The Joint Committee of Public Accounts (JCPA), the House Committee on Expenditure, the Senate Committee on Finance and Government Operations and the Senate Estimates Committees have all been active in pursuing matters raised in audit reports.

In this context the AAO, in accordance with its Corporate Plan, seeks to foster good relations with the Parliamentary Committees. In particular we have a close working relationship with the JCPA and provide an audit observer at all inquiries it undertakes. In 1985-86 the JCPA made 67 requests to departments and agencies on matters raised in Auditor-General's Reports.

To take this last point a little further, it is also apparent that the Parliamentary Committees cannot be criticised, as perhaps they once were, for being soft on senior managers in the Public Service or the central co-ordinating agencies as well as the AAO itself.

To quote but a few examples from recent JCPA Reports.

Report 242 - Government Aircraft Factories. Response by the Department of Finance - 6 December 1985

- The Finance Minute on the (Committee's 198th Report had little to say about the Committee's recommendations

- The Committee remains dissatisfied with the management practices of the Government Aircraft Factories

- The Committee believes that it has been misled by the Department of Defence on a number of issues relating to the Factories

Since the Committee's Report was tabled, the Auditor-General's September 1986 Report contained further critical references to Government Aircraft Factories, and to accounting for Defence factories generally.

Report 243 - Review of Defence project management - 10 Feburary 1986

This inquiry commenced in March 1984 following earlier AAO and JCPA criticisms and made 65 recommendations for action by the Department to improve the effectiveness and efficiency of Defence project management and related systems.

The Committee, which had now established a separate Sectional Committee on Defence, foreshadowed further inquiries into Defence supply and support arrangements and also Australian Industry Participation Programs which had been the subject of an AAO Efficiency Audit Report.

Report 252 - Job Seeker - Computer acquisition by Department of Employment and Industrial Relations - 11 June 1986

This inquiry arose from private representations to the Committee from sectors of the computer industry coupled with some adverse comment in the Auditor-General's September 1985 Report.

The Committee's Report expressed a number of concerns about the planning, evaluation, tendering and funding processes for the computer acquisition. Specifically, the Committee concluded that:

- The Department of Employment and Industrial Relations and in particular, the Secretary of that Department, must carry principal responsibility for the improper manner in which this tender was conducted, and

- The Department of Local Government and Administrative Services and its Secretary ... must also carry major responsibility in this matter

and to ensure proper balance

Report 250 - Australia Post - An audit discontinued - 20 August 1986

This inquiry commenced following allegations in the media about the discontinuance of an efficiency audit into Australia Post's counter services. Inter alia, the Committee concluded that the management of that audit was deficient and not in keeping with the AAO's Corporate goals and 'the ultimate responsibility was the Auditor-General's'.

Formal responses by the authorities concerned to all of the above have yet to be published.

The AAO has welcomed these developments because one of the most difficult tasks of the auditor is to get top management to focus on audit findings and recommendations.

With some notable exceptions the overall response by management to audit reports has been positive. In several departments and agencies, follow-up audits have disclosed that firm remedial action has been taken to overcome shortcomings in earlier audit reports. We have referred to this outcome in ensuing media releases but perhaps understandably the media has not found the item particularly newsworthy.

Agencies which look unkindly at performance audit reports are usually those that have not previously been subject to public review and constructive criticism. They complain that the AAO -

- examines issues in a theoretical world that does not recognise political or practical realities
- does not have staff with sufficient 'real world' experience to understand how business decisions are made, and
- by adopting a comprehensive reporting approach can disclose shortcomings in a way that unscrupulous people could take advantage of them.

The AAO has adopted quality review processes which are supplementary to the consultative processes required by the Audit Act to ensure that allegations of this kind cannot be sustained but are merely a reflection of the defence mechanism of auditees subject to criticism.

Most of the performance audits undertaken to date have been in the departmental arena. Although, as noted earlier, the scope for performance auditing in those organisations is large, our intention is to increase the range of audits undertaken in statutory authorities. I foresee some problems in this area.

Many of the larger authorities have a high media profile, operate in a sensitive community environment and are, at least in part, in competition with the private sector. Obviously, reports of performance audits in those organisations need to be written with special care but not in a way that diminishes the organisation's accountability to Parliament.

The Audit Act does provide that the Attorney-General may issue a certificate that the disclosure of certain information in an efficiency audit report would be contrary to the public interest on a number of grounds including

> by reason that the disclosure would be prejudicial to the commercial interests of a public authority of the Commonwealth.

The Act then provides for the Auditor-General to issue a restricted efficiency audit report to certain Ministers and persons.

These provisions have not yet been called upon. The onus is, however, on the auditee to demonstrate that disclosure is not in the public interest.

In regard to government-owned companies, the Act provides that the Auditor-General may undertake an efficiency audit if the responsible Minister invites him to do so. It may not surprise you to learn that at 30 June 1986 no such request had been received.

In short we have come a long way since 1979. But the resources available to undertake performance audits fall far short of what the AAO believes should be a reasonable coverage.

Conclusion

It should be well recognised that the top management of a organisation has prime responsibility for the efficient administration of the organisation's activities. Given, however, that we do not live in a perfect world, performance auditing has a role in helping to prevent 'government illegality' or at least keeping it within reasonable bounds.

But performance audit reports must be of sufficient quality to ensure serious consideration is given to them. They should also contain recommendations which need not be prescriptive but pragmatic enough for further development by top management.

The response given by senior management to audit reports is undoubtedly increased if parliamentary committees and the media continue to take a close interest in the issues raised.

There is evidence to show that audit reports and the ensuing examination of findings and recommendations both by agencies and parliamentary committees has helped lead to reforms both within agencies and the public sector generally. In this context it will be interesting to see how the recent initiatives by the Government to improve efficiency in the public sector develop.

In finalising the details of these reforms the Government might also wish to consider an increase in the resources available to the AAO. As the Auditor-General has indicated in his 1985-86 Annual Report (expected to be tabled in November 1986) it will take, at the present rate of progress, more than 20 years to subject each Government program with a value exceeding $10 million to an efficiency audit.

REFERENCES

1 Commonwealth of Australia Special Gazette No. S451 - 8 September 1986.

2 The case related to the Kingston Cotton Mill Company Ltd that went into liquidation in 1894. The liquidators took a misfeasance action against the auditors alleging *inter alia* that they improperly placed reliance on a Manager's certificate in regard to the value of stock without testing the accuracy of the certificate.

3 Ronald A. Irish, *Auditing* Sydney, Law Book Company of Australia Pty Ltd, 1957, pp. 345-6.

GOVERNMENT ILLEGALITY AND PUBLIC SERVICE BOARDS

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The role which has been assigned to me, whether on purpose or not, is that of defender of somewhat discredited paper tigers. Public service boards are having their powers whittled away. The trend has reached its limit in Tasmania and South Australia where the public service boards have been abolished: but the trend is unmistakable also in Victoria, in New South Wales, and even in the Commonwealth, where the Board remains more powerful than elsewhere in Australia. There are numerous reasons for the decline of public service board powers. Perhaps the principal one is dissatisfaction, expressed especially by the conservative media and politicians, over the levels of efficiency achieved by government departments: since public service boards have, among their several responsibilities, responsibility for keeping watch over efficiency in departments, the boards cannot avoid blame, whether the dissatisfaction is justified or not. Another cause of the eclipse of boards is a widespread perception that management of money and of staffing levels must be closely co-ordinated, and finance departments are considered to be the more appropriate choice if there is to be one agency in charge of rationing resources. But in addition to these quite powerful forces undermining public service boards' status and authority, there is also probably a belief that some public servants are getting away with misconduct of various kinds, and that if public service boards were doing their job this would not happen.

In Australia misconduct by public servants is seldom gross, and is relatively uncommon by comparison with what happens in other countries not far from our shores. No doubt there is pilfering, some influence peddling, some minor corruption. Crimes of a more serious nature are probably being perpetrated and not discovered. There may be excessive zeal, and disregard for citizens' rights, especially if the citizens in question belong to disadvantaged groups. Instances of all of these abuses have come to light as a result of public complaints, press reports, parliamentary protest, ombudsmen's enquiries, even through actions in the courts. Public service boards have disciplinary powers which

they are in duty bound to use, and which they do use to punish public servants who commit offences under the public services acts and regulations, though it is in the ordinary courts that public servants are brought to trial if the offences with which they are charged are of a criminal nature. Public service boards also have powers to investigate the operations of departments with full access to papers and persons and authority to take evidence, powers much like those of a court or commission of inquiry. So the boards must be responsible, or partly responsible, for such abuses of public service power as do occur: though it would also be fair, I contend, to give them some of the credit for the fact that Australian public services are efficiently delivered, and Australian public service officers are, on the whole, honourable, law-abiding, civiland diligent.

The public service boards are the agencies which have, up to now, had responsibility for guarding the merit principle in selection and promotion; protecting the rights of public servants against unfair treatment by supervisors; training and developing personnel; setting and monitoring standards of public service behaviour and generally maintaining the morale of the public service. Either they have been doing this rather well or else we are by nature such an honest and work-orientated community, that generally high standards of public service conduct can be taken for granted and need no special vigilance. The former hypothesis seems more plausible; but notwithstanding any credit which may be due to them, public service boards have become, or perhaps have always been, unpopular, and are now being superseded. Newer institutions have been created, and new processes adopted, such as the ombudsman's inquiries, _ad hoc_ public inquiries of various kinds, parliamentary committees, administrative tribunals and opportunities for judicial review of administrative action, and some part of the purpose of each of these newer processes overlaps with purposes and powers already vested, in part, in public service boards.

The explanation for this relative decline of the boards is not just that newer agencies are thought likely to be more effective. The boards may have a case to answer: their disciplinary and investigative powers may have been relatively weak to start with, but how vigorously have they used them?

Are the boards well suited to the task of guarding against government illegality, or ought they to confine themselves to the tasks of personnel management and industrial relations which are their main concern?

While at the end of this paper some answers to these general questions will be offered, my knowledge and experience are limited and therefore the limited information base of the paper,

on which my general answers are founded, needs to be explained. The public service acts of the Commonwealth, the states and the Northern Territory each contain clauses concerning disciplinary offences, procedures for hearing charges, penalties and appeals. It would be a research task of some complexity to examine and compare them, and I have not been able to undertake that comparison. Instead, I will take as an example, the one statute I know best and which I had a part in administering for five years, the Public Service Act of South Australia 1967-1982, an act which was superseded in 1986 by a new statute on government employment, with different disciplinary provisions. In spite of variations from time to time and place to place, however, I think the example chosen will adequately represent the usual disciplinary powers of Public Service Boards for the purpose of this discussion.

The South Australian Public Service Act 1967-1982 sets out a list of ten kinds of offences of which an officer may be guilty (S.58(a) to (j)). These offences include breaches of the Public Service Act itself; disobedience; negligence; inefficiency or incompetence through causes which are within the officer's control; absence from duty; unauthorised disclosure of information; excessive use of liquor or drugs; and, most general of all, 'conduct(ing) himself in a disgraceful, improper or unbecoming manner in his official capacity or otherwise.' When the head of the department has reason to believe that an officer may have committed one of these offences, the head of department may call on the officer for an explanation, and if, despite this, the head is convinced that the officer has committed the offence, the head may admonish the officer (S.59). This is reported to the Public Service Board, which may then either confirm the admonition, annul it, or if the Board considers the offence warrants a more serious penalty, may direct the head of department to charge the officer.

Alternatively, the head of department may see the offence as too serious for a mere admonition, and may charge the officer by serving the officer with a written statement of the particulars of the alleged offence (S.60). The officer may reply in writing either admitting or denying the truth of the charges. If there is no reply within seven days, the officer is presumed to have denied the charge. At this stage also, there is the possibility of suspending the officer from duty, either with or without pay, but of course if the charge later fails the suspension is revoked and the pay withheld is paid to the officer.

If the charge is admitted, the head of department reports this to the Board, which then considers penalty. If the charge is denied, the head of department reports this to the Board together with an opinion either that on the face of the matter a case has been made, or that the charge has not been proved.

Now the Board moves to hold a hearing and determines whether the charge is proved (S.63(b)). The Board, in holding a hearing 'may hear and consider evidence, argument or representation...' (S.21(1)) but ... 'shall not be bound by rules or practice as to evidence but may inform itself on any matter in such manner as it thinks fit.' (S.21(2)). 'Proceedings before the Board may be in public or in private, or partly in public and partly in private as the Board thinks fit.' (S.21(3)).

In the event that it was a head of department who was accused of committing an offence, then the Minister lays the charge and the rest of the procedure is the same as in the case of a less senior officer.

The discipline sections of our Public Service Act were certainly used. In my first year as a Commissioner, 1977-1978, the annual report records thirteen cases dealt with. The penalties available to the Board ranged from confirming an admonition by the head of department, a mild tap on the wrist, suspension, transfer, reduction in salary, reduction in leave entitlement, all the way through reduction in rank, and in the worst cases, to dismissal. In that first year we imposed two dismissals, and one officer resigned while his case was proceeding. In the subsequent four years of my term dismissals were 2 in 78-79 from a total of only 6 cases dealt with; in 1979-80 sixteen offences were dealt with but there were no dismissals; in 1980-81 fifteen offences were dealt with, four of the officers involved resigned and two were dismissed; and in my last full year at the Board we dealt with twenty-seven cases of offences with one resignation and one dismissal resulting from them.

The sorts of offences we were called upon to consider ranged from simple things like using government vehicles for unauthorised purposes, or carrying on a private business without approval from the Board, or attempts to claim compensation for faked industrial injuries, right up to more serious questions such as whether officers could continue to be employed as public servants once they had been convicted of serious criminal offences such as larceny or crimes of violence. Misuse of confidential information also gave rise to some difficult cases. There was, before my time on the Board but well remembered, the case of an officer whose family had allegedly made profit by purchasing land, the officer in question having confidential access to government planning information affecting that land. But oddly enough it was the very simple and ostensibly minor offences which sometimes had the most dramatic consequences for the individual. For example, a man in a responsible position as a professional officer was accused of having engaged on some few inherently innocent occasions as a private practitioner of his profession

without authorisation. The charge was sustained and the Board imposed a minor penalty, but the consequences for the man's career were grievous. Whereas he had been chosen and nominated for a position of leadership in his profession, after his public humiliation someone else was given the job instead.

His prospects were ruined. That he battled on and rose again in the ranks of his profession is a tribute to the man's courage and endurance, especially when the offence was minor, not uncommon, and he had been dobbed in to prevent his promotion over the heads of others who thought they were next in line.

Or to take another example, an officer uses a government vehicle after hours for a trip to the pub when working far from home, in the bush, and without access to any other vehicle. Not a heinous offence in itself. But on the way home the vehicle goes off the road, and damages property, the vehicle is a write-off and worst of all a passenger is killed. The coroner and the police have to deal with the questions of what charges are to be brought against the officer in relation to the fatality, the damage to property, and the Road Traffic Act. Thereafter the Board has to decide what penalty under the Act should apply to the offence of unauthorised use of a vehicle, and to what extent that decision should be coloured by the consequences which by this tme have been dealt with by the courts. Not as simple as it looks. What about double jeopardy? But what about the reputation of the Service and the public's sometimes over-zealous concern for probity and rectitude, for impeccable squeaky-clean behaviour, on the part of its servants?

When in doubt about the law, a board such as ours, none of whose three members was a lawyer, would go to a Crown law officer, sometimes to the Crown Solicitor, sometimes to the Solicitor General for advice. Even if one or all three of us had been a lawyer, it would have been prudent to do so. But in the end the decisions were ours alone and had to be made in the light not just of what the Act said but in the light of our individual and collective judgement of all the facts and circumstances and probable consequences. (That last point about consequences if controversial, in legal circles, as I am aware.)

Under the Act there was a right of appeal from the Board's decisions to a specially constituted tribunal headed by a judge or special magistrate (S.67). That Tribunal could decide to uphold or dismiss the appeal and to 'make such order as to it seems just...'. Thus it could amend the Board's decisions, and impose either more severe or more lenient penalties if it chose to do so. Both of these outcomes occurred in my time, but not, so far as I can remember, a reversal of a Board decision that an officer was guilty or innocent of an offence as charged.

In addition to its jurisdiction in disciplinary matters, the Board sat to hear grievance appeals and classification appeals. Promotion appeals, being appeals against the Board's own recommendations, went to a separate Promotion Appeal Board headed by a Magistrate.

In the Public Service Board's Department we needed to have two clerks, one relatively senior, to deal with our appeals business and also to serve the Promotion Appeals Board as clerks. From their files we could keep tabs on penalties previously imposed, so as to maintain consistency.

We were not as prompt as we would have liked to be. Often the delays were caused by the difficulty in arranging for attendence of witnesses. The Board itself was limited as to the number of days it could devote to appeals. In discipline matters we sat as a Board of three. In grievance matters we did likewise if the matter had to be dealt with formally; though of course every reasonable effort would be made to avoid that outcome by negotiations or conciliation, and those efforts might involve a Commissioner when the officers of the Boards Department, or the head of the Department involved, called upon us to take a hand. In classification appeals, because there were so many of them, we Commissioners sat individually, but with one of a number of senior officers to whom the Board delegated authority for this purpose. Classification appeals were mostly disposed of quickly, but with discipline and grievance appeals, the more complicated or serious ones could take as long as three days in the hearing, and what with adjournments, and finding a time when all parties and their counsel were available to reconvene, a matter could go on unresolved for months and months.

Counsel were often retained by officers charged with offences. This was not surprising, since their whole career and prospects for future employment and earning capacity could be in the balance. The head of department prosecuting the charge would normally not be represented by a lawyer, but on occasion would seek representation by a Crown law officer because of technical apsects in the handling of evidence or the like. When the Board had parties before it each of whom was represented by counsel it was in a position both fraught with risk and potentially relieved of difficulty. The risk was that we could get hung up on a technical point. The relief was that the Board could have the advantage of counsel's professional advice in conference before the hearing, or by adjourning for consultation with both counsel at some strategic point in proceedings, or with regard to penalty once the Board's finding had been decided.

Now what about natural justice? Was the Board sufficiently separate from the executive arm, or independent of the heads of department laying charges, to be fairly empowered to make decisions in disciplinary matters? Formally we were independent; our terms of appointment were distinctive, removal was only on receipt by the Governor of an address praying for removal from both Houses of Parliament.

However, there is an executive aspect of the Board's role, more important in the Board's day to day operation than its appeal jurisdiction.

The Board heads the government's personnel and industrial relations department. We were required to advise one Minister in particular, the Premier, but also each of the other Ministers as the occasion arose, particularly the Minister of Labour on industrial matters. We were one of the central co-ordinating agencies of government charged with insuring efficiency in administration. So how independent were we? In the eyes of a legal purist, not independent at all, I would think. That is not to say that we failed in our conscientious effort to be impartial. But the effort had to be made because of the duality of our roles. A committee of inquiry into the South Australian Public Service which reported in 1975 and of which I was chairman considered the issue of transferring the whole of the Board's disciplinary jurisdiction to a separate, independent tribunal, but decided against recommending such a transfer and instead recommended that the Board retain its disciplinary authority, subject to appeal as in the existing Public Service Act, though with the tribunal differently constituted. We were not legal purists. My committee colleagues and I considered that the disciplinary authority of the Board, subject to appeal of course, was necessary for good government.

The Act gave the Public Service Board immunity from suit. Section 122 is a classic privative clause. It reads

> (1) No action or suit shall be brought or maintained against any person or body for a misfeasance or non-feasance in connection with the carrying out of any provisions of this Act or of an Act repealed by this Act.
>
> (2) Except in so far as expressly provides in this Act no action, suit or other proceeding shall lie nor shall any costs be payable in respect of any proceeding before the Board or delegate thereof...

Safe as houses, one might have thought: but of course no privative clause gives immunity from the exercise of the prerogative writs, and one could have been taken before a court no doubt on a writ of mandamus, or quo warranto, or by an injunction or prohibition, or whatever. This did not happen, however, in my time.

The administrative law reform movement of the late 1960's in Australia, tracing its origins back at least as far as Lord Hewart in the United Kingdom in the 1920's, or the Donoughmore Committee (the Committee on Ministers' Powers) which reported in the United Kingdom in 1932, would no doubt have found fault with aspects of these arrangements. Certainly the 1970's in Australia saw tremendous changes in administrative law, and in some of the other forms of citizens' remedies. But these reforms have been more comprehensive, on the whole, in the Commonwealth than in the States.

In South Australia, of which I have been speaking mainly, we had an ombudsman and occasionally vigorous parliamentary committees, but no freedom of information legislation and no across-the-board, multi-purpose state-level administrative appeals tribunal, though there were numerous ad hoc appeal tribunals under various statutes. The very rise of these new forms of remedy in the 1970's probably gives testimony to dissatisfaction on the part of the press, possibly the public, and no doubt the judiciary and the legal profession (or leading members of these bodies). The dissatisfaction was directed not just at administrative bodies for what seemed to be dangerous powers conferred by statute or arbitrarily assumed and condoned by custom. Dissatisfaction was directed equally against Parliament for falling down on the job of scrutinising and controlling administrative discretion; against Ministers for the same reason; and even, I am glad to say, against courts and the law for archaic aspects of their practices which made a nonsense of citizens' hopes of defending their rights. Whatever the real problem was, it was bodies such as public service boards in their role as tribunals of first instance which have probably undergone the most drastic overhaul. For example, in South Australia the Public Service Board has been abolished, only however to be replaced in its several functions by a Commissioner of Public Employment, a Department of Personnel and Industrial Relations, a Board of Management and a Classification Review Panel.

I will not comment on these changes because they are since my time and I am not privy to the reasoning considered in making the changes.

Similar changes have occurred in Tasmania, and, as has already been mentioned, in New South Wales and in Victoria, aspects of the Public Service Board's former powers have been put into other hands, while in the Commonwealth and in other states similar moves are afoot, have recently taken place, or are contemplated. No doubt the underlying cause of this trend is a widespread perception which contains two rather conflicting elements, i.e. that public service boards were too powerful, and that they were ineffectual in achieving some of their aims. Was the dissatisfaction mostly to do with perceived or imagined inefficiency in government administration, and consequently a criticism of public service boards in their executive role as personnel managers and monitors of efficiency? I suspect it was this, rather than any widespread dissatisfaction with Boards in their role as enforcers of discipline, and punishers of offences. There may have been dissatisfaction with them in this latter regard, but I fail to see how it can have been either widespread or well founded. Illegality by employees of governments takes a very broad range of possible forms. Our powers were quite properly restricted to dealing with minor offences. If there were criminal charges to be laid, the police were called in and the ordinary courts dealt with the matter. Only afterwards did we deal with the consequences for public service.

If there was a suspicion of an offence in the nature of corruption or abuse of the powers of an office, we had to rely on the services of a government investigation officer, of whom there were two in the Crown Law Department, both former police detectives. They would submit a confidential report and if it warranted the laying of a charge, then that action was taken. We obviously had to act and did act in this way every time a suspicion of illegality was brought to our notice.

In a service employing (in South Australia's case) 30,000 people under the Public Service Act (and perhaps another hundred thousand or more in weekly paid positions, in statutory authorities, or in government schools and hospitals), there must in the nature of things have been more rogues and rascals, shirkers and idlers than were ever caught. If that were the nature of the complaint, one can see some reason for it. But is there any good evidence that, just because fraud, embezzlement and ripping off the public occurs in private sector business enterprises, there is an equal statistical likelihood of similar offences occurring among public servants? My suspicion is that quite different patterns of behaviour may exist as between the two groups. They are differently selected and are likely to have different psychic needs (more tolerance of risk among private sector business people, more demand for order and predictability among those who come into the public service).

Public servants are, I suspect, under more constant scrutiny and are conscious of it, for no matter how the advocates of market economics may extoll the virtues of competition and consumer choice, there is a need for secrecy and deceptive cunning in business which would make one expect the fine line between legality and illegality to be overstepped. But this is speculation. Public service boards have perhaps been found wanting on the ground that they have failed to conquer sin.

Mr Hawke has recently (in September 1986) announced, that at the Commonwealth level there is to be a new scrutiny unit to examine efficiency, and new arrangements for the redeployment or retrenchment of inefficient and surplus staff. New brooms do not always sweep cleaner than old brooms, but good luck to them. The changes are, of course, just one more instance of a government showing loss of faith in its Public Service Board.

In the past fifteen years this country has been intent on curbing possible abuses of power by public servants. The ombudsman, freedom of information legislation, parliamentary committees, administrative appeals and judicial review have all been applied as checks on their power to ride roughshod over citizens' rights. Yet there is a possible cost; are public servants now so nagged and hobbled as to be unable to carry the load the community expects of them? One is reminded of Roy Campbell's lines, which could well describe Australia's administrative law reforms: 'They use the snaffle and the bit all right, But where's the bloody horse?'

It does not perhaps matter very much if the public service boards, which have been such a distinctive fracture of Australian public administration, are abolished or reduced in power, so long as the duties they have hitherto carried out are put into the hands of people who can do them as well or better than the boards have done. For instance, it would be reasonable to expect a good performance of the disciplinary function from the new arrangements provided for in the 1986 South Australian Government Management and Employment Act. It transfers the bulk of disciplinary powers to heads of departments, gives the Commissioner of Public Employment (who replaces the Board in this respect) a relatively narrow disciplinary role, and retains an independent tribunal as a last stage of appeal. One could comment that the strengthened role of heads of departments makes good sense from a management point of view but adds to the risk of discrepancies in standards applied in different departments. There is also the risk that much more frequent use will henceforth be made of the independent tribunal by appellants unwilling to accept the verdict of their boss. While that has no doubt been forseen, and even welcomed by those who designed the

new legislation, the danger is that a wholly independent, judicial tribunal will lack the direct experience of public service management and full understanding of the consequences of its decisions which has characterised most public service boards most of the time.

Nevertheless, the new arrangements have their potential merits and advantages, and pose no threat to the public's confidence in the discipline and integrity of the public service.

This latter consideration is the fundamental one. The quality of life in any country depends not only on how well public services are delivered, but also on how much faith the public has in the integrity of its government and public servants. Where there is fear, distrust, contempt or even general suspicion of public servants, no amount of efficiency can make up for the loss of well being. The trains ran on time, we are told, in Mussolini's Italy. I am persuaded that a well administered disciplinary statute, and public awareness that the disciplinary powers are in honest hands, are essential requirements for a well-ordered and contented community. Public service boards in Australia have played their part in maintaining those characteristics of the Australian community. Public service boards have never been well equipped to investigate, much less to judge and punish, criminal behaviour of public servants. That quite properly has been the province of the police and the courts.

When suspicions of criminal behaviour are reported to public service boards, they have had to make a hasty assessment and call in the police when they are persuaded, or even only apprehensive, that a crime may have been perpetrated. The public service boards do not engage in cover-ups; the risk of being caught and exposed is too great.

While boards have not been the main ones to deal with crime in government once it has occurred; they have, through their work in public service selection, standard setting, promotion and education, undoubtedly helped to prevent illegality in government. I would argue that the personnel agencies in government, whether they are called boards or are reconstituted and renamed, should continue to have disciplinary powers combined with their powers in personnel management and industrial relations, because, in my opinion, a disciplinary power used vigorously when there is just cause to do so helps to keep up standards.

Voltaire puts it well in Candide (Chapter 23): 'In this country we find it pays to shoot an admiral from time to time to encourage the others.'

Is this perhaps what governments are doing to their public service boards?

ROYAL COMMISSIONS

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Canberra

I did have some three years ago, some short experience with a Royal Commission - it was the Royal Commission on Australia's Security and Intelligence Agencies, term of reference C. For those of you to whom that description is totally obscure, that meant the enquiry by Mr Justice Hope into the actions of the Government concerning Valeriy Ivanov and his relations with David Combe.

The first notice that was served at that Royal Commission was when one Friday afternoon the Prime Minister announced that a royal commission would be held and that Mr Justice Hope would conduct it. That excited my interest, as David Combe's solicitor at that time, in exactly what royal commissions were; what their powers were; and what they could do to you, if and when they ultimately wound up their enquiry. It was expected to be a very short enquiry, by the way, two weeks were set aside for it - it lasted four and a half months.

The salient features, however that appeared from the experience of that four and a half months were these. First of all, royal commissions as their name implies, are inquisitorial. That is to say, you do not go along with a case that is to be made out against you. You go along with the Royal Commissioner empowered to enquire into the matters that are set forth in the terms of reference. For those of us who are lawyers, it involves being somewhat thrown into the deep end without any swimming lessons because there are no issues involved; there are no pleadings; there is no document which tells you what the case is, what you have to meet; there are no rules of evidence and with one minor exception, there is no protection for any witness in respect of anything the witness might be asked or say. Now the minor exception is this, and perhaps in some respects not very minor, but section 6D of the Royal Commissions Act 1902 does say that, 'a statement or disclosure made by any witness in answer to any question put to him', (and I would say that the idea of a witness <u>disclosing</u> something to a royal commission is fairly novel) 'by a Royal Commission or any of the Commissioners shall not, except in proceedings for an offence against this Act' (which includes, of course, perjury, and no doubt suborning of witnesses) 'be admissible in evidence against him in any civil or criminal proceedings in any Commonwealth or State court or any court of

any Territory of the Commonwealth'. Now that is fine as far as it goes, but I should perhaps say that that sort of protection given to a witness does not protect the witness against self-incrimination where the consequence is disciplinary proceedings, either under the Public Service Act, the Australian Federal Police Act, or any of the other Acts which provide for the disciplining of public officials. Relevantly to the topic now under discussion there are two issues that raises. The first is that it enables the public official, who has incriminated him, or herself, to be dealt with within the disciplinary process and conversely, of course, it does not protect the public official who comes forward to give information to a royal commission against possible disciplinary proceedings.

The next conclusion that I drew from that experience was that royal commissions, both by virtue of the report of the commissioner and by the reporting of the proceedings of the commission during its progress, can and do cause considerable damage to the reputations of individuals, against which they have little or no recourse. It is, I suppose, no different in principle to parliamentary or judicial privilege but lacks the safeguard of inertia and the standing orders of the relevant house in the former case and the rules of evidence, particularly of the rule of relevance to stated issues and against hearsay in the latter case.

A further and more interesting issue which was raised by the Hope Commission and indeed, has been an issue in some others - though perhaps not as starkly so - is the control by the commission of its own proceedings. Generally speaking, the Hope Commission seemed to be like a roller-coaster. Once it got to the top of the rise and chugged away, there seemed to be little that the Commissioner or anyone else could do to control its progress thereafter. There were issues raised about contempt and about secrecy - evidence given in secret was given virtually in public in the South Australian Parliament - and proceedings were threatened against a South Australian parliamentarian for revealing what he said he knew or what he thought he knew, in the Parliament. What control do Royal Commissions have over their own proceedings if that sort of scenario can eventuate? In the result no proceedings were taken and an interesting legal and political question remains unresolved, particularly as to media reports of the parliamentary statements referred to.

The last question, which I would like to examine in a little more detail is: What purpose do royal commissions ultimately serve, particularly when they are enquiring into the actions of government?

As to the first group of issues that I mention - that is the inquisitorial nature of the proceedings - it is an extraordinary situation where persons find themselves in the situation of having some vague accusation which may well be brought against them, but be told that this Commission really is not about making accusations, that is for the criminal justice system, all it is doing is enquiring into something, so you are really not entitled to know precisely what it is that it is said that you have done, or how it is said you have done it, or failed to do it, as the case may be. In fact, in the case of the Hope Commission the question of whether David Combe was guilty of espionage, was something which might be thought to have been raised at least by the media preceding the Commisson. Nevertheless, that issue really never surfaced throughout the entire Commission's hearings. Nobody, it appeared in the ultimate analysis, really was concerned about that at all. What they were concerned to do was, it seemed, simply to establish that the Government had acted correctly and to establish that ASIO had acted correctly and to establish, indeed, that everybody had acted correctly except, of course, Mr Ivanov and Mr Combe. Nevertheless, Mr Combe was not to be said to be guilty of any offence known to law. He might be 'greedy' or 'foolish' or 'a security risk' but not a criminal. The fact that 'a security risk' might be an innocent pawn in any espionage game is not the imputation that such a categorization usually conveys.

The procedures that are adopted by royal commissions are extremely difficult to contend with. If any of you have ever been involved in a royal commission you find, particularly where there are a number of parties who seek leave to be represented, that you are faced not only with being examined by the counsel said to be assisting the royal commission, then cross-examined by the counsel who usually represents the government who is there to be the real presenter of the case. In this case the government was represented in two parts. It was represented through Mr McHugh QC, and also by Mr Charles QC, appearing for ASIO. You are then faced as a witness, not only with cross-examination by three counsel, but then there are a string of hangers-on who either are there for the entire time, or for part of the time and also have their turn.

The only amusing part of that was that when David Combe was being cross-examined, Alex Shand came down to cross-examine him on behalf of Richard Farmer, and unfortunately had not had time to read all his papers. Perhaps they had not been shown to him. Anyway he commenced by cross-examining Mr Combe about alleged contradictions between Mr Combe's evidence and what Mr Shand suggested were the facts of the case. He put to Mr Combe that he certainly had not been told about a certain conversation prior to

him talking about it on the telephone. Mr Combe's telephone of course, had been tapped at the time. And Mr Combe was able to point out to Mr Shand that if he had looked at the telephone tap transcripts at page 1 he would find the matter there clearly mentioned, to the detriment of his, Mr Shand's, client. But if that indicates that sometimes cross-examination can be dealt with successfully, generally speaking it cannot. So that that is the first problem that you have. You have no issues, you do not know what the examination or cross-examination is being directed to, but as a witness you are there being examined and then cross-examined by considerable numbers of highly paid and skilled lawyers.

The Rules of Evidence

Generally speaking, rules of evidence are designed to assist courts to come to a conclusion reasonably efficiently and without trampling too much on people's rights. In royal commissions, of course, hearsay is rampant. Hearsay upon hearsay is acceptable. Secrecy will be imposed at random, at least as far as the commission is concerned, whenever it chooses to do so, and this can lead to the curious effect that the person into whose activities (apart from those of the Government) the commission is being held, can be excluded from information being given to the commission, which might be relevant to their case as they wish to present it to the commission. It is a curious proposition that the person himself, in the case of the Combe Commission, could have been excluded from evidence which was given relevant to his conduct on the grounds that it would be inappropriate in the interests of national security that he should know about it. Indeed I might add that, as his solicitor, it was also considered inappropriate in the interests of national security that I should know about much of this. My Counsel, whom I briefed, were all very much more favoured. They were permitted to be told things that I was not permitted to be told, but, in the national interest, they were not told other things that only the Commissioner could hear and I am quite certain that there were other things, which, in the interests of national security, even the Commissioner was not told.

So much for the rules of evidence. If you think that any of them are to your advantage; will help you; will protect you - they do not exist in royal commissions. I mentioned earlier the question of contempt of commissions. Perhaps I should just expand on that. The incident to which I referred to of course, was the incidence were Peter Duncan in the South Australian Parliament revealed what he said were the activities of a Mr Matheson in connection with the Commission. Mr Matheson had given evidence 'In Camera' so, therefore, if Mr Duncan had said

what he said in the Parliament publicly and outside the Parliament, there would be little doubt that he would have been at least ostensibly in breach of the Royal Commissions Act, the Royal Commissioner having the power to make that evidence secret.

Now there would have been two problems with prosecuting him of course, even if he had said it outside the Parliament. The first is that you would have to make an admission that what he said was accurate, in order to say that he was revealing evidence which had been given to the Royal Commission. As the evidence was secret, it would have been very difficult to make that admission if it was desired to keep up the pretence that the evidence would damage national security if it was revealed, it would be reasonable if it could be done to continue to pretend that the revelation was inaccurate.

The second matter was the vexed question of the powers of royal commissions with respect to state governments and parliaments. Does a royal commission appointed under the Royal Commissions Act of the Commonwealth override the powers and privileges of a state parliament? Senator Gareth Evans, the then Attorney-General was given the opportunity to determine that question by prosecuting Mr Duncan, but declined to do so. I am told that it had nothing whatsoever to do with the fact that they are of the same political party. Indeed, if you see them together you probably would doubt that.

As I noted earlier, the question of privilege of state parliaments with respect to the contempt of federal royal commissions is an unresolved problem and it is probably not one that is likely to be capable of resolution without a test case for a prosecution of that kind which inherently is unlikely to occur. The less complicated contempts were, of course, usually committed during the course of that four and a half months by Mr Richard Carleton who nightly, or at least nearly nightly, on the program that he then had, which I think was called 'This Day Tonight' tended to suggest what the secret evidence was and what the secret code names were and indeed any other secret material that he could get his hands on, either licitly or illicitly and tell everyone about it. Again Mr Carleton, although frequently bagged by Mr Charles in the Commission, was not prosecuted. Again, I suppose the difficulty then would be the same apart from privilege. First, you incur the odium of prosecuting the press. Second you incur the difficulty of revealing that what he in fact had to say was accurate, when indeed it was supposed to be secret.

There are difficulties then with evidence given to royal commissions. You have to decide whether anybody should know about it at all. If you decide that they should know about it, it is given in public but without the protection of the rules of evidence. If it is decided that it should be secret, and people do not want to keep it secret, it appears that there is very little that the Commission can do about it. I suppose then one comes to a final question, before departing to more general questions, which can be summed up with this question: Royal commissions are usually conceived of as being very clever, but what use are they? We can take the Hope Commission as an example and in common with Sir Humphrey Appleby, I believe that royal commissions are usually held for the purpose of concealing the truth, particularly where they are enquiring into government, and are usually set with that purpose firmly in mind.

When you think about it, that is not illogical. After all, it is the government, as indeed it was in the case of the Hope Commission which decides to hold a royal commission. It is usually the very government into whose activities the enquiry is being held, which sets up the royal commission. If you were setting up a royal commission to enquire into your activities, the first thing you would want to do is choose the judge. And indeed, that is what governments setting up royal commissions first do, they choose the commissioners. You may be forgiven for thinking that in most cases they will choose commissioners whom they believe will give the right answers. The government of course, is always confident that the right answer will be given and this is one reason perhaps for that confidence.

The second reason for complacency is that the government determines the terms of reference. It can determine to make them narrow or broad as the government thinks fit, subject only to the roller-coaster effect, which may subsequently take the whole proceeding out of the control, not only of the Commission in which it never was, but also out of the Government in whose control that Government had hoped it would be. Generally speaking, Commissions will invariably end up with some minor casualties along the way such as Ministers of State; a few reputations blasted of some business men, but ultimately the government gets what it wants, and indeed that was the case here.

<u>Was the Real Issue or Were the Real Issues Really Resolved?</u>

The interesting thing about the Hope Commission, was the question: What was the Russian Mr Ivanov really up to? Interestingly enough, if you go through the Report of the Royal Commission on Australia's Security and Intelligence Agencies, reference C, you find no real answer to that question. It does not seem to have interested Mr Justice Hope at all. Whether David Combe was telling the truth or not telling the truth about

particular matters interested him greatly, but not the ultimate question: What was the whole thing about?

Interestingly again, the one fact which was not referred to anywhere in the Report nor in the evidence, public or sofar as I know privately, was the defection during the previous year of a Russian - an alleged KGB officer. Now the reason why that was important was, as appears in David Marr's book 'The Ivanov Trail', he happened to have been, according to the allegation, a KGB class-mate of Valeriy Ivanov's, so if he defected, it would seem that Mr Ivanov's cover had been blown. But he defected the year previous to the Commission, and it was therefore very strange that Mr Ivanov should have been attracting attention to himself with his cover blown to his own knowledge in the manner in which ASIO said that he did.

The non-mention of that person of course, leads to a number of interesting speculations which may be set in train. I will not go through the entire process of speculation, but I will say that it convinced me, for reasons that I can elaborate on if anyone wants me to, that in fact the whole ASIO effort was a farce. It was a sham set up for a security purpose. What that security purpose was, nobody knows. Whether it was to expose the defector as a sham, or whether it was to support the inference that the Russians should draw that he was believed to be a sham or was not - who knows. But certainly one thing it had very little to do with was David Combe. In fact ASIO made it quite clear during the course of their evidence (and this was evidence given by the Director-General in public) that ASIO had not even considered, that the Government might take any action at all in respect of David Combe. They thought that what should happen is that Valeriy Ivanov should be expelled and ASIO should be extolled for its success in exposing a Russian secret agent who was a KGB officer.

If, as I suggest, that particular episode really did not uncover what was the actual truth of the matter, and really did no more than embarrass a number of leading citizens of this country at enormous expense, I might say, what about other commissions? Well, needless to say my familiarity with those is a little less, but if I can take the Costigan Commission for example, which was a long-running Commission - four years, I think in the event - a lot of the material which was placed before that Commission is still secret. But one matter that, consistently with what I have said about the protection of individuals is worth noting, is the report by the Commissioner in which, and I paraphrase it, the Commissioner indicated that one useful effect he saw of Royal Commissions was, that they would enable the public to be informed of the evil reputation of persons, against whom nothing could be proved in a court of law.

When one analyses that proposition, it rather suggests that the criminal justice system can safely be supplanted by a system of damage by innuendo and indeed of guilt by association, which generally leads to the conclusion about evil reputation in this context. Now that rather stands on their head, the protections which have been thought appropriate to flow out of the criminal justice system. It might well be the fact that the persons be they in government, or outside of government whose illegal activities are thus publicly suspected, may deserve that condemnation. But until that fact is proved in a court of law, it is somewhat dangerous to have it asserted as if it was a fact that those persons deserve those evil reputations.

One of the advantages, I suppose, of royal commissions is that they are generally rare, but if they become more common, no doubt that sort of attitude, of damning by association and damning by innuendo, can be regarded as becoming somewhat more common and therefore more of a danger to the protections which are usually said to flow from the criminal justice system.

Mention may be made of other enquiries into government, for example, the meat industry enquiry. One wonders whether that really revealed any more than was already known to those whose job it was to investigate crime, and whether it indeed served any useful function in uncovering anything. As to other enquiries it is probably a little difficult to comment. Fortunately most of the others such as the Petrov enquiry, have been in the dim distant past.

PARLIAMENTARY COMMITTEES

Senator Janine Haines
Leader of the Australian Democrats
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Canberra

The capacity for parliamentary scrutiny of ministers' decisions and actions is a vital element in limiting government inspired abuse of powers. It goes without saying however that in the main this review and scrutiny mechanism is used with more enthusiasm by opposition members than by government ones!

I say 'in the main' because there are occasions in which government members and senators do engage in extensive review and criticism of government actions or lack of action and do so regardless of the fact that their own government could be severely embarrassed as a result. Peter Rae's Chairmanship of Finance and Government Operations is a case in point. Furthermore, there are at least two Senate Committees where a spirit of non-partisanship is the norm. These are the Senate's Scrutiny of Bills Committee and its Regulations and Ordinances Committee. Both of these Committees operate by considering the matter before them in the light of specific criteria and comment accordingly. Individual senators and their parties are able to pick up any criticisms and act accordingly. This may mean a motion to disallow a regulation or ordinance or a move to amend a bill.

There are two ways in which parliamentary committees operate to prevent government illegality:

1. Legislative review to prevent powers which may be regarded as constituting a trespass on personal rights or civil liberties from being conferred upon government officials or statutory corporations:

- Both the Scrutiny of Bills Committee (in respect of Acts) and the Regulations and Ordinances Committee (in respect of delegated legislation including by-laws made by government instrumentalities) operate to prevent or minimise abuses such as:

  - powers of entry, search and seizure without warrant;

  - wide powers to require persons to furnish information;

- the reversal of the persuasive onus of proof in criminal proceeding;
- persons being required to furnish information which may incriminate them without adequate safeguards as to the use of that information in future criminal proceedings;
- the conferral on officials of administrative discretions without specifying criteria for their exercise on their merits; and
- the conferral on ministers, officials or government instrumentalities of powers to make legislative instruments without parliamentary scrutiny.

Examples of amendments achieved by the Scrutiny of Bills Committee are set out in the Annual Report 1985-86. A good example of the role of the Regulations and Ordinances Committee in preventing similar abuses is to be found in its Seventy-Ninth Report (April 1986) dealing with the disallowance of a Health Insurance Regulation (Amendment) which would have permitted the Health Insurance Commission to have provided any of the information in its possession (including confidential medical records) to the Secretary to the Department of Social Security.

- Legislation may also be referred to one of the Senate Legislative and General Purpose Standing Committees for review - e.g. the reports of the Constitutional and Legal Affairs Committee on Freedom of Information, the National Crime Authority Bill 1983, and A Bill of Rights for Australia - or a Select Committee may be established to examine particular proposals for legislative amendment: e.g. the Joint Select Committee on an Australia Card and the current Joint Select Committee on Telecommunications Interceptions.

2. Continuing review of the activities of government departments, officials and statutory corporations:

- Senate Estimates Committees twice yearly examine in detail all government expenditures including the operations of statutory bodies like the Australian Broadcasting Corporation and the Australian Bicentennial Authority (to name but two which have attracted attention in recent years). The examination is wide-ranging and may, for example, include occupational health and safety issues like RSI in the workplace.

- The Public Accounts Committee examines government expenditure generally and the reports of the Auditor-General in particular and reports to both Houses on instances of malpractice or areas where it believes controls should be improved. Examples are its reports on the 'Job Seeker' computer acquisition by the Department of Employment and Industrial Relations - arising out of a report by the Auditor-General - and its more general report on Medical Fraud and Overservicing in the field of pathology.

- Matters raised in Estimates Committees, in reports of the Public Accounts Committee or in reports of the Auditor-General may prompt further inquiry by one of the Legislative and General Purpose Standing Committees. The Finance and Government Operations Committee has taken a lead in this work, most notably in its report on the Australian Dairy Corporation and its Asian Subsidiaries. It presently has under examination matters relating to the refusal of 'Australian' status to the film 'The Return of Captain Invincible' for tax purposes and delays in the disposal of the Customs House, Wiltona Hostel and Rifle Range, Williamstown, Victoria, both arising out of Estimates Committee hearings. The Constitutional and Legal Affairs Committee has recently undertaken the task of examining all reports to Parliament by the Commonwealth Ombudsman under section 17 of the Ombudsman Act 1976 relating to investigations into alleged misconduct by a department or statutory authority. Such reports to Parliament are the last resort of the Ombudsman and the power has only been exercised twice in the history of the Office.

- The Senate Legislative and General Purpose Standing Committees also exercise a general oversight with regard to matters of administration through their examination of the annual reports of departments and statutory authorities falling within their subject areas. In reports such as that of the Constitutional and Legal Affairs Committee on the High Court of Australia Annual Report 1984-5 and that of the Education and Arts Committee on the ABC's Radio Racing Service in Queensland (arising out of the ABC's Annual Reports for 1983-4 and 1984-5), Senate Committees have asserted the accountability of statutory authorities to the Parliament not merely in respect of their expenditure but also in respect of their efficient administration.

- Finally, in their more general inquiries into broad questions of public policy, parliamentary committees may be said to play an important part in the prevention of maladministration and government malpractice. In recent years Senate Standing Committees have examined matters such as the government's role in Rural Research and Extension

Services, Australia's Forestry and Forest Products Industries, the Natural Resources of the Antarctic Territory, Income Support for the Retired and Aged, and the Australian Army's rapid deployment capability. The Constitutional and Legal Affairs Committee is presently examining the operation and administration of the Freedom of Information legislation and the Industry and Trade Committee is about to embark on an inquiry into certain aspects of Australia's Manufacturing Industry Revitalisation. Such inquiries are unlikely to uncover instances of criminal conduct or abuse of power but in the long term they may result in improvements in government administration which prevent such criminal conduct or abuses of power being possible.

One difficulty facing the Scrutiny of Bills Committee is that we have enough trouble keeping up with new legislation without reviewing existing Acts. So often quite inappropriate and potentially dangerous powers remain in these Acts, e.g. regarding powers of entry, search and seizure without warrant.

The Scrutiny of Bills Committee tests each clause of the Bill against its terms of reference, writes to the appropriate minister if it finds a clause wanting, and then reports to the Senate. It has become an increasingly valuable tool in holding in check abuse of government powers. It has done this in several ways:

1) because its comments are often picked up by senators leading to amendments being made to legislation;

2) because drafters of legislation are more frequently bearing in mind that the Senate Scrutiny of Bills Committee regularly hones in on specific areas for comment and have therefore in recent years modified their drafting practices accordingly - and it is no mean feat to get the bureaucrats to change their thinking and drafting practices;

3) because the Committee has been in a position to reveal that in the past year attempts by Government to infringe on one or more areas of concern have increased (although others have dropped off). This fact is made particularly apparent in the most recent annual report from the Senate Standing Committee for the Scrutiny of Bills which notes that 'by comparison with previous years, the number of clauses drawn to the attention of the Senate under principle (1) - trespass on personal rights and liberties - has increased from roughly 40% of the total to almost 50%'. It goes on to say that those increases have been particularly noticeable in specific areas such as those involving the

> imposition of the persuasive burden of proof on defendants in criminal proceedings and clauses abrogating the privilege against self incrimination. On the other hand, the number of clauses drawn to the attention of the Senate under principle (3) - non reviewable administrative decisions - has fallen off from almost 25% of the total to around 17%.

The Committee notes however, that 'there has also been a slight increase in relative terms in the number of clauses drawn to the attention of the Senate under principle (4) as constituting inappropriate delegation of legislative powers'.

For those people who are not particularly familiar with the way in which the Scrutiny of Bills Committee operates, perhaps I had better quickly run through its terms of reference and its modus operandi.

The Committee was first established by resolution of the Senate on 19 October 1981. It consists of six senators, three Government and three non-Government, under the Chairmanship of one of the Government members. The Chairman has a casting vote but in accordance with the traditions of the Senate, as I mentioned earlier, the Committee has consistently operated in a bipartisan spirit evidenced by the fact that it has always been able to report to the Senate without recording the dissent of any of its members. Its task is essentially to alert the Senate and hence the Parliament to the possibility of infringements and rights and liberties or the erosion of the legislative power of the Parliament. In doing so it expresses no particular view on whether the clauses on which it comments do in fact infringe or permit such erosion leaving that judgement to the Parliament. During the last year the Committee met twenty times, issued twenty Alert Digests and twenty reports. It considered 250 Bills and commented on eighty-eight of them.

Its main term of reference is to 'report in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise - (1) trespass unduly on personal rights and liberties; (2) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers; (3) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions; (4) inappropriately delegate legislative powers; (5) insufficiently subject the exercise of legislative power to parliamentary scrutiny'.

The processes of the Parliament being what they are, we quite frequently find ourselves considering legislation which has already passed both Houses or on the other hand which has not been presented to the Senate.

Ministers are expected to respond to the issues raised in the Alert Digests and if their response is not satisfactory, the Committee has become increasingly prepared to give them a smart slap over the wrist in the resultant report. As the Chairman of the Committee notes in the current Annual Report ' the responses which the Committee has received from the Attorney-General have given it cause for concern on a number of occasions.' But his responses are examplary (if convoluted and reminiscent of the old 'broken window' defence) when compared with those of the Treasurer who like his predecessors, maintains a determined aloofness from the workings of the Senate Committee and refuses to respond to requests for clarification or justification of a clause on the grounds that such a response is 'optional'!

Another matter of concern, not only to the Scrutiny of Bills Committee, but also to the Senate as a whole, has been the question of what to do with legislation that has emanated from the Ministerial Council. This is due to the fact that, should some clauses require comment under one of the Scrutiny of Bills terms of reference, senators are impeded in acting on those comments by moving amendments since, as you would well know, those amendments have to be approved by the Council itself. As far as we are concerned this just makes it an additional removal of parliamentary powers of scrutiny over governments and something which is not to be encouraged.

The examples I have given show the significant changes that have taken place in recent years in the review and scrutiny mechanisms of Parliament. There is still room for improvement, of course, and those of us who believe in controlling the abuse of power can never relax our vigilance. However, some safeguards are now well entrenched and this is an encouraging sign for the future.

CONTROLLING POLICE MISCONDUCT, COMPLAINTS AGAINST THE POLICE AND THE PROCESS OF LAW REFORM: AS IT HAPPENS

AN ACADEMIC WAR STORY

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(1) INTRODUCTION

While the subject of controlling government illegality when it happens to concern police misconduct has been a matter of considerable importance for a long time, it attained a new prominence in social, political and legal agendas as a result of the social conflict engendered by participation in the war in Indochina and the general social ferment of the late 1960's and early 1970's.

By the latter half of the 1960's, police forces were involved in confrontation and conflict, sometimes violent, with a substantial and potentially highly influential minority of the population which, in simpler times, would have been regarded by them as essentially law-abiding. A crucial factor was the use of the public demonstration and public disobedience on a large scale in support of such ideals as pacifism and equality, and, more recently, conservation and opposition to uranium mining and the nuclear industry. It was nothing new for the police to face large public demonstrations of dissent, but the causes of the dissent and the nature of the dissenters were new.

The police were caught a little off-guard, and it took some time for them to realise that the tactics which were used against unionists before the Second World War no longer enjoyed even a modicum of success. The demonstrators were different, the issues were different and the social context was different. The law at the time recognised only two interests: the suppression of any sign of organised public dissent and the protection of the 'rights' of the road users to pass and repass without undue hinderance. The result was alienation and polarisation - and, ordered to remove or control a situation perceived to be threatening on a person, social or class level, the police often provoked the violence they were supposed to prevent.

The police also made a major mistake. Individually and collectively, the police allowed and often encouraged the public identification of the police interest on the substantive issues as well as on the procedural issues. Thus for example, not only did the police contribute to alienation by enforcing conscription laws and laws preventing public dissent about conscription, they also made it clear that they regarded the dissenters as traitors or cowards or both. The result was substantial alienation between the police force and an historically unusual and influential section of the policed society.

This was, no doubt, a part of a larger sense of a 'crisis of legitimacy' in the institutions of Australian society - but the police were highly visible, and had a direct and obvious impact. All of this led, as it happened, to some legal change - and part of that was a critical examination of the procedures for dealing with police misconduct. It was, in this writer's view, no coincidence that the first reference to the Australian Law Reform Commission was complaints against the police, and the second, police powers.

There are three traditional routes to the control of police illegality. In no particular order of importance, there is the exclusionary rule, civil liability, and direct administrative controls. If there was in Australia a Bill of Rights and a Civil Rights Act, there might be scope for injunctive orders based on a demonstrated pattern of corporate misbehaviour, but the fact is that there is not, nor is there likely to be. The exclusionary rule is, by and large, a broken reed in Australia, not only because judges fail to take it seriously, but also because of such endemic defects as the fact that, even if it works, it only works if the evidence illegally obtained is used in a prosecution and that evidence is necessary for conviction. That is a rare situation. So far as the civil remedy is concerned, the fact is that, even if one can assume a client of sufficient optimism, and even if there is a solvent defendant by reason of the statutory vicarious liability of the Crown, the time, costs, and general aggravation associated with a civil action is enough to deter all but those who are not the subject of police misconduct. If there is some hope, it lies in the administrative process, and there is a story.

(2) THE RECENT HISTORY IN SOUTH AUSTRALIA: A CHRONOLOGY OF REFORM

(I) The Background

The tide of reform activity in the area of complaints against the police, both in Australia and overseas, washed over South

Australia, virtually unnoticed. The Mitchell recommendations were not implemented, the successive reports of the Australian Law Reform Commission excited no public attention, and things went on much as before. What happened in South Australia, interestingly enough, was that exactly the same social forces which produced a momentum for change in other states at the level of the handling by the police of a complaint of police misconduct made by a citizen, produced in South Australia a momentum for change in the relationship between the Government and the Commissioner of Police. Two events precipitated this. In the first case, the Commissioner of Police defied a Government instruction not to interfere with a Vietnam demonstration; in the second case, a Commissioner of Police was sacked by the Government for allegedly misleading the Government and the Parliament on the subject of police Special Branch surveillance of citizens. Both instances led to Royal Commissions and public controversy of a very high order - but both focussed political and social attention on issues of police responsibility far removed from individual citizen complaints about police misconduct.

What this says about South Australia is open to conjecture - but it is submitted that the effect was the concentration of concerns about controlling the police on the institutional relationships between Government and the Police Force as an entity to the virtual exclusion of the more mundane area of individual complaints about particular instances of police misconduct. That is not to say that one area is more important than the other - importance, in this context, lies in the perspective and objectives of the beholder - but, as a matter of reality, it is true to say that the areas of police "illegality" with which the institutional relationship are concerned are those of broad policing and social policy within which, in rare cases, Government and policing ideologies may conflict, whereas the latter concerns the far more frequent applicaton of allegedly illicit policing practice. These issues involve an individual case only, or may reflect far more widespread systematic abuses which never come to the attention of Government, or its political agenda.

The issue of complaints against the police, although buried, never entirely disappeared. It remained a hardy perennial of such bodies as the South Australian Council of Civil Liberties and the annual conference of the Australian Labor Party, but it generated more light then heat, as is common with things placed on a back-burner. A sign that things were about to change occurred in 1981. By that time, Don Dunstan had resigned, Des Corcoran had been defeated, and South Australia had a Liberal Government. In October 1981, the Advertiser newspaper broke a major story which recounted significant and widespread allegations of police corruption and involvement in the drug

trade. The Government set up a largely confidential inquiry, and in the end nothing came of it, in the specific sense - or so it appeared - but, for various reasons not germane to this paper, the smell was not dispelled. By the time that John Bannon's Labor government was elected, it was committed to reform of the mechanisms by which complaints about police misconduct were handled.

(II) <u>The Grieve Report</u>

On 5 April 1983, Cabinet approved the establishment of a Committee with terms of reference which required it to examine and report to the Chief Secretary on the establishment of an independent authority to receive and investigate complaints from the public concerning police misconduct. The Committee consisted of the Chairman, Mr Ian Grieve, a Senior Stipendiary Magistrate, Dr Donald DeBats, a representative of the South Australian Council for Civil Liberties, Mr Ray Killmier, an Assistant Police Commissioner, Inspector Barry Moyse, President of the South Australian Police Association, and Ms Joanne Willmot, "Aboriginal, Woman and Community Representative". The Committee met twelve times, and conducted a study tour to the Australian Federal Police, New South Wales and Queensland. It reported to the Chief Secretary in August 1983.

Highlights of the recommendations made by the Committee are:

(a) Separate legislation should be enacted to provide for the handling of public complaints against the police by a Police Complaints Authority, but that that legislation should not diminish the capacity of the Police Commissioner to maintain a disciplined force;

(b) The Authority should be constituted by a Judge or retired Judge of the Supreme Court;

(c) The Authority, in addition to any police officer, should be empowered to receive complaints concerning police misconduct, but that such complaints must be reduced to writing and signed by the complainant - anonymous complaints would not be considered;

(d) The Authority should determine in the first instance whether a complaint should be investigated by the police investigation section, by the Authority, or jointly, but that in all but special cases approved by the Minister, the principal investigating force should be the police investigation section (the Authority retaining a power of oversight), backed up by police officers seconded to the Authority;

(e) Normally the Authority should not investigate a complaint received more than 28 days after the complainant became aware of the subject-matter of the complaint unless there were special circumstances; and that the Authority may suspend an investigation in the event of a court case which touches on the substance of the complaint and that the Authority should 'take cognizance' of the finding of the court in that matter;

(f) The Authority and the Commissioner should act in a state of constant consultation, sharing files, documents and conclusions and, in the event that the Commissioner and the Authority differ irreconcilably, that difference should be finally resolved by the appropriate Minister;

(g) A police officer should be required to answer questions put by a superior officer, but should have a right to a warning and a right to remain silent in the case of an investigation involving allegations of criminal charges;

(h) There should be an offence of making a false complaint, knowing it to be false, but such a charge can be made only in the discretion of the Authority;

(i) A Police Disciplinary Tribunal should be established, consisting of a Special Magistrate, which should proceed as nearly as possible as a court of summary jurisdiction;

(j) The hearings of the Tribunal should be in camera, unless the Tribunal determines otherwise, the standard of proof should be beyond reasonable doubt, but the Tribunal should not have any power to impose penalty, which would remain the exclusive preserve of the Police Commissioner.

This was not, to say the least, a commendable report. The Government had appointed a consultant to advise it on the recommendations of the Committee. The consultant reported on 8 September 1983. His comments may be summarised as follows:

(a) The recommendation that the independent Authority be a Judge or retired Judge of the Supreme Court was fatally flawed and unworkable in practice;

(b) While the recommendations of the Committee had provided for an independent element in the reception of complaints, and independent oversight of investigation, this was a minimal injection of independence into an otherwise unchanged partisan mechanism;

(c) The Committee's recommendations involved significant and unacceptable disincentives to genuine complaints;

(d) The Committee's recommendations involved an unacceptable degree of secrecy in the process;

(e) The Committee's recommendations were inadequate in respect of double jeopardy problems, the sub judice doctrine, and the enactment of related criminal offences.

These matters will now be considered in more detail.

(III) The Defects of the Grieve Report

(a) The Nature of the Authority

The fundamental debate on this issue was whether the Authority should be constituted by the Ombudsman or some other body. It should be understood, as a matter of reality, that certainly the Police Association, and perhaps the Police Commissioner, would not agree to an Ombudsman based authority in South Australia under any circumstances. The reason for this was that they feared and disliked the then incumbent of the office, the ferociously efficient Bob Bakewell. Mr Bakewell had not made any friends in the force when, in his Annual Report for 1982-1983, he said in part:

> My frustration in not being able to handle matters connected with the police are no secret. But until the Act which binds me is amended I must continue to stand back from all allegations against the police. Unfortunately though, that often means some allegations aren't fully investigated and justice skirted ... [Having detailed an allegation of police harassment] My attempt to get an explanation from the Assistant Commissioner of Police resulted in a whitewash. His two sentence reply ended: 'Mr X's complaint has been fully investigated and his allegation of harassment is refuted.' It was a classic case of how ineffective the present arrangement is.

This report was accompanied by a cartoon of a citizen being followed by three police - the citizen is saying 'What are you doing' and one policeman is saying 'We are not harassing you'.

Obviously, the Grieve Committee could not give this as a reason for its failure to recommend the ombudsman based model. Instead, it presented and discussed a list of 'advantages' and 'disadvantages' of that model. The 'disadvantages' which proved decisive in the event were:

(a) 'There is a tendency, particularly, in other nations, to separate ombudsman-type responsibilities into several distinct offices rather than to combine them in a single person.'

(b) 'The State Ombudsman is responsible for oversight of matters arising from the administration of department. The responsibility in the area of complaints against the police relates to conduct rather than administrative acts.'

(c) 'There is a serious possibility that the addition of the police complaints responsibility, involving perhaps three hundred additional complaints, would overbalance the entire office.'

(d) 'The New South Wales Ombudsman is of the view that the handling of police complaints may be best conducted by an entirely separate authority. The Senior Assistant Commonwealth Ombudsman, while noting the cost effectiveness of adding the complaints area to an existing Ombudsman's office, does not view the question of who exercised the independent powers in this area as more important than the powers themselves and the administrative guidelines for their use.'

(e) 'Vesting the power to deal with complaints against the police in the Ombudsman's office would have the effect of blocking off any complaint about the operation and administration of the Authority.'

(f) 'A legal background is not necessary for most matters now before the Ombudsman but would be an advantage in the evaluation of investigative reports and particularly in the question whether an officer should be charged with a breach of law or regulation.'

There is almost nothing to these arguments at all. Reasons (a), (c), (d) and (f) are not reasons at all, and reason (e) is simply not true. In particular, it seems that reason (d) involves an, at best, misinterpretation of the then position of the New South Wales Ombudsman. What he actually said in his Special Report to Parliament on the Effectiveness of the Role of the Ombudsman in Respect of Complaints Against the Police, (1982) was:

> ... the existing role of the Ombudsman in relation to police is impractical and ineffective. Worse, without exaggeration, it can be described as a dangerous charade likely to deceive members of the public into believing that there is a public watchdog or guardian with effective powers when there is not. Given the real possibility of deception and the not

> inconsequential cost of the present system, it would be better to abolish the present role of the Ombudsman in relation to police rather than retain the present system in an unamended form. If none of the various alternatives are acceptable to the Government, such an abolition would at least make clear to the public what in reality is the present position, namely that investigations of alleged police misconduct and consequent decisions about prosecution or disciplinary action are made by the police and there is no effective review.

It is, however, true, as reason (b) states, that the function of the Ombudsman envisaged in the typical police complaints scheme is materially different from that otherwise undertaken by that office. The Commonwealth Ombudsman has remarked upon this difference, but has not deprecated it. Mr J.V. Dillon, when Ombudsman for the State of Victoria, expressed the strong belief that full jurisdiction over complaints against the police was inappropriate and inimical to the ordinary functioning of his office, but his successor, Mr N. Geschke, in his report for the year ending in June 1985, expressed a contrary view:

> Because of the unsatisfactory situation as to the Ombudsman's jurisdiction in the investigation of police complaints, ... an amendment of the Ombudsman Act was sought in August 1983 to clarify this as well as correct a number of other anomalies.
>
> Instead of amending the Ombudsman Act, the Parliament has legislated to establish a Police Complaints Authority which will take over the Ombudsman's involvement with police complaints. ...
>
> My concern is that the proliferation of Ombudsman-like authorities can allow inconsistencies to develop in the handling of complaints and different standards to develop in relation to the evaluation of administrative practices, especially in employment or purely administrative actions.
>
> It also seems a shame that the experience which has been gained in this office over the last 11 years will have to be re-learnt by a new authority. ...

The South Australian Ombudsman expressed similar views in relation to the South Australian legislation.

But if, contrary to these opinions, it can be said with justification that the altered role of the Ombudsman in this matter is a disadvantage of the Ombudsman based model, it must wilt before the manifest advantages, from a policy point of view, of the use of that model. These include existing public knowledge and trust, existing and understood independence, acquired skills and economy. These advantages need not be detailed here - they have been more than adequately detailed by the Australian Law Reform Commission.

If this were not enough, the Supreme Court Judge model proposed by the Grieve Committee was impossible and, in at least one respect, bizarre. A serving Supreme Court Judge would find himself or herself in an appalling position if he or she was faced in court with the evidence of a police officer who was or had been the subject of a complaint, or faced with the investigation of a complaint concerning a police officer who had given evidence in his or her court. The possibilities for embarrassment are endless. Worse, the hearing Tribunal, being constituted by a Magistrate and conducted as a court of summary jurisdiction, would be exercising a judicial function in respect of an investigation either conducted or supervised by a Supreme Court Judge. Worse still, what would be the position if the case went on appeal to the Supreme Court?

These matters aside, the fact is that the Grieve Committee chose the Supreme Court Judge in order to trade on that image of impartiality and independence commonly associated with that office. One need not go all the way with the Irvine memorandum and the firm attitude of the Victorian Supreme Court with respect of the co-option of Judges to traditionally non-judicial tasks to say that this task is quintessentially non-judicial. The task involves investigating, supervising police investigation, conciliating, formulating raw policy, interviewing persons in an inquisitorial mode, and, moreover, the judging is to be done by another, inferior, judicial officer. Not only are the job specifications non-judicial, but the judicial task is forbidden. This is absurd.

The Committee had, rightly, rejected the Queensland model of an investigatory quasi-judicial tribunal. The radical solution of a civilian review board was, whatever its merits, simply not on. The case for the ombudsman was clear, and the arguments against it nonsense, but the political reality was that the ombudsman solution was not on either. The Supreme Court Judge idea was palpably unworkable. What happened will be detailed below.

(b) Independence

The conclusion of the Grieve Committee that, as a general principle, the administrative system for dealing with complaints against the police should be as independent as possible is not only unexceptionable but also praiseworthy, despite the concealment of real policy behind the usual rhetoric of 'the sole and only reason for this idea is that, while the police can be trusted to investigate and punish their own, there needs to be the appearance of independence in the system'. This is, of course, nonsense, but, while it is tempting to accede to this argument in order to get onto the real issues, acceptance of the argument leads to compromises of the independence argument on a large scale. The Grieve recommendations are a case in point.

When each component of the proposed system is examined, it will be seen that the Authority would provide an alternative independent forum for the reception of a complaint, an independent oversight of internal investigation, and independent investigation in a minimal number of cases, but would have no role in the determination of the complaint or the penalty imposed. It may be seen at once that the injection of an independent element into the previously existing process would have been, had these recommendations been adopted, of a very low order indeed. Worse, in the context of investigation, the Grieve Committee contemplated that something like two thirds of all complaints would be investigated, not by the special police unit, but by 'line officers': that is, the superior of the subject of the allegations. This is directly contrary to a strong consensus of opinion both in Australia and overseas, and specifically contrary to the carefully reasoned recommendations of the Mitchell Committee and the Australian Law Reform Commission.

Further, the Grieve Committee was aware that its recommendation that the assessment of penalty should remain the exclusive preserve of the Commissioner was contrary to the recommendations of the Australian Law Reform Commission and the resultant Complaints (Australian Federal Police) Act. The Committee stated that it was unwilling to recommend even a minor intrusion into the Commission's obligation to maintain discipline within the force. It follows that the recommendations offer no safeguard at all against the possibility that the whole system could be set at nought by petty penalties. Indeed, as we shall see below, the Committee would wish to keep the penalty confidential.

(c) Secrecy

Considered as a whole, the Grieve recommendations were designd to keep the system as closed as possible from public view. The idea that 'justice must be seen to be done' was simply ignored when

the working of the system was framed. Thus, while the Authority would keep a register of complaints, the register would be confidential and privileged from production in any criminal or civil court. The Committee recommended that proceedings before the Police Disciplinary Tribunal should be in camera, subject to the discretion of the Tribunal. The Committee recommended that the Authority should notify the complainant if the police officer was disciplined, but that the penalty imposed should remain confidential. The Committee did not comment on the confidentiality of investigation reports, but it may be conjectured that they would be confidential as well. The result of all of this is quite clear: the whole process, from beginning to end, would be secret.

With the exception of the investigation reports, this is entirely unacceptable and contrary to the consensus of opinion in Australia and overseas. Again, it should be entirely unnecessary to discuss here why that is so. The Committee could provide no reasoned justification for these recommendations.

(d) Complaining

The Grieve Committee recommendations placed major hurdles to the reception of complaints. Outside metropolitan Adelaide, the police would in fact remain as the sole reception point, a matter of considerable significance if the complaint concerns the only police officer within range. The Committee recommended that there be a presumptive limitation period of twenty-eight days, so that after that period, a complainant must not only justify the complaint but also the fact that it is 'late'. The Committee recommended that all complaints must be signed by the complainant and thus that anonymous complaints could not be investigated. Again, these recommendations run contrary to a consensus of opinion both in Autralia and overseas, and again, the Committee could provide no reasoned justification for them.

(IV) The Fate of the Report

The Grieve Report was seriously flawed, not only in the major matters discussed above, but also in other respects. It is not necessary to detail them here. The position was that, in September 1983, the Government was in possession of the unanimous report of its representative committee and a consultant's report which highlighted its manifest flaws. An ominous silence descended.

On 16 March 1984, the Advertiser published, accurately, the substance of the Grieve recommendations, with an editorial which stated that reform in the area was long overdue but that 'some would find greater assurance from the establishment of a tribunal

more fully independent of the department whose members have been complained against.' Ominously, Mr Brophy, the Secretary of the Police Association, the President of which body had signed the report, was reported as saying that the Association was not yet in a position to comment on the recommendations.

On 19 March 1984, the Minister for Emergency Services, Mr Wright, released both the Grieve Report and the consultant's report. Mr Wright stated that the Government had accepted the Grieve recommendations except that the Authority would not necessarily be constituted by a Supreme Court Judge - any person with suitable legal experience would do - and the presumptive limitation period would be extended from 28 days to six months.

By September 1984, a Bill had been drafted. It was complex: 54 sections, eight parts, 40 pages, interlocking definition and redefinition. It may be said with fairness that, while it reflected the Grieve recommendations, it differed from them in substantial respects. The precise nature of the Bill need not detain us here - the resulting legislation will be discussed in detail below.

The Government then set about a selective consultation process. It is known that the Ombudsman, Mr Bakewell, was highly critical of the Bill. In particular, his reading of the Bill was that the independent authority had powers so inadequate that it would in practice be a creature of the Police Commissioner, (indeed, with less power than the Ombudsman has in his ordinary jurisdiction). He was highly critical of provisions empowering the relevant Minister to make final decisions when the authority and the Commissioner disagreed, and he objected to the naming of the authority as 'The Police Ombudsman'.

On 10 November 1984, the Police Association placed a newspaper advertisement advising of an extraordinary meeting to discuss the Bill, but also commenting that the Bill provided that the authority could search a police officer's home without a warrant, authorise the investigation of anonymous complaints, and question families of police officers with criminal penalties attached to failure to answer. These criticisms were taken up by the Leader of the Opposition, who publicly asked the Government to withdraw the Bill pending further consultation with the police.

On 12 November 1984, the meeting of the Police Association rejected the draft Bill. On 13 November the Commissioner of Police stated that he had concerns with the Bill and had sent a paper to the Minister. The Minister refused to release that letter. On the same day, the issue dominated Question Time in the House of Assembly. In part, the Minister stated:

> Two or three weeks ago the Police Association ... came to me with two complaints against the Bill. I considered those complaints and agreed to make amendments. The Association, through the Secretary, agreed to those amendments. ... I do not break agreements. I was surprised ... that after the Bill had been introduced the media was informed of further discoveries, but not I. I was not told of further dissension about matters that had been discovered, but all of a sudden we have a media war on this legislation. I do not believe that that is fair or that it is playing the game. The fact is that the Police Association did not honour its agreement with me. If one cannot honour an agreement on industrial relations or on any other matter, the game is not worth playing.

Debate on the Bill was postponed until 4 December.

On 15 November, the letters column of the Advertiser was filled with the outraged cries of police and their families. The Advertiser ran an editorial which, while supporting the general idea of an independent police complaints authority, condemned the Bill as a 'draconian' measure, rendering police threats of a strike as 'understandable', in particular condemning the provisions permitting search without warrant of a police officer's home and questioning an officer's family under threat of criminal penalties as 'a fundamental assault on civil liberties, in effect making the very upholders of the law second-class citizens'.

It must first be observed that the subjects of search without warrant and questioning under penalty were not derived from the Grieve Report, and that the provision of the Bill permitting investigation of anonymous complaints was directly contrary to its recommendations. It should also be remarked that all of this hysteria was properly answered, a week later, when the Advertiser allowed the Council of Civil Liberties space to explain its support of the Bill. In brief, the Council argued correctly that there are very good arguments for permitting the investigation of anonymous complaints - not least that the police routinely do so themselves - and most complaints systems allow for that. The Bill was not specifically directed at the compulsory questioning of officer's families - the Authority was empowered to question any person under threat of penalty. Last, it lay ill in the

mouths of police to complain about search without warrant in a State in which general search warrants exist and are routinely used, which use has always been staunchly defended by police.

On 15 November the Minister met with the Police Association executive, and a rumour circulated that he had ofered to withdraw the offending clauses. Neither the Minister nor the Association would confirm that rumour. The Council for Civil Liberties publicly supported the Bill.

On 16 November, Advertiser Police Reporter Robert Ballhed some light on what was really going on. His article pointed out:

> It is election time round at the union's Carrington Street office and seats on the union's State executive are at stake. The legislation, which at the time was still being negotiated, obviously contained aspects highly contentious among rank and file police officers - aspects they were not about to cop at any price. Some candidates have been less than shy about making known their views on the legislation, and coupling this with suggestive analysis of the ability of the present union committee. The introduction of the legislation effectively exposed sensitive negotiations and ... police publicly made known their objections and slated their association executive for allowing the legislation to be introduced in such a fashion.

The Police Association met again on 20 November, and resolved to continue negotiating with the Government for another week. The Commissioner of Police announced that he was now happy with the Bill. On the day before the next meeting of the Association, its secretary stated that the issue of compelling answers to questions had still not been resolved: the Government had conceded a privilege against self-incrimination with respect to criminal offences but not disciplinary offences. There were intimations of industrial action, and the United Trades and Labour Council was known to be discussing the issue.

The meeting took place on 28 November. A letter from the Minister was read in which he undertook to defer debate on the Bill until 6 February. The meeting voted its continued opposition to the investigatory powers of the authority, but deferred any industrial action pending further negotiations.

On 21 December, two stories of relevance appeared in the Advertiser. The first was a statement by the Secretary of the Police Association that the Association and the Government had agreed in principle on the investigation issue. The second reported that a petition had been organised and presented by some members of the Association demanding a removal of the Secretary for 'gross neglect of duty' in relation to negotiations over the Bill. The effect of this was that a special general meeting must be called to debate the petition. On 26 December, it was reported that a counter-petition was circulating, and on 29 December, there were reports of bitterness in behind-the-scenes manoeuvering.

On 27 December, in a perhaps unrelated matter, the Government announced that it would soon proclaim the Controlled Substances Act, which had been passed in April, and which, it boasted, was the spearhead of a new campaign to 'crack-down' on drugs. How unrelated this announcement may have been should be seen in the context of later events. On 2 January 1985, the Government announced legislation for 'massive' increases in penalties for assaulting police, hindering police, disorderly behaviour, and bribing police - in some cases by a factor of 800%. It was also hinted that 'certain police powers were being reviewed as part of the upgrading of the Act'. The Police Association welcomed the announcement. On 3 January, the Attorney-General confirmed that loitering laws were under consideration, but would give no details.

The Police Association met again on 11 February. It again requested the Minister to withdraw the complaints Bill, and threatened industrial action if the full membership were not shown the new Bill before it was introduced. On 15 February - four days later - the Attorney-General introduced a Bill to vastly increase penalties for police offences and significantly widen police powers. The Bill sought to extend police powers to stop and search without warrant, and to allow detention for questioning. The initial reaction of the Police Association was favourable. On the next day, Police welcomed the legislation, although the Criminal Lawyers Association condemned the Bill and accused the Government of 'token consultation' with it.

On 21 February, the Minister again introduced the Complaints Bill. Introducing the Bill, the Minister announced that the independent authority would not have the power to examine persons on oath, that the authority would need a search warrant before conducting any search, that anonymous complaints would be investigated only in 'special circumstances', and that police and their relatives would have the privilege against self-incrimintion. The next day, the Police Association agreed to the Bill.

The Bill was passed without further controversy worthy of the name on 14 March. On 12 May 1985, Mr Andrew Cunningham, not a Supreme Court Judge but an industrial court Magistrate, was appointed to head the Authority. The only note of dissension was sounded in August 1985, when, in her annual report, the Ombudsman strongly criticised the proliferation of complaints authorities 'which is not only confusing the public, but is an unnecessary duplication of resources'. It may interest the observer to note that, in 1985, Victoria legislated for a separate police complaints authority, but Western Australia conferred that function on its Ombudsman.

That is the history. Two topics remain. What system did South Australia have when the dust settled? And what lessons about law reform can be drawn from this experience?

(3) THE SYSTEM IN PLACE

The Police (Complaints and Disciplinary Proceedings) Act, No. 26 of 1985, establishes a body called The Police Complaints Authority constituted by a legal practitioner of at least five years standing. The Authority may not engage in other renumerative employment without the consent of the Minister and is not subject to the Public Service Act. The Act makes provision for dismissal of the Authority in terms similar to those applicable to Ombudsmen. The Act also provides for the establishment of a Police Internal Investigation Branch within the police force.

The Complaint

Any person may make a complaint about the conduct of a police officer either to the Authority or to a police officer except the police officer about whose conduct the complaint is made. In the latter case, the police officer is required to advise the complainant to complain either to another police officer or to the Authority. The complaint may be made anonymously or by one person on behalf of another. There are quite detailed provisions requiring police officers to facilitate the making of a complaint by a person in custody.

Where a complaint is made to a police officer that police officer must expeditiously refer the cmplaint to the internal investigation branch, which must, in essence, send a copy to the Authority. Where the complaint is made to the Authority, the Authority must send a copy to the Commissioner and, subject to what follows, refer the complaint to the Commissioner for investigation by the internal investigation branch. In either case, the Authority may determine that the complaint should not

be investigated or further investigated if, inter alia, the complaint was made more than six months after the complainant became aware of the conduct, if the complainant is anonymous, if the complaint is trivial, vexatious or made in bad faith, if the complainant has taken other legal steps in relation to the complaint or for any other reason, unless, in all such cases, the Authority is of the view that 'special reasons' justify taking the matter further. If such a determination is made, the Authority must communicate that determination and the reasons for it to the Commissioner. That determination does not bind the Commissioner, but if the Commissioner continues the investigation, that investigation is taken outside of the provisions of the Act.

Either the Commissioner or the Authority may attempt a conciliation process, and each must notify the other of what is going on and what has happened.

Investigation

The presumption is that the complaint will be investigated by the police themselves. However, the Authority may determine that it will investigate the complaint itself, after consultation with the Commissioner, if the complaint:

(i) concerns an officer of a rank equal to or senior to the officer in charge of the internal investigation branch, or

(ii) concerns an officer in that branch, or

(iii) is in substance about the practices, policies or procedures of the police force, or

(iv) concerns matters which the Authority is satisfied, for any other reason, demand his or her investigation.

The Authority may determine whether or not the Authority will conduct the investigation in team with the branch or solely. The Authority must notify the Commissioner of these determinations, and the Commissioner must provide the Authority with a complete report on what, if any, progress the branch has made on the matter. It is not clear whether or not these determinations bind the Commissioner.

Where the complaint is investigated by the internal investigations branch, the Act provides in essence, although with great circumlocution, that those police officers have all the usual powers plus a special one. The special one is the power to require that any police officer answer questions or furnish any evidence. Failure to do so is a disciplinary offence. It is no

excuse that the disclosure of the information would be contrary to the public interest, would contravene another law, or would tend to show that that officer has committed a breach of discipline. This power is hedged about with two protections. They are that (a) before giving such a direction, the investigating officer must inform that police officer of the general nature of the complaint and (b) the police officer may claim a privilege against the incrimination for a criminal offence of himself or herself, or his or her spouse, putative spouse, parent or child.

Where the complaint is investigated by the police themselves, the Authority is given quite extensive powers to oversee that investigation. The Authority may discuss the complaint with the complainant, require the Commissioner to provide any information about the investigation and the complaint, and direct the Commissioner as to any matters about the investigation of the complaint, its conduct and methods. These directions bind the Commissioner unless he or she objects, in which case the difference must be resolved by a direction of the Minister, which must, in some cases, be tabled and gazetted.

Where the investigation is conducted by the Authority, the Authority is directed to use, in the first instance, police officers made available to the Authority by the Commissioner or, under arrangements made by the Minister, police officers from other Australian police forces. The legislation does not provide that those police officers retain the powers invested in them, as police officers, by the law, but that is submitted to be a necessary implication from the legislation, even in the case of an external police officer, for to argue otherwise would be to defeat the purpose of the legislation. Nevertheless the matter should have been made clear.

The Authority is given three specific powers by the legislation. First, the Authority may require, by notice in writing, any person to produce any information and/or documents. Second, the Authority may require either the complainant, or the person on whose behalf the complaint was made, any member of the police force or any other person to attend before the Authority and answer questions relevant to the investigation under penalty. These first two powers are attended by three protections. First, the Authority must state in that notice the general nature of the complaint. Second, the Attorney-General may disentitle the Authority from receiving that information by reason that it would breach Cabinet secrecy. The Duncan case lives on in strange forms. Third, as before, the person required may claim the privilege against self-incrimination if the information might tend to incriminate the officer, or a relative, or might tend to show that that relative who is a member of the police force has committed a breach of discipline.

The third power given to the Authority is the power to search by warrant. It is further provided, with respect to all three powers, that the Commissioner may certify that the information in question might prejudice a police investigation anywhere in Australia, might constitute a breach of confidence, might 'endanger a person or cause material loss or harm or unreasonable distress to a person', in which case the information is privileged to the police and the Authority and the required person may refuse to provide the information for a maximum of 48 hours in order to seek such a certificate.

Charging

Under this sytem, in most cases the investigation will be completed by the internal investigations branch who will report to the Commissioner. The Commissioner is obliged to report fully to the Authority who, having considered the matter, must report in writing to the Commissioner as to his or her assessment of the complaint, and views as to what should happen. This report may include a recommendation that the complaint be further investigated by the police or the Authority. The Commissiiner is, in essence, bound by these recommendations, unless, in the case of disagreement, he or she refers the matter to the Minister, in which case the Minister will make a binding determination on the matter, which determination must, in some cases, be tabled and gazetted. All of this must be copied to both the Authority and the Commissioner, and the complainant is entitled to know all of the particulars of the decisions made.

Trial

The legislation sets up the 'Police Disciplinary Tribunal' constituted by a magistrate. The charge must be laid by the Commissioner. The burden of proof on the charge is beyond reasonable doubt. The Commissioner has the sole right to impose penalty, but the Tribunal may comment on what it thinks about the penalty. The proceedings of the Tribunal are to be in private unless the Tribunal permits any person to be present, but the Tribunal must permit the Authority to be present. The parties are the accused police officer and the Commissioner. In effect, the proceedings of the Tribunal should reflect the proceedings of the magistrate's courts as far as is possible, but are bound by the rules of evidence. The Tribunal has inquisitory powers.

(4) CRITIQUE

The simple, and cost-effective thing for the South Australian Government to have done would have been to follow the example of the Commonwealth, New South Wales, Tasmania and Western Australia, and add the police force to the jurisdiction of the

Ombudsman. That alone would not have been enough, for, as has been pointed out above, the desirable function of the ombudsman in the area is significantly different from the function usually performed in that office. Nevertheless, Australian ombudsmen given the tools for the task have performed it to the best of their ability, and that seems to have been very good indeed. The debate on this issue has been set out above. As has been explained, whatever the principles, the ombudsman option was a political non-starter in South Australia. It is interesting to note that, in Victoria, where the relationship between the Police Commissioner and the Ombudsman was reputedly less than cordial, the Government has also legislated for a separate Police Complaints Authority. It is also interesting to observe that, after a meeting with the Commissioner to settle differences of opinion about the role of the Authority, the Victorian Authority says he is not so much interested in looking at individual complaints as 'aggregate issues'.

But if the Ombudsman option is to be rejected, what of the legislative system that South Australia has produced? There is much that is good about it. The detailed legislative provision for the making of complaints by persons in detention are exemplary. In the end, the legislation does provide that the Authority can receive anonymous complaints, verbal complaints, and complaints made by one person on behalf of another. The presumptive time limit of six months is acceptable. The Authority is an independent authority, although the Commissioner may force the Authority to the relevant Minister, and the Authority may report directly to Parliament. The Authority does have extensive powers to supervise and direct internal police investigation, and has, despite strong police opposition, a reasonably wide power of independent investigation. All of this, and much else, is praiseworthy.

But there are problems. Here are the ones that seem to appear on the face of the legislation. Of course, practice may solve some problems and/or raise new ones.

Police Investigation

As noted above, it is commonly agreed that it is unacceptable that any internal police investigation be carried out by an officer in the line of command of the office complained about. The legislation does not contain that principle - on the contrary, the legislation contemplates the possibility by providing that the officer in charge of the internal investigation branch may co-opt as a member of that branch any other member of the force, and, elliptically, that:

> Where a member serving in the internal investigation branch is able to do so without unduly interfering with the performance by the branch of its functions, the member may be directed by the Commissioner to perform duties not related to investigations into the conduct of members of the police force (not being duties involving the investigation of offences alleged to have been committed by persons other than members of the police force).

Oversight

While the Authority is given extensive powers with respect to its independent oversight of the police investigation, and has the power to discuss the complaint with the complainant, the legislation also provides that the Authority may only interview any other person about the complaint through arrangements made by the Commissioner. That seems to this writer to be extraordinary.

Concurrent Investigations

The legislation provides that, where the Police Authority has made a determination that a complaint should be investigated by the Authority, nevertheless the Commissioner may continue to investigate the complaint in which case this legislation does not apply to that investigation, unless the Authority makes a further determination that the matter should not be investigated or further investigated by the police under the direction of the Commissioner. This is, to say the least, odd. The legislation provides that the Authority may make a determination that an investigation be carried out jointly by the authority and the internal investigations branch, so the only logical function of this provision is to cater for the case in which the Authority believes that a complaint should be investigated, simultaneously, by the Authority and by the police without reference one to the other. It is, at best, difficult to envisage a situation in which that course would be desirable. Incidentally, these determinations may not be taken to the Minister.

Investigative Powers

Much of the dissension concerning the legislation centred on the independent investigative powers of the Authority. The Minister revealed in introducing the Bill that the Police Association initially took the position that there should be no such powers at all. It is instructive to compare the investigative powers of

the Authority and the internal investigations branch. Sadly, but predictably, it seems that the Authority has lesser powers than the internal investigation branch. The members of the branch retain their powers as police officers, including, at least in the case of a criminal investigation, a general search warrant, but the Authority must seek a specific search warrant. Both the branch and the Authority have wide powers to require information under penalty, and there is no privilege against self-incrimination with respect to offences against discipline when a police officer is questioned by the branch or the Authority, but a police officer may claim privilege in relation to a breach of discipline committed by a close relative when questioned by the Authority. These anomalies are even sillier when it is realised that the Authority is contemplated as the investigator in the more serious cases.

The Privilege Against Self-Incrimination

The privilege against self-incrimination, and the difference between that applicable to branch and Authority investigations has just been referred to. In fact, in both cases, the privilege contains an unprecedented extension since it applies, not only to matters pertaining to the person questioned, but also to his or her 'close relatives', which term is defined to mean a spouse, putative spouse, parent or child. It is really a privilege against family incrimination.

Secrecy

It is submitted that the process contemplated by the legislation will take place in an atmosphere of unacceptable secrecy. Not only are proceedings before the Tribunal presumptively in camera, but the Act provides the Commissioner with an almost unfettered power to censor information. The key provision states that where the Commissioner provides a certificate to the Authority stating that information in the possession of the Authority might prejudice present or future police investigations or prosecutions in South Australia or elsewhere, or constitute a breach of confidence or endanger a person or cause material loss or harm or unreasonable distress to a person, then that information is privileged at the discretion of the Commissioner or the Minister after consultation with the Commissioner. It is however pleasing that the Act does not require the register of complaints or the penalty imposed by the Commissioner to remain confidential.

Burden of Proof

The burden of proof before the Tribunal is to be beyond reasonable doubt. It is submitted that this should not be so, for reasons given by the Commonwealth Ombudsman when a similar change was mooted to the Commonwealth legislation. These

arguments reflect the conclusions of the Australian Law Reform Commission. In brief, the argument is that the burden of proof should be flexible - the criminal standard in serious matters such as those warranting dismissal, the civil standard in minor matters such as those warranting counselling. The Commonwealth Ombudsman's spokesman said that the invariable application of the criminal standard would 'give the rotten apple greater opportunity to escape unscathed, even when he has been unmasked'.

(5) THE PROCESS OF LAW REFORM

What lessons may this story have for law reformers? The following headings and comments are highly conjectural, and do not represent firmly held positions.

Representative Committees

Despite the statements of the Minister, it is clear that the legislative initiative, in all its forms, did not reflect more than a shell of the highly unsatisfactory Grieve Report. Politically, the Government could not discard the Report as such, and indeed it recommended, as it was set up to do, that the Ombudsman option was not on, although it could and did not provide the real reason for that conclusion. That hurdle was, I think, vital to the Government.

But the Grieve recommendations produced another problem. The point of such a sectionally representative committee is that, if all can be persuaded to sign the report, there is at once a set of recommendations and effective consultation. But where, as here, the committee is not expert in the policy of the particular area, the recommendations lead to a report which leaves vast policy black holes on which there has been no agreement and no consultation, even in this limited sense. That was what happened here. The Grieve Committee did not even mention the powers of the Authority when conducting its own investigation and this topic featured large in the fight that followed. The lesson seems to be that, if Government uses a sectionally representative committee to formulate policy recommendations, it must ensure that the representatives are expert in the area of policy concerned. Had that been so, the Government might have saved itself a good deal of pain. In this case, that conclusion means, for example, that if one wants a civil libertarian view, one is ill-advised to reach automatically for the Council for Civil Liberties, which usually provides an enthusiastic amateur.

Police Unions

Police unions, at least in South Australia are powerful bodies beyond either the merits of their views or the strength of their representation. They pose particular difficulties for Labor Governments for obvious reasons. In this case, the Government

was caught between opposing union factions in an election. As a personal view, it is submitted that it is one thing for the police union to use industrial action as a weapon in support of union policies about terms and conditions of employment, but the unions, and indeed many other participants in reform of the criminal process, seem to regard the criminal law and police powers as terms and conditions of employment rather than the vital issues of public policy that they are. It is unfortunately true that both Liberal and Labor Governments are of the view, perhaps correctly, that the voting public will reject any Government which significantly provokes a police union.

The police union was clearly far more able to use the media to its own ends than any other participant in the law reform process. Any other consultation on the Bill never reached the public light either in the press or in the Parliamentary debates. The Council for Civil Liberties was, simply, inept in putting its point of view forward. But then it has no formal political constituency. Its view in Parliament appeared only in the speech of the Liberal representative in charge of the Bill, Mr Baker, in this form:

> I was disturbed by a letter that I received from the Council for Civil Liberties, saying that this was a great Bill and that we should give it our full support. I replied to the Council, outlining the four areas to which I have referred ... The council replied that the Bill was a good idea and that, although the three areas in question might not be up to scratch, they needed it. That was a far cry from the council's original statement that the Bill was perfect. Whether the Council was satisfied with the Bill or was merely happy that the police should have liberties taken away from them I do not know, but sanity eventually prevailed.

Whether or not that is an accurate representation of the Council's view, the fact is that that view was entirely submerged.

These are, it seems, the realities of political life. They are to be regretted. The public dominance of the rank and file police view led, in this case, to inferior legislation on a matter of public importance, although, in the event, it is submitted that the results were far better than one had any cause to suspect would be the case.

Related Legislation

It is a fact that the acceptance by the police of this legislation coincided with the public announcement of the proclamation of drugs legislation in terms of increased penalties and a harsher legislative framework, and the legislation of a new package of police powers which emphasised increased police powers and heavily increased penalties for offences committed against police. If these measures were entirely unrelated, it was a remarkable coincidence. But if there was some kind of trade-off involved, the relative perception of the values involved in that trade-off must remain a mystery unless in some unlikely event a participant talks. Wagers on the truth, in the unlikely event that it becomes known, will be accommodated by the writer.

Timing

Apart from any other factor, the Government made a number of mistakes as to timing which made the task much harder than would otherwise have been the case. In the first place, it should not have held onto the initial report for over six months, and then reacted in a guilty manner when the substance of the report was leaked. Had it released the report at once, and called for general public comment, it is highly likely that the Police Association, which had after all a representative on the Committee, would have been far less strident or convincing about the issues. In the second place, the Government managed to introduce the first draft Bill at about the time that the Police Association elections were due. There was always going to be hard-line opposition to any change in this area, and the union election gave the dissidents both a platform and a lever to use against the current union executive. Once debate on the Bill was deferred beyond the election, things became much easier.

(6) CONCLUSION

Controlling police illegality is a large, complex, and politically sensitive area. This paper has not been able to touch on a great number of issues and policies. Instead, its object has been to describe the movement to independent scrutiny of complaints against the police by an administrative mechanism in South Australia, the legislative framework of that mechanism and its weaknesses, the reasons why that result occurred, and to tease out some admittedly speculative and tentative conclusions about the process of legal change in the area. Given its rocky history, the legislation is surprisingly good, although key concessions to the conservative police union has led to important anomalies - such as the fact that the Authority has lesser powers than the police. But, perhaps, in the world of real-politik, that is the best that could be expected and, after all, it might actually work.

VICTORIA POLICE INTERNAL INVESTIGATION DEPARTMENT

Assistant Commissioner W.J. Horman
Victoria Police Force
Melbourne

The Victoria Police Internal Investigation Bureau was established in 1975 by an Executive Instruction. The Bureau generally operated with a staff of about 12 members.

The Chief Commissioner of Police, Mr S.I. Miller, in the Victoria Police Annual Report of 1981, said:

> Because of the enormous commitment of police resources to the investigation of complaints, I am convinced that the entire process must be rationalized in terms of cost-effectiveness, the effect upon police morale and public credibility. Much of a Divisional Officer's time is absorbed in internal investigations, distorting his role as a police leader and identifying him as an inquisitor. I consider that, either the Internal Investigations Bureau should be dramatically increased in strength, so that a compliment of Officers are engaged in internal investigations exclusively, or that complaints investigation should be handed over to an agency outside the Police Force.

In December 1984 it was decided to expand Internal Investigation Bureau into the Internal Investigation Department. Internal Investigation Department came into existence in February 1985 with the following structure and staffing:

Assistant Commissioner	(1)
Commander	(1)
Chief Superintendent	(1)
Superintendent	(2)
Chief Inspectors	(7)
Inspectors	(11)
Senior Sergeants	(4)
Sergeants	(5)
Senior Constables	(2)
Public Servants	(2)

(See 'Appendix A').

Comment was made on page 13 of Mr Matthew Goode's paper 'Controlling Police Misconduct, Complaints' (Against the Police, and the Process of Law Reform: As it Happens - An Academic War Story) that in South Australia two thirds of all complaints investigated were investigated by on-line Police Officers.

The general policy of the Victoria Police has been for many years that line officers will not investigate complaints against their own police personnel other than minor discipline matters.

There are a number of obvious reasons for such a policy:

- objectivity and impartiality - what it must look like to the complainant and public generally;

- the loss of confidence or effect on morale for members to be investigated by their own officers, who one day are guiding them and working with them and the next day are responsible to investigate complaints against them;

- and, of course there is the effect on the police day-to-day operations.

Mr Goode commented about the South Australia Police Board which is considerably different, so that, in Victoria, where the Police Discipline Board has been constituted for many years by a Stipendiary Magistrate and a representative of the Chief Commissioner of Police (who is generally of Assistant Commissioner rank) and a person elected to sit on the Board in matters where civilians are involved.

The Police Discipline Board sittings in Victoria are not held in secret where civilians are involved. In fact, last Thursday, at my request, a member of the Police Complaints Authority attended a Police Discipline Board and sat in on a particular discipline hearing because there will be some relevance to a further and ongoing investigation in which the Police Complaints Authority and Internal Investigation Department will have some involvement. In Victoria complainants are often required to attend the Board and give sworn evidence.

Another difference to the South Australian model is that the Police Discipline Board in Victoria not only makes the decision as to whether the charge or charges are found proven or not, but also determines the penalty. In South Australia the matter is referred back to the Police Commissioner for penalty.

In Victoria both the member convicted and the Chief Commissioner have the right to appeal against the findings of the Police Discipline Board. Appeals are dealt with by the Police Service Board, the Chairman of whom is a County Court Judge.

Mr Goode in his paper mentioned the Grieve Report and he pointed out a number of what he considered defects in it. And also went on to talk about the introduction of the South Australian legislation which set up in South Australia the Police Complaints Authority.

The Victorian legislation relevant to the Police Complaints Authority is the Police Regulation (Amendment) Act 1985, No. 10250. Part IV of that Act established the Police Complaints Authority which came into existence on 14 July 1985.

The Chairman of this session Mr Hugh Selby, is the first person appointed to the Police Complaints Authority in Victoria.

(A two page handout was distributed to the Conference on the Police Complaints Authority by Mr Selby - See 'Appendix B').

Some of the further differences between the South Australian and Victorian models include:

- The legislation in Victoria setting up the Police Complaints Authority does not, like the South Australian legislation, require the police to set up an Internal Investigations Branch. Victoria Police established its Bureau of Internal Investigations (BII) in 1975, and the concept was developed into the Internal Investigations Department which was established in February, 1985 - prior to the Police Complaints Authority legislation coming into existence.

In Victoria there is a statutory requirement for the police members receiving the complaints to advise the complainant that he or she may also make the complaint to the Police Complaints Authority. Prior to the Police Complaints Authority coming into existence in Victoria, the Internal Investigation Department forwarded notices to police stations with instructions that the notices be prominently displayed so that members would be well aware of the statutory obligation placed on them by the new legislation.

The Victoria Police Officer receiving the complaint must also notify the Police Complaints Authority of having received the complaint.

- The legislation in South Australia provides that the South Australia Police Complaints Authority may determine that a matter need not be investigated or further investigated. There is no such provision in the Victorian model.

- A further difference is that in South Australia if the complainant was aware of the particular matter for at least six months, then it may not be investigated. In Victoria the period of time which is provided is 12 months.

- The South Australian legislation refers to anonymous complaints. The Victorian legislation does not.

(And it may be of some interest to you that at times the Victoria Police carry out investigations into anonymous complaints).

- The South Australian legislation also provides another reason for complaints not to, perhaps, be investigated - i.e. where the complainant has taken other legal steps. Again, that is not a provision in the Victorian legislation.

- The South Australia legislation refers to consultation between the police and the Police Complaints Authority in relation to the investigation of complaints. By agreement between the Victoria Police Chief Commissioner, the Minister for Police and Emergency Services and Police Complaints Authority, Mr Selby, consultation will take place. We have had consultation meetings between Mr Selby, myself and the members of our staffs from the very commencement of the Police Complaints Authority.

- The South Australian model includes categories where the Police Complaints Authority <u>must</u> investigate, i.e. if an officer is of equal rank or senior to the Officer in Charge of the Internal Investigations Branch in South Australia. The Victorian legislation provides that the Police Complaints Authority <u>must</u> investigate a complaint if it is made against the Chief Commissioner of Police, a Deputy Commissioner or an Assistant Commissioner.

- The South Australia legislation also provides for the Police Complaints Authority to investigate a complaint if it relates to an Officer with the Internal Investigation Branch. Again the Victorian legislation differs as it does not contain such a provision.

However, let me suggest, that where such a complaint was received it would certainly be a matter I would discuss with Police Complaints Authority, Mr Selby. In fact, that has happened in the last week or so, and between he and I, we are addressing that particular matter.

- The South Australian legislation requires that the Commissioner must provide the Police Complaints Authority with a complete report on what, if any progress, the Internal Investigation Branch has made in relation to any complaint investigated. Victoria has similar legislation in that the Chief Commissioner must on request provide in writing to the Police Complaints Authority progress reports of investigations and must report to the Police Complaints Authority when investigations are finalised and what action has been taken or proposed to be taken.

In Victoria the Police Complaints Authority MAY also investigate a matter where they consider it of public interest or where the complaint relates to a practice or procedure which should be reviewed. (Mr Selby has referred to those in (b) and (c) of his handout - 'Appendix B').

- Both the South Australian and Victorian legislation require people to provide information and/or produce documents. However, Victoria does have a provision under the legislation for the Police Complaints Authority to take out a search warrant.

(In Victoria the police do not have the right to have general open search warrants as exists in South Australia.)

Mr Goode in his paper pointed out that the South Australian Attorney General 'can prevent' the Police Complaints Authority from having certain information if it would breach cabinet secrecy. Again the Victorian Police Complaints Authority legislation does not provide such exemption. It has been suggested that the provision was included because of something peculiar to South Australia - the Duncan Case.

Both the South Australian and Victorian legislation provide for arbitration on matters where there may be some disagreement between the Police Complaints Authority and the Commissioner of Police. However, the way I read the two pieces of legislation, the South Australian provisions are somewhat different to the Victorian Legislation.

One provision in Victoria I would like to comment on is Section 86.S(3) which provides that the Minister may refer a matter to the Director of Public Prosecutions where there is some disagreement between the Police Complaints Authority and the Chief Commissioner of Police as to what action may or may not be taken at the conclusion of an investigation. For some time it has not been unusual for the Head of the Victoria Police Internal Investigation Department or the Deputy Commissioner (Administration) (who is responsible for discipline in the Victoria Police) to seek legal advice from either the Legal Assistant (who is out-posted from the Crown Solicitor's Office and attached to the Chief Commissioner's Office) and/or to refer matters to the Director of Public Prosecutions for advice. And in some less important matters, advice may be sought from the Prosecutions Branch (which contains a number of members with legal qualifications) within the Force. At any one time, there would be a number of files being considered by the Prosecutions Branch, the Legal Assistant and the Director of Public Prosecutions.

(When I was promoted to Assistant Commissioner and took over the Internal Investigation Department, one of the investigations I took over was the Continental Airline inquiry. That matter, now over a year old, is still waiting decision from the Director of Public Prosecutions. In fairness to the Director of Public Prosecutions the investigation has been on-going and although he received a substantial quantity of material back in the last week of November of last year, because the investigation has been on-going, he has regularly received more and further materials for his consideration.)

The chart of the Internal Investigation Department ('Appendix A') includes the Internal Security Unit (ISU) which is a small section of the Internal Investigation Department. The Internal Security Unit has a proactive role rather than a reactive role, that is, instead of investigating and responding to complaints, the Internal Security Unit may initiate investigations, or act on 'information' received. The Internal Security Unit is staffed by a small skeleton crew from the Internal Investigations Department and is supported on a 'Task Force' basis, that is where a particular problem is identified, I and our Deputy Commissioners discuss what and who is needed to investigate the matter and such members are seconded to Internal Security Unit for a particular task.

By explanation, the Continental Airline inquiry started as a normal Fraud Squad investigation. A couple of the Fraud Squad Detectives were sufficiently perceptive and recognised the name of a person who had certain friendships with some senior officers in the Victoria Police. The matter was brought to the attention of the Assistant Commissioner, Internal Investigation Department,

and the head of the Internal Security Unit which then monitored for some time the Fraud Squad investigation. Later it was then decided that it would be more appropriate for the investigation to be continued by the Fraud Squad Detectives if they were attached to and assisted by the Internal Security Unit. The members of the Internal Security Unit subsequently took over matters which related to members of the Police Department.

In preparation for the response to Mr Goode's paper I sought comments on various aspects from Chief Superintendent Marshall, Head of the South Australia Police Internal Investigation Branch.

Chief Superintendent Marshall advised:

1. he felt the South Australian legislation was fairly good;

2. he felt that the legislation and the system, particularly the system between the Police Complaints Authority and the Internal Investigation Bureau is, in fact, working; and

3. he pointed out that whilst the South Australian legislation does NOT contain a sunset clause, it does require a review of the Act in two years.

In response to my query as to whether he had identified any issues, he pointed out three:

1. Under the Act, the limitations of time to charge a person with having made a false complaint is six months -

   - he believes 6 months is too short because of the complicated nature of some investigations and the time needed to get matters to Court. He suggests the period should be extended.

2. Under the South Australian legislation, to bring a charge against a person for having made a false complaint, requires the approval of the Police Complaints Authority -

   - Chief Superintendent Marshall expressed the view that the prior approval of the Police Complaints Authority is unnecessary as the Police could initiate such prosecutions.

3. He also mentioned that the Police Complaints Authority, which has the power to assess the Internal Investigations Bureau Police investigation files and, where the Police Complaints Authority believes there has been Police misconduct, to recommend that the police member(s) be charged -

   - Chief Superintendent Marshall is of the view that the Commissioner of Police who has for quite some time been in the position and had the power to investigate complaints against police members, should still have that power, as well as the Police Complaints Authority, to make such a decision.

A copy of Mr Goode's paper was also provided to the Secretary of the Victoria Police Association, Mr Tom Rippon and some comments sought from him for the purpose of this session.

Some comments Mr Rippon made include:

1. The paper referred to the secrecy of the South Australia Police discipline hearings. The Police Discipline Board hearings in Victoria are open.

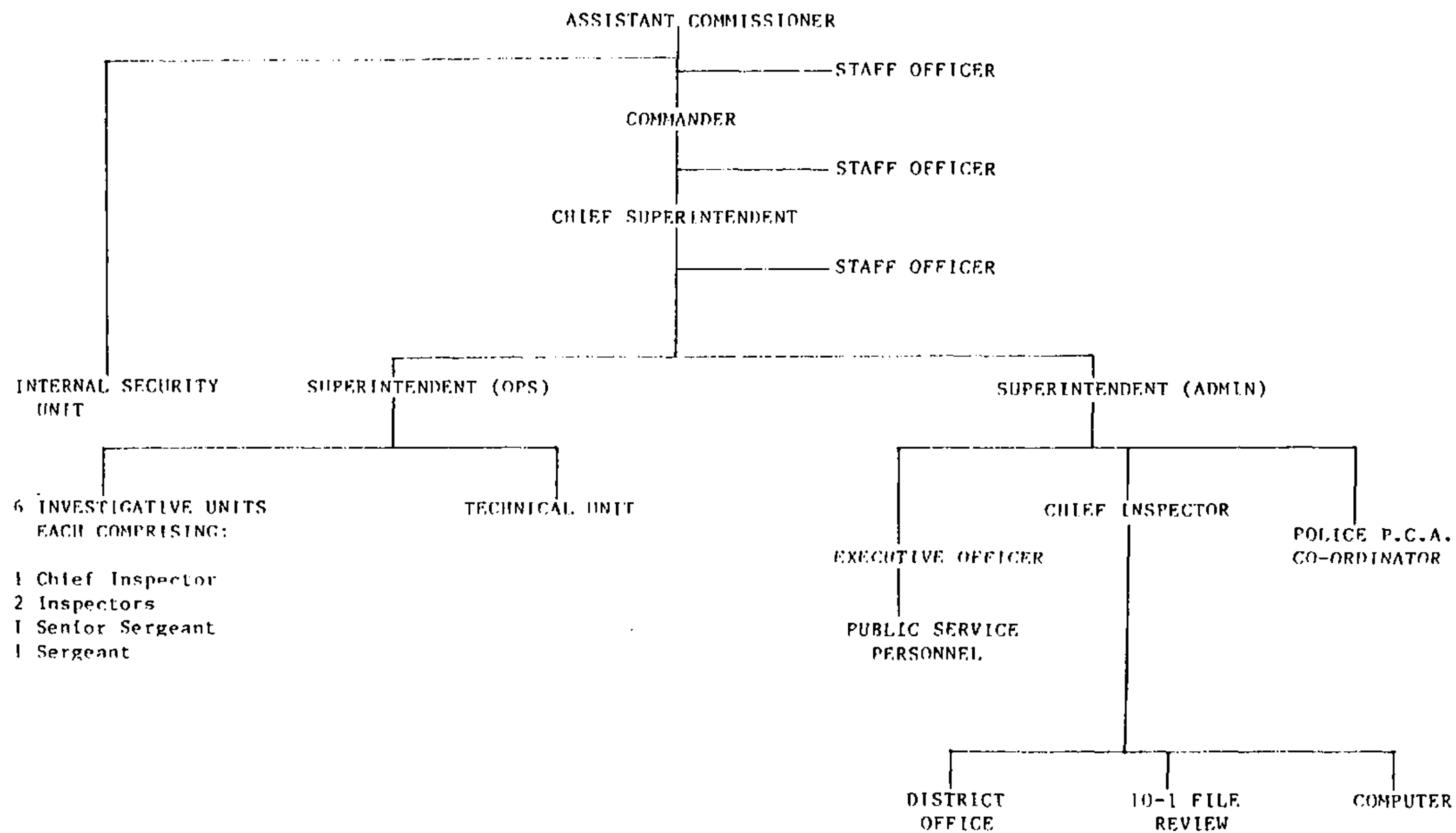
   - The Victoria Police Association supports disciplinary hearings being open to the public as some potential danger is seen if such hearings were held in secret;

2. Where Mr Goode commented in his paper about the South Australian system where the Board makes a determination and then refers the matter to the Police Commissioner for penalty who could, perhaps, impose no penalty and make a nonsense of the procedure.

   - Mr Rippon took another point and mentioned that the Commissioner could be draconian and impose very severe penalties on members for comparatively minor matters.

'APPENDIX A'

INTERNAL INVESTIGATIONS DEPARTMENT



'APPENDIX B'

POLICE COMPLAINTS AUTHORITY

Temporary address
Old Treasury Building
Spring Street
MELBOURNE 3000
Telephone: 651 1337

The independent, single-person Police Complaints Authority began operation in Victoria on 14 July 1986 with the task of oversighting the investigations of complaints against Victoria Police.

It took jurisdiction from the Victorian Ombudsman under amendments to the Police Regulations Act and is responsible directly to the Parliament.

After the 'settling in' period, the Authority has decided that the best course is to divide complaints into three categories.

Our resources, then, are directed towards:

1. Close involvement in the investigation of the most serious allegations.

2. Analysis and appraisal of a group of police internal investigations selected by such factors as allegation, neighborhood, characteristic(s) of complaint.

3. An in-depth review of police investigations and reports when the complainant responds to the police findings with useful comment and criticism.

Most complaints fall into category three. Such complaints are investigated by police and the police findings sent to the complainant, who is invited to respond to the PCA if they are dissatisfied with the police conclusions.

As the first aggregate cases, as covered by category two, the PCA has chosen to tackle the question of alleged police assaults. For this purpose, the PCA has selected a number of such allegations and is working closely in the Internal Investigations Department examination.

When these matters are concluded, the PCA will report to the Chief Commissioner on matters such as investigation method and, hopefully, the PCA observations will help achieve net improvements in policing.

There are three categories which require the Authority to conduct its own investigations:

(a) Complaints about the conduct of Commissioners.

(b) Matters the Authority deems to be of 'public interest'.

(c) Complaints requiring a review of police practices and procedures.

But most complaints continue to be investigated by police. While there has been considerable disquiet at the practice of police investigating police - and, indeed, in Victoria both the Chief Commissioner and the Police Association have on occasion said they were not opposed to all investigations being independent of the police - no practicable means have yet surfaced for such a switch.

Where the Authority is dissatisfied with the outcome of internal investigations, it may ask the Chief Commissioner to further investigate or may decide to initiate its own investigation.

Where the Authority and the Chief Commissioner disagree on further action, adjudication is left to the Minister for Police and Emergency Services, who may draw on the advice of the Director of Public Prosecutions.

No such differences of opinion have yet arisen and the Authority has not had cause to mount its own investigations or to exercise its Board of Inquiry powers under the Evidence Act.

The public of Victoria makes about 1400 complaints a year and of those, about 44% fall into the categories of greater seriousness; i.e., allegations of serious criminal activity or assault, unjust arrests etc. On investigation of these complaints, about 20% will be found to be at least partly substantiated.

The Authority has a small staff of four investigation officers and two administrative assistants, none of whom have served as members of Victoria Police. While the PCA necessarily must work closely with the police, it is imperative that its independence be unquestioned and that its staff be chosen partly because they have perspectives different from those acquired by police.

CONTROLLING ILLEGALITY IN PRISONS DEPARTMENTS

Susan Armstrong
Senior Lecturer in Law
University of New South Wales
Formerly N.S.W. Assistant Ombudsman

1. Illegality in Prisons Departments

Illegality in Prisons Departments runs the full spectrum from the Bathurst bashings and the once systematic brutality of Grafton Gaol, to far more routine abuse of powers and responsibilities. This may arise from many causes, including simple bad management; deliberate use of improper sanctions as a substitute for proper ones where the latter are seen as ineffective or biased in the prisoner's favour; the incompetence, laziness, vindictiveness, or punitiveness of individual staff; simple ignorance of the rules, arising from a failure to ensure that all staff and inmates are effectively advised of their rights and obligations; corruption; tolerance of atrocious conditions or practices which have ceased to be questioned because they are of long standing; and the idea of many senior officers that they have a better understanding of what needs to be done in a particular situation than whoever wrote the Departmental rule book.

In my view these are simply management problems, really no different from those arising in any large bureaucracy. Certainly I met all of them except corruption when I was Director of the South Australian Legal Services Commission. The differences lie not in the nature of the problems nor in the management skills to overcome them, but in the special characteristics of a gaol:

- The clients (prisoners) are enormously vulnerable, being dependent on the prison for every aspect of their day to day life, large or small. They can be moved overnight from one side of the State to the other, regardless of inclination or family commitments. If they need toothpaste, they cannot go out and buy it - they are dependent on the efficiency of the lumbering prison buy-up system to produce it. Moreover, they are shut off from every normal avenue of appeal or action if ill-treated. They have no easy access to outsiders, they cannot leave or resign, and constant complaints to the Superintendent or the prison hierarchy are rewarded with a reputation for being 'difficult' and with harassment and resentment from staff and other prisoners.

- Gaols are still closed communities, most having virtually no contact with the world outside or with other gaols. Attitudes and practices which may be quite unreasonable or out of line with those applying elsewhere or in the general community are often perpetuated because they are never questioned. This problem is exacerbated by hierarchical management structures, which discourage internal questioning or change.

- Prison officers exercise total control over the inmates. We are all familiar with the research that shows what happens when blue-eyed people are given total superiority and authority over brown-eyed people, or vice versa. Prison officers are in this position every day of their lives, and many of them are psychologically unsuited to coping with it. This problem is exacerbated because prisoners as a group are not generally skilled in the management of human relationships.

Thus in my view running the New South Wales Prisons Department, while perhaps more difficult than running Peko-Wallsend or the Australian Opera, is not essentially different in terms of the management and human relationships strategies that are required.

It is certainly not helpful to confine any discussion of illegality in the prison context to behaviour which is clearly unlawful. The breadth of the discretionary powers available to prison staff is such that virtually nothing except outright and unprovoked assault is clearly illegal. It is certainly necessary to include the natural justice ground of basing decisions on inappropriate criteria, or failing to take appropriate criteria into account. In my view this category would cover the vast bulk of serious problems in gaols, the balance being comprised primarily of administrative errors such as private property being lost, sentences miscalculated, incorrect advice on entitlements being given, and so forth.

It is very easy to underestimate the contribution which simple administrative mix-ups make to the sum of problems within gaols - at least in New South Wales.

For example, one running sore throughout the whole time I was Assistant Ombudsman and dealt with prison complaints in New South Wales, was the fact that no-one had codified the rights and obligations of prisoners and staff in an accessible, comprehensible set of rules available to inmates and officers. Instead, when the Commission thought up a new rule, or changed an old one, a typed circular was sent out to Superintendents to be added to the enormous, unindexed stack which had accumulated over

the years. Some Superintendents placed these on notice boards for prisoners and staff to see - most did not. As a result, no one except the responsible bureaucrat in Head Office had any real idea of what the rules governing important issues like day leave, work release, transfers, and segregation might be. Prisoners acting on advice on their rights from staff often became understandably aggrieved when told by Head Office that the goal they had been confidently working towards was still years away rather than available at the end of the month.

Indeed, sometimes Head Office was unaware of the relevant rules. When I became Assistant Ombudsman we obtained a full set of these circulars and took the precaution of indexing them. From then on it because commonplace for us, when investigating a particular problem, to come up with a rule that the Commission had expressly devised to cover the situation but that everyone in the Department had ignored or forgotten about.

In my view <u>at least</u> 30% of the problems which came to us would never have occurred if staff and/or prisoners had access to a proper manual or rule book setting out their obligations or entitlements. As in one year while I was there we handled 833 complaints (see Table 1), change in this area would avoid a lot of cost and a lot of anger within the gaols. Nothing is more provoking to a prisoner who has in good faith been working towards day leave after a certain period of good behaviour than to be told he has been misadvised and will not be eligible for another two years. This sort of problem was common, yet it might be noted that four years on the Department still has no rule book or procedures manual.

Moreover, even clearly illegal conduct such as officer assaults on prisoners is often condoned and thereby perpetuated by, at least, bad management techniques. A regime such as that which applied for so long at Grafton is only possible if management techniques within the Department are such that senior officers and ministers who can be held to account can avoid knowing too much about what is going on. Bad management practices make that possible.

I have chosen to illustrate this problem through to case studies which were the subject of Reports to Parliament while I was Assistant Ombudsman in New South Wales, as well as through a number of less detailed illustrations. These are all drawn from New South Wales, as that is the only state of which I have detailed knowledge. However, my contact with people undertaking similar work in other states suggests to me that there are no significant differences in the nature of the problems encountered elsewhere, although there are of course variations in degree. To comply with the secrecy provisions governing ombudsman's offices,

all the material included has been published elsewhere - mostly either in Special Reports to Parliament or in the N.S.W. Ombudsman's Annual Report for 1981-82.

2. Case Study: Failure to Deal with Assaults by Officers

Assaults by officers on prisoners - or by prisoners on other prisoners with the condonation of officers - are probably an inevitable part of any prison system. However, if allegations of such assaults are properly investigated and the officers charged criminally or departmentally where ever possible, their incidence is likely to be comparatively small. If they are not, the end of the road lies in the old Grafton and the Bathurst bashing.

I do not believe it is going too far to say that when I became Assistant Ombudsman in 1981 the Department did not really investigate allegations of assaults by officers at all. Even where serious assaults were alleged, there was generally no medical examination, and no attempt to take statements from any prisoner witnesses. All the file would contain were statements from the officers concerned denying the allegations, and the most likely outcome would be that the prisoner/complainant would be charged with making a false statement or possibly with assaulting the officer.

In a situation like this, the main role of the Ombudsman's Office should not be to investigate whether or not the assault occurred. It may be able to do this once or twice, but cannot replicate it for every allegation of assault within the prison system. The priority should rather be to investigate why the Departmental systems for investigating and dealing with such complaints are not working, and to make recommendations designed to improve them. This was a major preoccupation of the Office in the three years I was there, and I believe we had some success, although I am not sure whether it has endured. The extent of the problem can be assessed from the following case. It should be noted that the Establishments Division then and now is that section of the Department - staffed with senior officers - which is responsible for overseeing what is happening in the gaols, reporting back to the Commission, and investigating misconduct.

This alleged assault by two prison officers on a female prisoner - call her Mary Jones - was unusual because the allegations were made not by prisoners but by two other prison officers. Both the accused officers were large and senior, and one was in fact the officer in charge of Mulawa Women's Prison at the time. The two officers who witnessed the assault were both junior officers in the gaol. The prisoner was not only slight in build but was also known to be mentally disturbed.

The senior officers' story was that Mary Jones had created a disturbance in the shower room and, when pulled out of the shower, threw herself on the floor and started kicking their legs. They therefore picked her up by the ankles and wrists and carried/dragged her down the corridor to her cell, notwithstanding her continuing struggles. They denied any suggestion that they had struck or kicked her.

The events in the corridor and the cell were observed by the two junior officers, whose version differed considerably from that outlind above. They said that Mary Jones was not resisting at all as she was dragged down the corridor, but despite this, both there and in her cell, she was savagely kicked on the body by both senior officers, with the more senior officer kicking her right between the legs. They also said that after the prisoner had been left in her cell, and was lying on the floor with her clothes in disarray, they observed bruising and marking on her upper thighs and buttocks.

The junior officers did not, initially, make any report of this incident because, as one of them subsequently explained to the Establishments Division... 'they (the senior officers) would have persecuted me as I have seen them do to other officers'. In this context it should be remembered that both accused officers were senior in the hierarchy, and one was the officer in charge of this very large gaol at the time.

However, by coincidence Mary Jones had a personal friend among the officers, with whom she had once shared a flat well before she had been imprisoned. She mentioned what had happened to this officer - call her Diana Hamilton - who then approached the two witnesses and asked whether they would be willing to make statements to the Establishments Division. They agreed, and accordingly four days after the assault statements were taken from all four of the officers concerned by a Superintendent from Establishments. These showed an irreconcilable conflict between the accusers and the accused over what had happened in the corridor and cell.

The obvious means of resolving the conflict was with a medical examination of Mary Jones, and the Establishments Division Superintendent did indeed arrange for this to be done. However, he neglected to brief the doctor on what he was looking for, and the examination was accordingly carried out while the prisoner was fully dressed. Any bruising which might have existed on the buttocks or upper thighs was therefore not detected, and the bruising which was found on the prisoner's upper arm, elbow and knee could be consistent with either version. You may find surprising this failure to ensure that the medical examination

was properly carried out. I can only assure you it was entirely routine in Establishments Division operations at the time - the unusual thing about this case is that a medical was conducted at all.

Nevertheless, Establishments passed the statements to the Department's legal officer, who reported in writing that a prima facie case of assault had been made out and recommended in fairly strong terms that the senior officers be charged, although he noted that more detailed statements should be taken from all concerned.

It did not turn out like that. The lawyer's recommendation was endorsed by the Chairman of the Corrective Services Commission and went back to Establishments Division 'for attention as recommended...' Two senior officers were despatched to take the more detailed statements, which did not differ in any material way from their predecessors. However, instead of proceeding to lay charges, the two then recommended that no further action be taken. Their reasons for so recommending were fairly typical of the reasons which could normally be found by the Establishments Division for not doing anything at all about anything at all:

(1) 'it could not be proved' that the two officers were lying in their account of what happened in the shower room; and

(2) the witnesses did not see what happened in the shower room.

Whether the two senior officers were lying was, of course, precisely what a court would have had to determine. But what happened in the shower room was never in issue - the witnesses made no allegations about that. All the allegations related to a savage assault by two large officers on a slight and unresisting prisoner in the corridor and her cell - actions which could not be excused by anything Mary Jones may or may not have done in the shower room. The investigators were fortified in their conclusion that nothing should be done by the 'absolute lack of any medical corroboration'. They made no reference to the fact (clearly noted on the medical report) that Mary Jones had been examined fully dressed.

This recommendation went up to and was approved by the Director of Establishments. It was not referred back to the Commission Chairman, who had previously approved the commencement of proceedings.

However, the Establishments Division and its Director did acknowledge the need for some action over the matter. They were very concerned about the relationship between Mary Jones and Diana Hamilton, the officer who originally reported the assault (it will be recalled they had once shared a flat). Indeed, in his report on the matter the Director of Establishments dealt at length with this issue before even mentioning the assault. He concluded - apparently without any investigation at all of the facts - that their past association was 'in defiance of Rule 10 if indeed Ms Jones had a record at that time and if Ms Hamilton was aware of it'.

This was wrong on three counts:

(1) Rule 10 in fact regulated associations between prison officers and 'discharged prisoners' - it made no mention of persons with a criminal record.

(2) At the time she shared a flat with Diana Hamilton, Mary Jones had never been to gaol.

(3) In any event, Rule 10 had some time before been repealed and replaced by a rule that would have permitted Diana Hamilton to share accommodation in these circumstances, even if Mary Jones had at the time been a discharged prisoner.

Everyone was also very critical of the two junior officers for not immediately reporting their allegations - the investigating officer who recommended that no action be taken over the assault called this 'disgraceful'. No mention was made of the problems which would confront two junior officers making such allegations against two very senior officers in the context of a gaol like Mulawa - the only major women's prison and, at the time, the only place where women officers could be employed. The Establishments Division was no doubt fortified in its adverse asessment of the two junior officers by the fact that two weeks later one of them was Departmentally charged for failing to wear a hat.

Anyone who considers that I have overstated or misstated the facts in this case should read the accounts set out in the Reports mentioned above. The accused officers were finally charged and ultimately dismissed only after:

1) the matter came to the attention of the Ombudsman's Office (initially unofficially) and our investigation of the matter resulted in a recommendation to the Minister that the officers be charged;

2) this recommendation was rejected, and accordingly I made a special report to Parliament on the matter in accordance with the Ombudsman's Act;

3) this Report led to the commissioning of the N.S.W. Deputy Chief Stipendiary Magistrate to inquire into 'all aspects of the alleged assault, and the conduct of prison officers...', and

4) finally his Report led to the laying of charges. As it turned out, this case may have been somewhat of a turning point at Mulawa, but the deficiencies it exposed in the Department's systems for investigating allegations of assault are obviously fundamental. If Reports to Parliament and from Deputy Chief Stipendiary Magistrates are needed to get any action from the Establishments Division in a situation as clear as this, it is obvious that in future staff and prisoners will be even less likely to lodge such complaints than they were before.

In my view, and whatever the explanations for Establishments' reluctance to move, this case primarily illustrates a failure of management. The real concern is not the assault itself, but the fact that when it came to attention it was effectively condoned because senior staff were lazy, incompetent, misguided, or worse in fulfilling their obligations. Addressing this problem, rather than the much easier one of whether the assault actually occurred, should be the priority of the Ombudsman's Office or whichever external investigation agency is responsible for prisons complaints.

In the upshot, recommendations that the Director of the Establishments Division be charged with neglect of duty and that other senior officers be reprimanded were not accepted by the Minister. Nevertheless, by the time I left the Ombudsman's Office the Commission's procedures for investigating alleged assaults had been improved - certainly medicals became routine, and were no longer conducted with prisoners fully dressed - and I have no doubt that this and other similar cases were significant in contributing to those changes.

3. Case Study: Cell Searches at Parramatta Gaol

Another case which reveals clearly the management deficiencies at the heart of many prison complaints arose from a series of cell searches at Parramatta Gaol. If one ignores the serious consequences for many inmates the background to this reads more like a script for Porridge than a case-study of a prison complaint.

This investigation began when complaints were received from many prisoners at Parramatta Gaol that over two days in 1982 - immediately following the latest in a series of brutal and unresolved murders of inmates - their cells had been ransacked by officers and a large quantity of personal property removed, much of which was subsequently lost or destroyed. Much of this property was valuable, and one question which obviously arose was how such objects came to be in the possession of prisoners in the first place.

At the time the rights of New South Wales priosners to hold property were theoretically governed by Circular 81/18, one of a enormous number (my folder was 1 1/2" thick) of generally incomprehensible and unpublished circulars which at that time governed the rights and obligations of inmates.

Circular 81/18 was not only incomprehensible and unpublished but also completely out of line with practices in New South Wales gaols. It allowed each prisoner to possess only one or two items of property (one pullover, one bedspread, one cup etc), and required that all personal items be entered up on a prisoner's property card. If items were transferred between prisoners (for example, when one left prison and gave goods to another), the Superintendent's permission was required and the property cards amended accordingly.

Not one gaol in New South Wales would have been applying the rules laid down by 81/18. As no other rules about property existed, each gaol invented its own. Most prisoners are allowed to keep a reasonable amount of personal property (TV, electric jug, posters, photos etc), and there was a sensible flexibility towards long-term prisoner. However, possessions are currency in gaol, and one or two of the better run prisons did keep some sort of track of who possessed what, requiring the Superintendent's permisson for the transfer of major items. However, such gaols were the exception, and Parramatta was definitely not one of them.

Indeed, for all practical purposes Parramatta was not 'run' at all. A weak and incompetent Superintendent had long ago learned that the easiest way to run his gaol was to let the prisoners do it, and for some time effective control had been in the hands of a small clique of prison 'heavies' who regarded themselves as the elite of the prison system. No real attempt had been made to break up this group and transfer its leaders to better disciplined gaols. Staff morale at Parramatta was non-existent, and the levels of corruption were astronomical. Control within this maximum-security gaol for long-term, often violent prisoners was virtually nil. Prisoners came and went as they pleased from cell blocks to yards to workshops and so forth, to the extent

that in none of the considerable number of murders which had taken place there over the last year or so had police been able to reduce the number of persons who might have had access to the victim at the time significantly below the effective population of the gaol.

In keeping with this gung-ho approach and with Parramatta's reputation as a centre of the drug trade, there was no control at all over property. The property cards on file for each prisoner often read something like: '7 cartons of gear', and even where they did accurately enumerate the possessions a prisoner had arrived with, they certainly took no account of property acquired since that time. Prisoners openly walked around wearing expensive gold chains and Rolex watches, and the cells of many were packed with stereos, TVs, home-made bookcases, and so forth. One prisoner had a refrigerator he had won in a prison raffle; another had a fancy cocktail cabinet which he had built (and paid for) in gaol craft classes, and which was a routine stop on the Superintendent's standard tour for visitors.

As Assistant Ombudsman I did not approve of the non-regime at Parramatta, and on a number of occasions had made my views known informally to senior members of the Establishments Division - who all professed enthusiastic concurrence and complete helplessness. However, we had other priorities, and the police were responsible for investigating the growing number of murders so nothing formal was done.

However, after the last murder it appeared that someone able to make a decision had finally worked out that in a gaol where the Department was unable to fulfill its basic function of keeping prisoners alive, concealing weapons was very easy when cells were packed with cocktail cabinets, fridges, and the like. Accordingly, the Establishments Division locked prisoners in their cells for two days and went through the gaol.

They were nothing if not thorough. From allowing prisoners to have basically anything they pleased, Parramatta moved to being (at least for a time) the only gaol in New South Wales to apply the strict terms of the outdated Circular 81/18. Accordingly, they left one bedspread, one jumper, and one photo etc., and took everything else - furniture, clothing, TV sets, watches, electrical appliances, the lot. Much of the furniture (most of which had been made over the years by prisoners in activities classes and paid for with their hard-earned prison wages) had to be destroyed to get it out. The smaller items were placed in bags and removed.

Theoretically, each cell was supposed to be searched by two officers and an inventory taken of the items removed. However, the search was generally not in the prisoner's presence; in many cases no inventory was taken; and often only one officer did the searching.

The hundreds of bags of gear which resulted (either insecurely sealed or not sealed at all) were then placed in a room to which every officer in the gaol possessed a key. To top it all off, the area then flooded in heavy rain, and many of those items which had not already been stolen by the officers became mildewed or ruined, and had to be thrown away.

The prisoners concerned were mostly serving very long sentences, and much of the lost or destroyed property had been painfully accumulated and paid for (in many cases from meagre prison wages) over a long period of time. The howls of outrage could be heard to the borders, and the claims for compensation followed quickly.

The Department acknowledged that the search had been botched and indicated, in response to the Ombudsman's questions, that compensation would be paid where the loss could be substantiated. But of course the loss could not be substantiated, because the Parramatta property cards were a joke. Nevertheless, the Department's view was that if an item was not on the property cards it did not exist - so no one got compensation. The Department even denied the existence of the cocktail cabinet, which had been acknowledged in several Establishments Divisions reports on the searches and which had so often starred in the Superintendent's standard tours of the gaol. This item became briefly famous when the Minister, Rex Jackson, cited its alleged existence on television as an example of the idiocy of the Ombudsman's Office.

No one ever got compensated for the property they had lost, although those items which remained were mostly returned in due course - not always to their rightful owners. One continuing source of grievance was that a lot of personal clothing was confiscated and returned to Parramatta Linen Service (a workshop in the gaol), in the often mistaken belief that it had been misappropriated from there in the first place. From there some of it was subsequently re-stolen by other inmates, and for some time we received complaints from prisoners that 'their' beanie, jumper or whatever had now reappeared on the person of another prisoner.

Some of this may be funny, but the property lost in the Parramatta cell searches caused enormous distress and some hardship to many long-term prisoners who had been able over time to accumulate some comforts to alleviate their sentence. This loss was entirely due to bad management in the first place, topped off by the unbelievable ineptitude with which the searches were executed. Departments which cannot perform better than this should not be entrusted with the care and management of prisoners.

4. Other Aspects of Illegality

There is insufficient time in this paper to enumerate many other aspects of unlawful conduct in gaols. However, I would like to make brief comments on four particular areas which I think illustrate my view that the most effective means of addressing these problems is through general improvements in management practices.

A) Misuse of Segregation and Transfer Orders

All prison systems have procedures for charging inmates who are guilty of criminal behaviour or simple misconduct in gaols. Crimes are normally dealt with by the courts; misconduct such as refusing an order or abusing an officer is usually dealt with by a Visiting Justice. Visiting Justices can impose substantial punishments and the legislature in most states has now provided protection for prisoners appearing before them. In New South Wales prisoners had the right to a hearing which permitted cross-examination of officers and, rather later, the right to legal representation.

Most prison officers (including Superintendents) dislike both courts and the Visiting Justice procedure - in part because of the inevitable delays, but primarily because they consider they take insufficient account of the disciplinary needs of the gaol, and require staff to justify their actions before an outside authority in a way they consider inappropriate. An alternative avenue for minor infractions is to allow the Superintendent to deal with the charge, but only limited penalties may be imposed in these circumstances.

The obvious alternative adopted by Superintendents is to make use of their powers to order segregation of prisoners or their transfer to another gaol in order to punish prison infractions.

Superintendents inevitably possess such powers as an essential emergency tool for dealing with trouble within the gaol. However, because segregation orders and transfers are not officially punishments, there are no tiresome formalities or requirements for outside scrutiny and appeal. Yet the consequences of such orders can be far more devastating than any punishment handed down by a Visiting Justice. In New South Wales segregation orders were routinely made by the Superintendent, and rubber-stamped by the Commission which resulted in prisoners being confined for up to six months or even longer in places as barbaric as the old Parramatta Circle or the Goulburn High Security Unit. Long term prisoners who were settled and happy at a medium security gaol close to their family might be whisked away overnight to maximum security gaols on the other side of the State, with no charges laid against them and with no explanation being given. When I was Assistant Ombudsman the standard response to an allegation that a prisoner had assaulted a prison officer was the making of a segregation order for at least three and possibly six months. In most gaols it was unusual for the prisoner to be charged, either before the courts or the Visiting Justice, thus offering him or her no possible avenue to challenge the accuracy of the allegation other than to appeal to the Ombudsman's Office. This course is rarely satisfactory because the discretionary powers of the Superintendent are so wide. It is only comparatively rarely that outside investigation can conclude that the Superintendent could not reasonably have believed the prisoner was a threat to the security of the gaol or of other prisoners.

Misuse of segregation and transfer powers as punishment is a long-standing problem, and was considered at length by the Nagle Report. No-one is suggesting that Superintendents should not have reserve powers to deal with emergency situations, but those powers need to be tightly monitored and controlled at a departmental level if they are not to be misused as a punishment.

B) <u>Tolerance of Unacceptable Conditions</u>

Many conditions in gaols are unacceptable if judged by general community standards, but there are questions of degree. In some circumstances plainly intolerable conditions have been accepted over time because of historical factors and/or because there was insufficient exposure to outside scrutiny. One such instance was the situation of protection prisoners at Goulburn Gaol.

Protection prisoners are those who require protection from other inmates. This may be because of their youthful beauty, the nature of their crime, a reputation as an informer, an unpaid debt, or for many other reasons. Their vulnerability makes them a problem in gaol, and Goulburn offered no facilities for their separate accommodation.

Nevertheless, protection prisoners were kept at Goulburn, and as long as anyone could remember they had been held in the Front Yards - a series of 3m x 5m cages in one corner of the gaol. The conditions in which they were held defied belief:

- up to eight prisoners were held each day in yards designed for one person;
- the yards were open to the rain and wind, and had no seating arrangements -inmates were forced to sit on the bare concrete floors;
- although Goulburn has an extremely cold climate (in winter there are an average of eleven days per month where the minimum daily temperature falls below freezing point), prisoners were allowed only one wool/nylon sweater - estimated as about a third of the amount of clothing needed to provide adequate protection in the circumstances;
- prisoners received no exercise at all, spending the nights in their cell and their days in the yard approximately 3 metres x 5 metres. Some prisoners interviewed had spent up to 2 years in these conditions;
- no work was available to inmates, and no recreation was provided. Prisoners had no access to the library, and could not use TV or make hot drinks during the day because the yards contained no power points;
- they were denied contact visits and were grossly disadvantaged in their access to other rights and privileges such as telephone calls, availability of welfare officers, etc.;
- physical conditions in the yards were disgraceful. There was one disgusting and entirely unscreened toilet in every yard, which had to be used in full view of all the other inmates and the officers on the tower.

The Goulburn Front Yards had the worst conditions I ever saw in a New South Wales gaol - at least as bad as the infamous Parramatta Circle, which at least was a punishment area rather than long-term accommodation for prisoners who were guilty of no misconduct at all. The only explanation offered for the unspeakable conditions was that there was no where else to put them, and they had always been housed there. The Superintendent was genuinely surprised at our concern, and regarded as novel the suggestion that if this was the best Goulburn could offer, then protection prisoners should routinely be transferred elsewhere.

His lack of concern was not shared by the Sydney Morning Herald, which splashed our Report and accompanying photographs over page 1 when it was given to them by the complainant. Only at that stage did the Department announce that it had already approved a major upgrading of the Front Yards - there had been no whisper of this during our extensive inquiries. Nevertheless the Minister absolutely rejected any suggestion that the move was prompted by the Ombudsman's Report.

C) Vindictive or Inconsistent Practices

A major source of grievance among prisoners related to mean-spirited administration and inconsistencies in treatment as between different gaols. An illustration of a situation where this had developed virtually to flashpoint was Cooma Gaol, a medium security prison which should have been regarded as a reward for prisoners who had worked their way up from maximum security. Instead, on our first visit there we were virtually beseiged by the entire prison population complaining about a host of petty and unreasonable practices which appeared to have been devised for the express purpose of aggravating inmates:

- Even though Cooma is a very small gaol (the cell block is located only a matter of yards from the dining area, the showers, the yards, and the workshops) at the time of our visit prisoners were not permitted to return to their cells even for a few minutes during the day. This meant that prisoners leaving their cells in the morning had to take their shower gear with them and carry it around all day in order to be ready for the afternoon shower, which occurred after work was completed. This absurd requirement did not apply in any other New South Wales gaol, even in those many times the size of Cooma where arranging access to the wings was far more difficult.

- Electricity to all cells was cut off at around midnight and during the day, so that people sick in their cells during the day, or unable to sleep at night, were prevented from listening to music or making a cup of tea. This practice was greatly resented, because in all other New South Wales gaols power to the cells was left on continually.

- Although Cooma is a very small gaol and has no exercise area, no attempt had been made to provide reasonable alternative facilities, although these were readily available elsewhere. Inmates were permitted a short run inside the gaol wall, but this had to be taken immediately after lunch, when prisoners were forced to

> run on a full stomach. Only two weight bars were available for the 100 inmates, and these were only unlocked for two hours each day, even though a number of prisoners spent all day locked in a yard where use of the weights would not have been difficult. This meant that each prisoner might only get three minutes exercise with the weights per day, and no other exercise at all. Exercise was allowed only after the inmates had completed their daily showers.

These were only a few of the stupid restrictions which had upset the prisoners - and the others were equally pointless. The Department (and the Establishments Division) appeared blissfully unaware that there were any problems with Cooma at all. When we brought the matter to their attention, most of the problems were resolved on a return visit which we made with staff from Establishments.

Surely these are not the sorts of problems that the Ombudsman's Office should have to resolve - yet I have never seen inmates in any New South Wales gaol more collectively angry and distressed then those at Cooma.

D) <u>Industrial Problems</u>

A factor in any reform of prison practices is the industrial power of prison officers. A Department with real commitment to reform can effectively use the Ombudsman's Office in its negotiations with those elements in the Department who are less than happy about reform. However the difficulty which industrial relations pose in changing even the most minor gaol practices may be illustrated by the case of the 'shutters' at the Special Care Unit.

The Special Care Unit at Long Bay is an independent unit within the MRP which houses 'difficult' or 'problem' prisoners in a 'therapeutic community' environment. It is completely enclosed, and prisoners therefore enjoyed looking through the one outside window available, which allowed them to observe activity in the main yard. In September, 1981, this Office received complaints that shutters had been erected over the window to prevent the inmates looking out.

It was established that the erection of the shutters had been authorised by the Acting Superintendent of the MRP, who had not consulted in any way with the Superintendent of the Special Care Unit. The reason given was that prison officers had complained that inmates could look down on them and observe the night routine.

A necessary background to an understanding of the dispute was the great hostility which many officers felt towards the Special Care Unit, a successful and innovative program launched by the former Chairman of the Corrective Services Commission. Indeed, there was clearly doubt that the security considerations cited were the real reason for the erection of the shutters. It apeared that the Chairman of the Prison Officers Vocational Branch (POVB) had conceded that curtains would be sufficient to avoid this problem, and in any event prisoners could readily observe the night routine from their cells, albeit with the aid of a mirror.

Nevertheless, discussions were held with the Department and it was agreed that a reasonable compromise would be to replace the shutters with sliding doors which could be left open by day but closed at night. This Office asked to be kept informed of progress.

By the end of October, no visible progress had been made, although measurements needed for the doors to be made had been given to the Principal Industries Officer some six weeks earlier. On 29 October, we obtained from the Acting Chairman information to the effect that the doors were a stock size and were expected to be installed immediately. On the same day we were advised by staff at the MRP that the measurements previously submitted had been lost, and would have to be done again. One month later no visible progress had been made, but we were advised that the doors had now been ordered, although they would not be available for between four and six weeks.

The sliding doors were finally erected some time before Christmas. However, the shutters were left in place when the new doors were erected, so that now the window was shielded by both a shutter and a door! It was explained to this Office that the prison officers had threatened industrial action if the shutters were removed.

Ultimately the shutters were removed on 12 January 1982 - some four months after they were erected. They were removed only after the Chief Superintendent of Long Bay had issued written orders on the matters, and the Chairman of the Corrective Services Commission had personally intervened.

5) Complaint Statistics

The cases described above set out only a small fraction of the kinds of illegality or misconduct, or the associated issues, which need to be addressed in considering the appropriate mechanisms for controlling improper conduct. As an indication of the broad range of problems which arise, the following table sets out statistics on the range of issues dealt with by the Ombudsman's Office when I was Assistant Ombudsman in 1981-82,

together with their disposition. Further explanation of the figures can be found in the Annual Report for that year.

COMPLAINTS AGAINST THE DEPARTMENT OF CORRECTIVE SERVICES—1981-82

Nature	Discontinued	Under investigation	Declined withdrawn	Not sustained	Sustained	Total
Legal Aid/Visiting Justice Legal Representation ..	15	2	6	4	..	27
Classification	30	8	3	7	..	48
Transfers	53	16	11	11	..	91
Calculation of Sentence ..	25	11	3	21	3	63
Victimisation	26	9	5	8	1	49
Assault	11	12	2	1	4	30
Parole	19	18	9	13	3	62
Property	30	17	4	4	13	68
Mail/Phone Calls	23	11	1	7	1	43
Visits	18	6	4	1	1	30
Day Leave	8	..	2	5	3	18
General Conditions	27	20	..	5	1	53
Money/Wages	7	9	2	1	..	19
Medical/Dental	36	12	3	3	1	55
Segregation	13	18	1	1	2	33
Protection	7	5	..	1	2	15
Work/Work Release ..	4	9	..	3	..	16
Searches	3	..	2	3	6	14
Riots/Disturbances	2	..	..	..	..	2
Buy-ups	2	2	..	..	..	4
Other	19	7	32	17	..	77
Licence	3	..	1	2	..	6
Injury	..	3	..	..	..	3
Food	4	1	1	1	..	7
	385	196	92	119	41	833
	(43%)	(24%)	(11%)	(14%)	(5%)	

6) <u>Strategies for Control</u>

If it is accepted that the problems in gaols are largely attributable to management failures, then it follows that the answers are necessarily management answers. In particular, three main strategies need to be adopted:

1. <u>Improve the quality of management within gaols and within Departments of Corrective Services generally:</u>

Too many gaols are still run as if they were independent fiefdoms subject to the unfettered control of the Superintendent, rather than elements in a large, modern bureaucracy responsible for the proper implementation of government policy with respect to the imprisonment of offenders. Certainly all New South Wales gaols would benefit enormously from the application of basic modern management techniques and personnel practices.

Such an approach has many aspects - improved recruitment and training; better communications between authority and inmates; rotation of senior staff; more attention to staff morale and to Departmental objectives; and a range of other practices generally accepted as basic to proper management.

In New South Wales one of the most important priorities is to improve the performance of the Establishments Division - that section of the Department which is responsible for monitoring what is happening in the gaols, reporting back to Head Office, investigating problems, and recommending on or taking remedial action as appropriate. Senior management cannot possibly run prisons effectively if it has no idea of what is going on inside them, and staff who wish to substitute their own rules and practices for those of the Department can do so with impunity if they know that misconduct is unlikely to be reported. However conscientious Superintendents may be, they cannot be relied upon to fulfill this function - they are inevitably subject to strong institutional pressure to keep their gaol running smoothly by maintaining the co-operation of staff. In any event Superintendents should be as much the subject of this sort of reporting as their staff.

An external agency such as an Ombudsman's Office or a prison visitor cannot fulfill this role. Such an office lacks the effective sources of information needed to oversee the running of a gaol, and also lacks the range of informal sanctions and remedies available to an employer. Moreover, Ombudsmen and Prison Visitors have their own functions and responsibilities to fulfill - they should not be expected also to play a role in administering gaols. Their function is rather to ensure that the Department is administering its responsibilities fairly and effectively.

2. <u>Provide a Prison Ombudsman to ensure that the Department (including the Establishments Division) is doing its job properly:</u>

In view of the universal presence of ombudsmen at state and federal levels, I presume it is no longer necessary to provide an overall justification for their existence. If ombudsmen are needed by the general public in its dealings with governments they are even more necessary for prisoners, who are more exposed to government intrusion; more vulnerable; and denied access to other avenues of appeal.

However, a fundamental question which has to date been answered only by inaction is whether the existing ombudsmen's Offices can adequately deal with the problems of gaols, or whether there should be a special prison ombudsman as the Nagle Commision recommended.

I am strongly of the view that a special prison ombudsman is needed, although I would not oppose that office being administratively associated with, and possibly located within, the Ombudsman's Office. The reason lies in the special characteristics of gaols - closed environments quite different from the other public agencies which ombudsmen are expected to supervise.

To deal adequately with prison complaints and asssess departmental performance, the responsible agency needs effective powers to monitor what is happening in the gaols - to arrive and inspect without notice; to check files; to speak to prisoners and staff; and to assess conditions.

Ombudsmen do not have these powers, because outside the closed environment of a prison there is no need for them. The Ombudsman's role with respect to the public sector generally is not to monitor performance but to investigate particular problems, and his or her powers arise only after notification of an investigation is given to the Department. Whether these powers are adequate for investigating problems in the public sector generally depends on one's view of the proper role of the Ombudsman's Office. However, they are certainly not sufficient for investigating closed institutions such as gaols.

Indeed, I have never heard anyone suggest that they are adequate. To my knowledge all ombudsmen now working in this area routinely arrive and inspect without notice etc, either with the co-operation or at least the tacit acceptance of the department. I suspect that the public would be astonished if it were told that officers of the agency responsible for investigating problems in gaols did not possess such rights. Moreover, it was failure to

adopt these practices which led to the very strong criticisms made by the Nagle Commission of the New South Wales Ombudsman Office's failure to uncover the problems of Bathurst and Grafton.

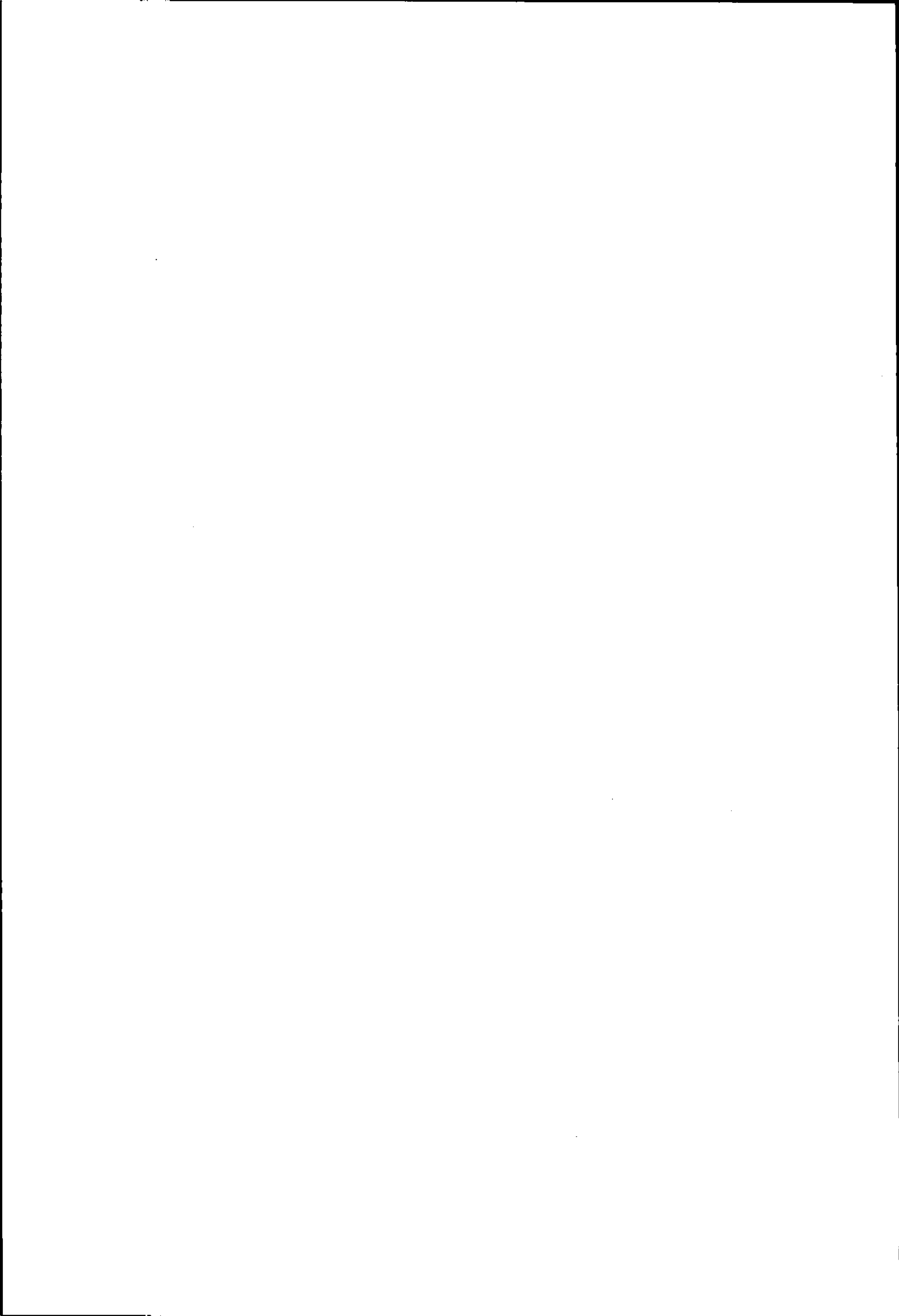
3. Reduce the Administrative Isolation of Gaols

If gaols are to operate more fairly and efficiently it is necessary to break down the present barriers which isolate them so effectively from each other and from the community generally. Part of the answers here lie in more modern personnel and management practices, but it is also important to expose prison staff to as much outside or community influence generally as is consistent with effective security and good management. The latter also has the benefit of increasing community understanding of prisoners as people, and therefore reducing the hostility which ignorance readily develops towards convicted offenders.

Part of this community access can come through participation in activities inside and outside gaol - football matches, debating, drama, and so forth - but a most important contribution can be made through the appointment of local Prison Visitors to hear complaints and monitor activities at a particular gaol.

Visitors are no substitute for a prison ombudsman - they have no overall perspective on prison practices, they lack effective powers of investigation and sanctions, and they do not generally appreciate the legal framework in which the system operates. Moreover, because they must operate in effect via negotiation and conciliation, they will encounter great difficulty in maintaining the co-operation of both staff and prisoners - there is a danger that they will be viewed by each side as a stooge for the other.

Nevertheless, there are many situations - for example, the problems at Cooma described above - where the application of a little common sense from an outside source could probably have avoided major difficulties, and certainly many complaints can readily be resolved by visitors. Where this is possible, they certainly represent a cheaper and probably less disruptive intrusion than the Ombudsman's Office, and should be encouraged.



THE OFFICE OF CORRECTIONS

A SYSTEM OF CHECKS AND BALANCES

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Historical Perspective

In 1973-74 at the direction of the Governor in Council a Board of Enquiry was commissioned in Victoria to examine:

(i) the maintenance of discipline in prisons;

(ii) the formulation, training and determination of charges against prisoners;

(iii) the punishment of prisoners for offences committed in prisons.

This was known as the Jenkinson Enquiry.

In its summary of findings (Chapter 9 page 89) was stated that between 1970-72, "prisoners in 'H' Division were being habitually subjected to ill-treatment by the unlawful violence of Prison Officers" these incidents were not reported to the Governor of the Prison by staff or prisoners. The general conclusions are drawn that unlawful violence had become a regular mechanism for the maintenance of discipline within the Prison System.

The Jenkinson Enquiry was a major catalyst of change in the Victorian Correctional System within the early 1970s recommending legislative change, procedural review and criminal charges against some prison officers.

In the mid-1970s the Victorian Ombudsman's office was established. The Ombudsman provided the opportunity for prisoners to have independent investigation of complaints regarding administrative matters within prisons. I can recall in the late 1970s, that the existence of the Ombudsman was perceived by many in the Prison service as an unwarranted intervention

into the operation of prisons; and more particularly, that the role of the prison officer was undermined by the mere existence of an independent investigator. A common reaction to an enquiry by the Ombudsman was one of general resentment to an accountability process which extended outside of the prison. In short, a form of 'siege mentality' existed.

During this period a general increase in community interest in the correctional process was also evident. People involved in correctional work were often confronted with the need to identify either with prison officers or prisoners. The 'us and them mentality' often precluded objective investigation and determination of issues, both in relation to matters raised by officers or prisoners.

In 1983 the Victorian Government established the Office of Corrections to provide the community with professional custodial and community-based correctional programs. The creation of the Office of Corrections was more than a bureaucratic reorganisation, it was the establishment of a new proactive organisation, with a new philosophy, policies, practices and personnel.

Thus a goal of the organisation was to facilitate change; that is, change the negativity of the predominant 'siege mentality', to an attitude which seeks community involvement in the correctional processes.

Office of Corrections Strategies for prevention, control and reform of illegal practices

The major thrust of the organisation is to be proactive in the establishment of appropriate philosophies, policies and practices, and once these are established, to be vigilant in monitoring the committment to these in all areas.

This goal is achieved through

(1) Training

The organisation has given a major committment to the training function within the Department. It is acknowledged that the training function is a major vehicle of change - perhaps even a 'trojan horse'.

The Director-General and Directors of the Department participate personally in all training programs conducted for Recruit and Promotional Prison Officers Courses, and also in general induction courses for Community Corrections Officers. Thus the Executive establish and reinforce corporate goals and standards with each new officer as part of the induction process of the Department.

I would like to refer to two examples of the capacity of the training function effect change within the organisation.

(a) Unit Management

The Department is presently establishing two units in which unit management principles will be adopted. By unit management I mean the general movement toward self determination by prisoners in relation to activities including cooking meals, choosing a work shift, and determining when to retire for the evening. These changes to regime are facilitated by the provision of small living units for 15-20 prisoners; and by manning such with staff who are committed to a management model which is based upon interaction and communication with prisoners.

Courses provided at the Staff Training College have been reviewed to ensure that all staff have the opportunity to participate in training activities which will equip them to be effective managers in a unit management environment. Greater emphasis has been placed upon the development of management skills such as; stress and anger management, communication skills, problem identification, listening skills and increasing each officer's operational understanding of these areas through workshops and role plays.

I feel confident in saying that prison staff within the Office of Corrections, are equipped and enthusiastic about, a more interactive management model which will inevitably improve the quality of the prison environment for staff and prisoners. The special purpose units soon to commence are a Drug Treatment Unit at the Metropolitan Reception Prison and the introduction of a pilot Unit Management Program at Castlemaine Prison.

(b) Cell Clearances

In the event of major disturbances within prisons, or incidents which involve prisoners barricading themselves in cells, staff may be required physically to transfer prisoners to different locations.

The Staff Training College has provided training in cell clearance procedures for all recruits and officers on promotional courses. The main emphasis of this training is that in any situation the minimum of force is used, a medical officer is present, each officer participating has a pre-determined role in the exercise and that the operation be recorded on video, and described in writing.

In April 1985, there was a period of two weeks passive resistance by prisoners in 'A' Division at Pentridge Prison. These prisoners were refusing to work or participate in musters until a list of grievances were resolved. The Organisation's response was to withdraw privileges and reduce the remissions of those involved. On the tenth day of unrest, the prisoners who had played a major role in the event lost control of the remaining prisoners and major insurrection appeared imminent.

That night it was necessary to relocate sixty prisoners away from 'A' Division. The transfer of these prisoners was supervised by staff from Headquarters and each transfer was video taped. There was not one complaint by a prisoner concerning his treatment, there were no incidents of verbal abuse towards staff, nor were there any physical injuries sustained by staff or prisoners.

Thus the organisation demonstrated its capacity to respond flexibly to passive resistance, but undertook firm and disciplined action in a professional manner when required.

(2) Communication and Supervision

The Director-General demands that communication be a two way process within the organisation. Operational Directors both within Community-Based Corrections and Prisons, are required to visit all locations on a regular basis and meet with staff concerning the effectiveness of policies and to reinforce organisational priorities. (For example the Director of Prisons visits the Maximum Security Coburg Complex on a weekly basis and Country institutions quarterly). The Director-General also visits locations regularly and always meets with the staff as a group, to ensure that operational officers have a clear understanding of the Department's policies and practices.

Communication between the Executive and Line Managers is also formalised through Governors and Regional Managers' Conferences at which policy proposals are discussed. Thus committment is sought to a particular policy proposal as part of the consultation process rather than being demanded as a consequence of a directive.

Communication and Supervision are effective mechanisms for preventing abuse of power within a correctional environment - "all players must be aware of the rules".

(3) Internal Review Systems - Organisational Structure

(a) Management Review Process

Management Reviews are conducted within Prisons and Community-Based Corrections annually.

These are proactive processes designed to ensure that the operational units within the Department are complying with legislative requirements and Director-General's Rules and are meeting the prescribed minimum standards of service delivery. Director-General's rules embody the policy and procedures of the Office of Corrections and provide clear direction for Governors and Regional Managers.

(b) Inspections Unit - Prisons Division

Staffing Superintendent
Governor, Grade III
Governor, Grade II
Governor, Grade I

Unit Objectives

(a) To co-ordinate any investigations of discipline and procedures within the Prison System.

(b) Regularly inspect and monitor operations and management of prisons to ensure facilities, procedures and practices conform to established standards and guidelines which optimize security and custodial aspects of prison management.

(c) To provide advice to the Director of Prisons.

Functions

(a) Inspect each facility half yearly.

(b) Assist Governor with implementation of policies and strategies for improved prison management.

(c) Co-ordinate multi-disciplinary inspection team, Classification, Programmes, Management Services Internal Audit, Planning and Review and Investigations.

Clearly in the context of this conference, the activities of the Investigations section are worth elaboration.

(d) Investigations Unit
The unit's function is to provide independent and impartial investigations into reported incidents involving staff or prisoners. The unit is located at Headquarters and staffed by a Governor Grade I, two Principal Prison Officers and one Chief Prison Officer.

In the past 12 months, that is 1 July 1985 - 30 June 1986 there were 38 referrals to the unit concerning staff. The nature of the investigations were as follows:

1	firearm
2	introducing alcohol
2	trafficking
1	neglect of duty
1	breach of regulations
5	alleged assaults on prisoners
6	misconduct
1	damage prison property
19	complaints and allegations against officers by prisoners

In terms of outcomes following investigation

12	no further action
6	to be seen by Governor
2	to be seen by Director of Prisons
4	referred to Headquarters for further investigation
3	staff were transferred from present duties
4	charged under provisions of Public Service Act
7	referred to Police

(e) Management Reviews - Community-Based Corrections are conducted by the Chief Probation and Parole Officer, Executive Assistant and Project Officers. During each review both personal development and community work programs are observed. Examination of case files is undertaken to ensure compliance with the Department's Case Management Policy and to make qualitative assessments concerning the nature of interventions in particular cases.

A full staff meeting is held both at commencement and completion of the review, the first to clearly indicate the purpose of the process and the second, to provide feedback to staff. Local magistrates, service providers such as T.A.F.E., and recipients of community-work are all consulted during the review process.

External Accountabilities - Community Windows

The philosophy of the Department is embodied in the names of the two operational Divisions, Prisons and Community-Based Corrections. When establishing the Office of Corrections in late 1983, there was discussion regarding the Based in Community-Based Corrections. Some felt the term a bit wordy; however, the Director-General indicated that Prisons are also part of the Community and that the term Community Corrections, therefore also applies to Prisons. The Correctional process is a community process, it is not owned by a Government or a group of public servants. The Community must be encouraged to actively participate and accept responsibility for standards, policies and procedures within institutions. Such involvement is presently facilitated in the following ways:

(i) Official Visitors Scheme (Commenced May 1986)

The Official Visitors Scheme was established to provide independent advice to the Minister with respect to the Prison System. Visitors are appointed by the Minister for a two year term and are required to:

(a) visit the nominated prison for at least 2 hours every 6 weeks;
(b) be available for discussions with both prisoners and staff;
(c) inspect/observe programs;
(d) report in writing to the Minister and the Governor concerning each visit.

(ii) Community Corrections Committees

In Community-Based Corrections, committees have been established to provide community input into the operations of the Division. Generally, members include local magistrates, police, legal aid representatives, T.A.F.E. board member, local council member, pensioner's representative and other interested community members, such as local teachers or co-ordinators from volunteer organisations.

(iii) Ombudsman

The Ombudsman provides a formal mechanism for prisoners to have matters investigated by an independent statutory body. In 1985 approximately 370 Ombudsman's enquiries were made. The majority of which related to prisoners' property, the level permitted, or the loss or damage thereof. (This area is presently under review within the Office).

(iv) Visiting Magistrates

A Stipendary Magistrate visits each Prison on a regular basis and any prisoner may request to see the Visiting Magistrate concerning any matter.

(v) Medical Officers

Routine medical examinations are available to prisoners in maximum security facilities such as Pentridge and the Metropolitan Reception Prison. Where prisoners are subject to closer confinement, Medical Officers are stationed at the Prison.

(vi) Chaplains

Chaplains are present at large institutions on a daily basis and visit country prisons and open camps regularly. Chaplains move freely within the prison environment and are accessible to all prisoners.

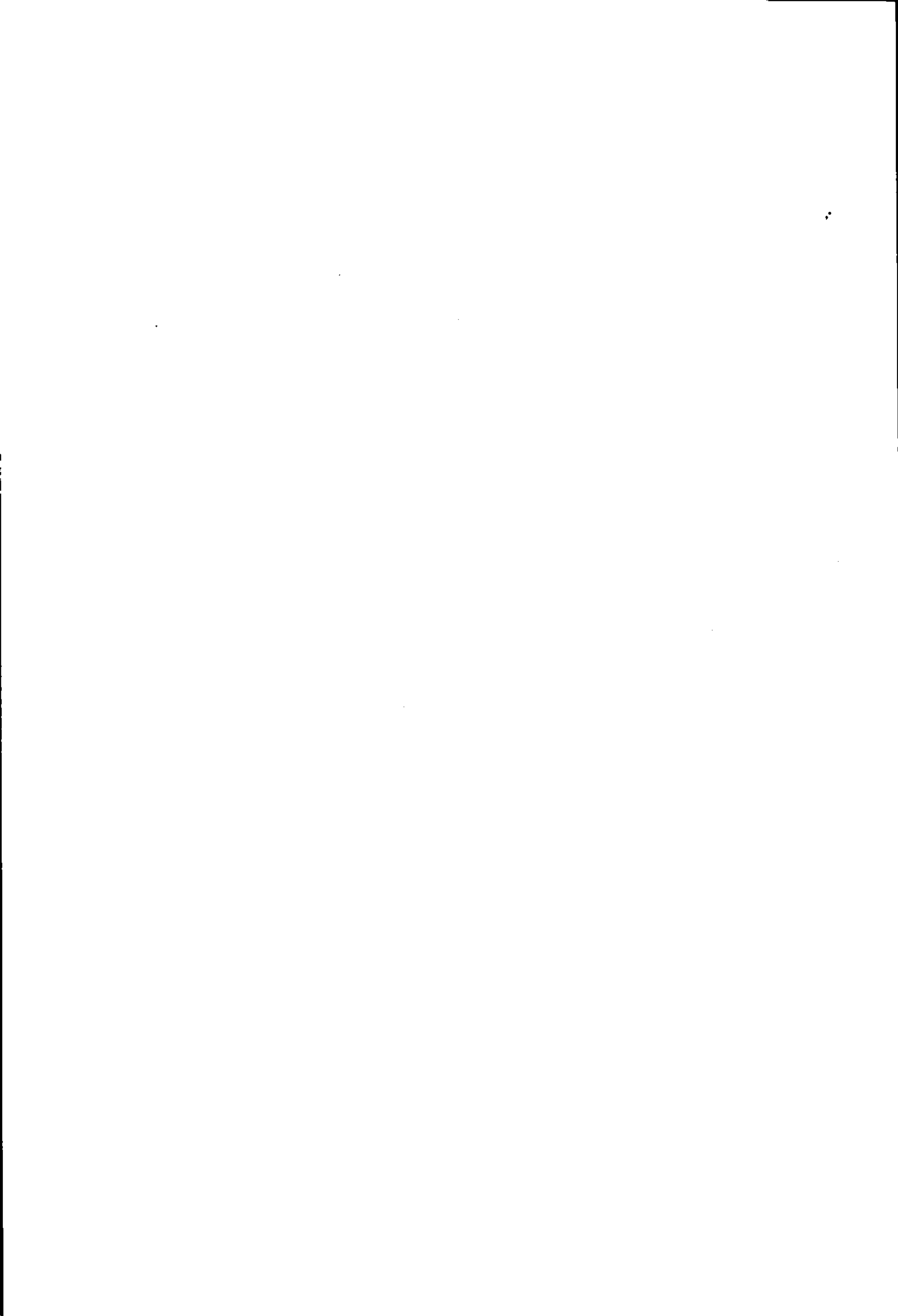
Recent Initiatives

The Director-General has introduced non-uniformd support staff including Welfare Officers, Social Workers, and Psychologists on a shift work basis in the major prisons. This development is significant in acknowledging that prisoners have needs when actually housed in cells. Generally, services tend to be concentrated in the out of cell hours and prisons virtually shut down at the time of evening lock-up.

The creation of special purpose units such as the 'Drug Unit' Treatment and the 'Castlemaine Unit' will enable even clearer definition of the roles and objectives of the units and of the staff who work within them. This clarity and unity of purpose will hopefully facilitate a qualitative improvement in prison life for both prisoners and staff.

Summary

The OOC system of checks and balances is really about being proactive, about having clear policies and practices which are regularly monitored and about communication between all parties involved.



CONTROLLING GOVERNMENTAL CRIME:

ISSUES OF INDIVIDUAL AND COLLECTIVE LIABILITY

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N.S.W

I INTRODUCTION

Governmental wrongdoing is hardly new but has increasingly come before the public eye, in Australia as elsewhere. In looking back over such events as the kangaroo meat substitution scandal, the _Age_ tapeworms, the ASIS break and enter at the Sheraton, the N.S.W. prison bashes, and other conspicuous acts of official malfeasance, one is struck by the incidence of the problem in diverse walks of government, by its gravity, and by the limited responsiveness of the present law. One of many issues, and the subject of what I have to say today, is whether we should abandon the traditional immunity from criminal liability enjoyed by governmental organisations under the shield of the Crown[1] and seek instead to develop a mixed strategy of collective and individual criminal liability for governmental wrongs. To begin with, I deal with the limitations of individualism as a guide to corporate crime control. Secondly, I identify and reject as unpersuasive the distinctively governmental factors which govern the shield of criminal immunity for public agencies.

II CONTROLLING ORGANIZATIONAL WRONGDOING: THE FOLKLORE OF INDIVIDUALISM

The argument of this part is that an exclusively individualistic approach to criminal liability for corporate crime ('Individualism')[2] is unlikely to work. The major deficiencies of Individualism are these:

(1) Individualism unsuccessfully attempts to explain the phenomenon of corporate blameworthiness in terms of the conduct of individual persons;

(2) Individualism seeks to control corporate power by means of individual liability, which has too limited a preventive capacity;

(3) Individualism urges the reallocation of scarce enforcement resources to prosecuting larger numbers of corporate personnel, an enforcement strategy which is inegalitarian in tendency;

(4) Individualism neglects the role which corporate criminal liability plays as a benign means of achieving social control without crucifying individual persons;

(5) Individualism uncritically accepts the dogma that it is impossible to devise effective and just means of imposing criminal liability on corporations; and

(6) Individualism incorrectly presumes that corporate liability is necessarily antithetical to individual accountability.

(1) Individualism unsuccessfully attempts to explain the phenomenon of corporate blameworthiness in terms of the conduct of individual persons.

Corporations are often regarded as blameworthy but according to Individualism such blameworthiness reduces to blameworthiness on the part of individual representatives or to merely casual responsibility on the part of a corporation. This reductionism is unrealistic; both corporate and individual blameworthiness are alive, well and living internationally.[3]

The fact is that organisations are blamed for causing harm or taking risks in circumstances where they could have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy agents. When people blame corporations, they are not merely channelling aggression against the ox that gored or some symbolic object. Nor are they merely pointing the finger at individuals behind the corporate mantle. They are condemning the fact that the organisation failed to exercise its collective capacity to avoid the offence to which blame attaches. Many instances of corporate blameworthiness have been documented, especially in the context of disasters. A patent illustration is the finding of the Royal Commission which investigated the crash of an Air New Zealand DC 10 near Mt. Erebus, Antarctica, in 1979. According to the Commission, the crash resulted primarily from the failure of the flight operations centre at company headquarters to communicate the correct navigational co-ordinates to the flight crew. The Commission did not engage in any ritualistic slaying of the equipment involved; no radio transmitter or word-processor was ceremoniously disembowelled. Nor was the Commission prepared to blame the personnel in the flight operations centre. Rather, condemnation was directed at 'the

incompetent administrative airline procedures which made the mistake possible.'[4] Air New Zealand, viewed as a collectivity, had failed to live up to the navigational standards expected of an international airline.

No matter how individual criminal liability might be reformed, it would still be incapable of expressing the corporateness of corporate fault. Logically, the concepts of corporate negligence and corporate intentionality are not reducible simply to statements about fault or conduct on the part of individual personnel.

Although it is often said that corporations themselves cannot possess an intention, this is true only in the obvious sense that a corporate entity lacks the capacity to entertain a humanoid mental state. Corporations exhibit their own special kind of intentionality, namely corporate policy.[5]

Corporate negligence is prevalent where communication breakdowns occur, or where organisations suffer from collective oversight. Other factors are also relevant, for example group pressures to conform, and anticipated reactions of superiors. Does corporate negligence amount merely to negligence on the part of individuals? Perhaps it is possible to explain the causes of corporate wrongdoing in terms of the particular contributions of managers and employees, but the attribution of fault is another matter. Corporate negligence does not necessarily reduce to individual negligence because a corporation may have a greater capacity to avoid the commission of an offence. We may be reluctant to pass judgement on the top executives of Union Carbide for the Bhopal disaster, but higher standards of care are expected of such a company given its collective might and resources. Thus, where a corporate system is blamed for criminogenic group pressures, that blame is directed not at individual actors but rather toward an institutional set-up from which the standards of organisational performance expected are higher than those expected of any personnel.[6]

(2) Individualism seeks to control corporate power by means of individual liability, which has too limited a preventive capacity.

A second major claim of Individualism is that there is no need for corporate criminal liability because the task of preventing corporate crime can adequately be handled by means of individual liability. Prevalent as this claim is, it takes too optimistic a view of the capacity of individual liability, both under existing law and in the event of far-reaching reforms. Insufficient account is taken of many factors including the corporate destiny of illicit profits, the collective nature of decision-making witin organisations, and the expendability and turnover of personnel.[7]

For instance, account must be taken of personnel turnover in assessing what is required for effective deterrence of corporate crime. In order to catalyze corporations into preventive action, it may not be enough to prosecute individuals alone, and there is a case for concentrating attention on the corporate entity. To begin with, individuals held liable for a corporate offence may leave the company soon afterwards and hence no longer be in a position to activate corporate reforms. More importantly, the persons responsible for a corporate offence in the past are not necessarily those best suited to spearhead a campaign against corporate offences in the future; indeed, if jail were imposed, the person jailed would usually be placed out of action.[8] Another factor is that it may be unclear, especially to outsiders who should be given responsibility for revitalising compliance within the company. From a deterrent perspective which focusses on the need to induce sound corporate compliance, proceeding against the company may hold out more prospect of spurring responsive organisational change than proceeding against individual actors.

(3) Individualism urges the reallocation of scarce enforcement resources to prosecuting larger numbers of corporate personnel, an enforcement strategy which is inegalitarian in tendency.

A major assumption of Individualism is that the greater the pressure toward enforcing individual criminal liability the more egalitarian the application of the law.[9] The thinking behind the egalitarian pretension of Individualism is that by doing away with corporate liability there will be less chance of individual liability being compromised by cosy deals in which the company pleads guilty and managers are let off the hook. However, this line of thought fails to heed the inegalitarian implications of abandoning corporate liability.

It is a truism that the criminal justice system is faced with many more allegations of crime than it can ever be expected to handle. The conventional solution to this overload is to try to tackle only the more important cases; in the argot of prosecutors, there must be 'prioritization'. For street crime, this strategy has a chance of working reasonably well. The more serious offences can be given priority, and for each offence particular priorities can be established with reference to such matters as gravity of harm and degree of personal fault. Moreover, the application of these priorities is unlikely to cause much difficulty: the facts on the face of the record usually give solid clues as to what happened and whether the defendant behaved egregiously. And, if the question of responsibility becomes a central issue at trial, the enquiry is focussed on one individual (or, in joint trials, typically a small handful of defendants) and is unlikely to subvert justice

by putting too great a strain on enforcement resources. For corporate crime, the same kind of strategy can be formulated but in practice will soon become myth. The most serious type of case in terms of harm (e.g. a Bhopal or Seveso) almost certainly will involve complex issues of individual responsibility which, if put to trial, will require months or even years of investigation and court-room battle.[10] Challenges like this confound the conventional prosecutorial wisdom that serious cases ought to be prosecuted seriously.[11] From this can be derived a general theorem of corporate criminal justice: The more extensive the harm committed by a corporation and the larger the size of the organisation, the lower the probability of individual criminal liability and the less extensive its distribution.

Little can be done to overcome this inegalitarian bias by recharging the batteries of individual liability. Worse, if scarce enforcement resources are taken away from the imposition of corporate liability and reallocated to the pursuit of individual defendants the balance of power in the social control of corporate crime is likely to become even less egalitarian than at present: resources would be invested in the costly, resource-intensive task of chasing individuals instead of easing the problem by proceeding against corporations where it is too difficult to mount effective prosecutions against individuals. By proceeding against corporations there is at least some hope of achieving individual accountability at the level of internal corporate discipline.[12]

Even if there were enough enforcement resources to implement a crime control strategy of Individualism it would not follow that those resources should be used exclusively in the pursuit of individual criminal liability. The potential gain likely to be attainable would be a minimal increase in the numbers of individuals brought to justice at the expense of dropping the more efficient mixed strategy of relying on corporate as well as individual liability.

(4) Individualism neglects the role which corporate criminal liability plays as a benign means of achieving social control without crucifying individual persons.

Corporations provide convenient surrogates in situations where it is harsh to impose individual criminal liability, whether by reason of corporate pressures, oppressive rules of criminal liability, or need for exemplary punishment. Corporate criminal liability is economical of distress in that it avoids the socially bruising experience of conviction and punishment in a significant range of cases where individual criminal liability might otherwise be imposed. In contrast, the individualistic idea of relying completely on individual criminal liability is insensitive to the utilitarian value of making the greatest impression with the least personal torment.

This feature of corporate liability is neglected in Thompson's contention that the control of governmental illegality requires stricter standards ofindividual liability:[13]

> There are nevertheless several reasons for adopting the stricter standard of negligence in judging organisational crime. First, a view that justifies punishing negligence directs our attention beyond the current state of mind of an alleged criminal and the immediate occasion of an alleged crime to the prior circumstances that led to the negligence. In this way, the view expresses a concept of responsibility that more satisfactorily represents human relationships in a moral community. We would not conceive of officials confronting citizens as isolated individuals coming together at discrete moments, sharing only an awareness that they should not intentionally harm one another. Instead, we regard them as persons having characters shaped over time in association with each other, sharing an understanding that officials owe citizens a more stringent and constant concern. In such a community, citizens would judge officials according to standards of care that the community has evolved, and in light of the past efforts that each has made to satisfy those standards. Organisations provide the order and continuity necessary to sustain such standards. For practical reasons, the criminal law may confine its attention to the immediate context of a crime, but its underlying conception of moral responsibility, at least when applied to organisational life, would be understood as having greater temporal extension.
>
> A second reason that negligence in organisations may deserve the criminal sanction derives from the nature of the harm that this negligence can cause. The degree of care demanded by a standard of conduct traditionally has been set in proportion to the apparent risk; arguably, that risk may be higher in organisations. The magnitude and persistence of the harm from even a single act of negligence in a large organisation is usually greater than from the acts of individuals on their own. The greater risk comes from not only the effects of size but also from those of function. In the common law of official nonfeasance, for example, public officials whose duties include the 'public peace, health or safety' may be criminally liable for negligence for which other officials would not be indictable at all. Because of the tendency of organisational negligence to produce greater harm, we may be justified in attaching more serious penalties to less serious departures from standards. Although the departure may be ordinary, the potential harm may be gross.

> A related reason for imposing stricter standards in organisations is that officials are more likely to underestimate the harm that their negligence may cause. The division of labor and the remoteness of results combine to create a psychological (and perhaps moral) distance that may make efforts to take precautions seem less important than they are. To compensate for this discounting effect, the law may have to attach more severe sanctions to some kinds of negligence than would be warranted either solely by the harm produced in any particular instance or by the harm produced by this type of negligence in general. It is sometimes claimed that intentional harms are more serious than negligent harms because we can usually expect the former to be repeated unless we try to prevent them. Whatever the merits of this distinction in individual conduct, it does not hold an organised activity where persistent harm is at least as likely to be caused negligence as intentionally. The careless bureaucrat is more common than the malicious one.

Although the gravity of much governmentally caused harm is undeniable, Thompson's proposal for stricter standards of individual liability is fraught with the risk of injustice. As Stone has observed:[14]

> [T]o move the law in this direction is, at least by degrees, to loosen the criminal law's moral tethers. Negligence is shadowy. Vicariousness is plastic (who, after all, will appear, after the fact, to have been in 'a responsible position?'). Neither squares well with fair notice, intent, or real blameworthiness.

Indeed, a vicious irony of Thompson's approach is that in seeking to impose stricter standards of individual liability it departs from the libertarian values for which Individualism traditionally has stood. Where stricter standards need to be imposed, a more obvious approach is to rely on corporate liability and thereby minimise the need to sacrifice libertarian protections for individuals.

(5) Individualism uncritically accepts the dogma that it is impossible to devise effective and just means of imposing criminal liability on corporations.

Underlying Individualism is the belief that it is impossible to punish corporations in a way that is both effective and just.[15] Thus, Lederman has contended that the notion of corporate criminal law challenges 'the ideological and normative basis of criminal law and its mode of expression and operation.'[16] However, to say that criminal law is intrinsically an exclusively individualistic construct is sheer dogma.

An initial issue is whether a workable concept of corporate fault can be devised. This is a large topic discussed elsewhere.[17] Given that corporate blameworthiness is a well-known phenonmenon, there is reason to believe that a workable concept can be constructed. In any event, as Stone has pointed out, corporate moral blameworthiness is not necessarily an essential condition for imposing corporate criminal liability:[18]

> A structuralist could favour sanctioning the organisation on perfectly plausible practical grounds, unconnected to any metaphysical notion that corporations are independent moral agents. For example, consider a case in which a prosecutor believes that whoever is responsible is buried so deeply in the bureaucratic structure, would be so costly to find and prosecute, and was so tenuously culpable that the likely sanction would not merit the effort of prosecuting him. After all, the prosecutor has the option of prosecuting the organisation - a less costly undertaking - and leaving it to the organisation to identify and discipline the culprit according to its own devices. Whether such an allocation of prosecution resources is, in any given circumstance, prudent, is one question. But when it is selected, as it commonly is, it implies no special moral ontology, no commitment to 'queer entities'.

Another problem typically raised is the limited efficacy of fines against corporations and the difficulties associated with finding a tougher form of sanction that will not have unacceptable side-effects (e.g. worker lay-offs). Again, this is a large question which has been tackled at length elsewhere.[19] One promising possibility is corporate probation or its more stringent variant, the punitive injunction, a sanction that would impose punishment constructively by requiring a corporate defendant to implement an innovative and demanding compliance program. Although the idea of punitive mandatory injunctions may seem novel, the real oddity is that the criminal law has yet to develop such an option. As Coffee has observed, 'It is a curious paradox that the civil law is better equipped at present than the criminal law to authorise [disciplinary or structural] intervention. Corporate probation could fill this gap and at last, offer a punishment that fits the corporation'.[20] It sould be noticed that unlike the position with fines, the sanction of corporate probation or punitive injunction is capable of directly impinging on management and, by reason of this superior targetting capability, is unlikely to have significant overspill effects on workers or consumers.

Beyond the issues of corporate fault and corporate sanctions is the concern that insufficient is known about the nature of corporate behaviour to justify the adoption of any strategy of social control by means of corporate criminal liability.[21]

This concern seems exaggerated and, if taken seriously, suggests that even individual criminal liability for corporate malfeasance should be held in abeyance until a persuasive theory of corporate action is discovered. Rather than lapsing into a state of do-nothing anxiety, consider the implications of the decision-making models of corporate crime control developed by Kriesberg.[22] These models - Rational Actor, Organisational Process, and Bureaucratic Politics - each have different implications for sanctioning strategies. However, since it would usually be impossible or impractical to pinpoint which model most closely corresponds to the realities of decisionmaking within a particular corporation, these different implications are of secondary significance. The prime need is for a sanction which is capable of reflecting all implications of the models and this need conceivably could be satisfied by the punitive injunction. Thus, injunctive sanctions could be directed at individual actors within an organisation, regardless of what decisionmaking pattern predominates. Additionally, punitive injunctions against corporate offenders would be consistent with the model which views the corporation as a value-maximising rational actor. In other words, corporate as well as individual sanctioning effects could be achieved through punitive mandatory injunctions. We may not have a definitive theory of corporate action but we can at least devise multi-purpose sanctions like the punitive injunction and thereby hedge our theoretical bets.

(6) Individualism incorrectly presumes that corporate liability is necessarily antithetical to individual accountability.

It is a mistake to suppose that corporate liability is necessarily corporate in impact and therefore inimical to the customary value of individual accountability as a means of social control. Already under the present law one aim of corporate criminal liability is to catalyse internal discipline, especially where organisational secrecy, numbers of suspects and other such considerations make it difficult or even impossible to depend on individual criminal liability. The challenge ahead is not so much to improve individual criminal liability as to harness the police power of corporations. The need for some mechanism to ensure effective imposition of individual responsibility as a matter of internal corporate discipline has long been recognised. As the Law Reform Commission of Canada has explained, corporate liability is potentially an efficient dispenser of individual accountability:[23]

> In a society moving increasingly toward group action it may become impractical, in terms of allocation of resources, to deal with systems through their components. In many cases it would appear more sensible to transfer to the corporation the responsibility of policing itself, forcing it to take steps to ensure that the harm does not materialise through the conduct of people within the organisation. Rather than

having the state monitor the activities of each person within the corporation, which is costly and raises practical enforcement difficulties, it may be more efficient to force the corporation to do this, especially if sanctions imposed on the corporation can be translated into effective action at the individual level.

III CONTROLLING GOVERNMENT WRONGDOING: THE FOLKLORE OF GOVERNMENTAL ORGANISATIONAL IMMUNITY FROM CRIMINAL LIABILITY

The orthodox view, based on the doctrine of sovereign immunity, is that governmental agencies are not subject to criminal liability. This orthodoxy appears to depend on the following main grounds:

(1) Imposing penal liability on governmental agencies is absurd because the Executive controls the processes of prosecution and remission of penalty;

(2) There is no need to impose criminal liability on governmental agencies because wrongdoing by such agencies can be adequately prevented by means of electoral or bureaucratic controls within government;

(3) Governmental agencies cannot be sanctioned in a manner which is both effective and just, as is evident from the spectacle of imposing a fine which ultimately will be paid for by the people out of taxes and other state funds;

(4) Subjecting governmental oganisations to criminal liability would lead to the recognition of protective rights, and it would be dangerous to increase the degree of political autonomy conferred on arms of government; and

(5) Wrongdoing by governmental agencies often stems from deep-seated structural problems within an organisation, and institutional reform is best left to politicians and bureaucrats rather than to the courts.

(1) Imposing criminal liability on governmental agencies is absurd because the Executive controls the processes of prosecution and remission of penalty.

This argument received the imprimatur of Latham C.J. in _Cain v Doyle_,[24] a decision of the High Court quashing the conviction of a government factory manager charged with complicity in a crime allegedly committed by the Government. The main argument relied on was that the conviction entailed the 'absurdity of supposing that the Executive Government ... is to be brought before magistrates to receive punishment, a punishment which the Executive may enforce or remit'. However, the absurdity is more

superficial than real. For one thing, it is always possible in theory for the Executive to remit punishments imposed on political cronies but the political constraints on such a course of action are very considerable. To the extent that political constraints are insufficient, it would be possible to devise some additional screening mechanism so as more independently to control the remission of punishment; such a development is foreshadowed by the widespread introduction of a director of public prosecutions to control the exercise of prosecutorial discretion.[25] It should also be realised that different considerations arise when assessing the merits of imposing criminal liability at an intergovernmental level, as Stone has explained:[26]

> [T]here is a different theoretical tincture in intergovernmental suits, as where the federal government fines a municipality, or arranges for a State agency - say, the prison system, or the State mental health hospitals - to be put under a sort of trusteeship. These intergovernmental conflicts raise problems, too, but they are different problems: not those of flimflam bookkeeping, but those of federalism.

(2) There is no need to impose criminal liability on governmental agencies because wrongdoing by such agencies can be adequately prevented by means of electoral or bureaucratic controls within government.

An influential assumption appears to be that the processes of electoral or bureaucratic control within government make it unnecessary to resort to corporate as well as individual criminal liability. It is far from obvious that public agencies are in fact subject to closer scrutiny and correction[27] but even if this is the case, it is difficult to understand why public agencies should be exempt from punishment for serious episodes of unjustified harmcausing or risktaking where administrative and other non-criminal methods of control break down. In the context of private enterprise punishment is available against corporations partly in order to discourage the belief that offences are merely commodities in which the enterprise can indulge without risking more than civil or adminsitrative remedies. Exempting public enterprise from punishment creates the risk that the social costs of crime will not be internalised as in the private sector, but kicked back and forth along the corridors of power as if political or bureaucratic footballs.

The assumption under consideration also loses force when it is remembered how murky the public-private distinction often is. This problem has been highlighted by Stone:[28]

> We are at a loss even to say where, for our purposes, public government leaves off and private begins. The Department of State is clearly government. But what about Comsat or Amtrak or an investor-owned but highly regulated public utility? The problem is pervasive, inasmuch as the line between public and private, never distinct, is becoming increasingly blurry. As governments get involved in many traditionally private lines of business, such as land development, railroading, insurance, and fuels production, are they still to be regarded ... as government? Conversely, services that were traditionally provided by government servants are increasingly being made available from the private sector, sometimes as competitors (private mails, private rent-a-judge) and sometimes under government contract. In such cases, are the service providers still to be regarded as private?

(3) Governmental agencies cannot be sanctioned in a manner which is both effective and just, as is evident from the spectacle of imposing a fine which ultimately will be paid for by the people out of taxes and other State funds.

A commonly expressed doubt is that voiced by Latham C.J. in Cain v Doyle: 'there would be no reason in a provision that the Commonwealth shall pay a fine to itself'.[29] This doubt has been challenged by Hogg:[30]

> The reality of the Crown paying a fine to itself is that one government department, with its own separate accounts, accounts for the fine to another government department. If the accounts of government are to reflect the true costs and benefits of running each department - and surely this is a prerequisite to efficient management - then the recording of a judicially imposed fine as an item in the outgo of one department and the income of another seems an entirely proper procedure.

However, an excursus into cost-benefit analysis is significant only to the extent that fines will operate as a fair and effective deterrent sanction.[31] How likely is it that heavy fines would be imposed? Is there the risk of such fines impeding public services, delaying remedial measures, or forcing a typically monopolistic enterprise to dispense goods or services at increased costs? Many governmental corporations are large organisations and it is precisely in this context that the gravest doubts about the efficacy of corporate fines have arisen.

Formal publicity sanctions offer more promise. Deterrent force could be achieved in many situations without so great a risk of the adverse consequences which might be attracted by high fines,

and the fact of conviction could be drawn much more quickly to the attention of parliamentarians and other persons in a position to exert a corrective influence. A properly designed publicity sanction stands a greater chance of provoking response than the relatively secret and sedate process of departmental budgeting.

Above all, probationary orders or punitive injunctions would offer a direct method of pinching the nerves of government without causing unwanted twitches elsewhere in the body politic. Institutional reform via mandatory injunctions has long been used in the U.S. to remedy governmental abuse of constitutional rights,[32] and an equivalent approach could be adopted where sentencing convicted governmental organisations requires a hard-hitting and yet constructive and well-targetted sanction.

It may be argued that there are important differences between for-profit and not-for-profit corporations when it comes to the kind of incentives most likely to deter.[33] Thus, financial disincentives directed against a for-profit organisation may be congruent with the fears of managers whereas the same disincentives may mean much less to administrators in not-for-profit concerns. To a large extent, however, the solution lies in devising sanctions such as the punitive injunction which do not depend on financial disincentives but which impinge on non-monetary interests (notably power and prestige) and hence are likely to be of concern to personnel in not-for-profit as well as in for-profit organisations.

From the standpoint of unfairness, it has been urged by Thompson that imposing corporate criminal liability on governmental agencies would be unusually severe on innocent parties:[34]

> [T]he problem of the dispersion of punishment is even more serious in government than in other organizations. Not only does the punishment fall on citizens who, like shareholders or employees of corporations, had nothing to do with the crime and may not be able to do anything about similar crimes in the future, but it also often falls most heavily on those citizens who have the least opportunity to do anything about such crimes. To assess a fine or punitive damages against the budget of a derelict government agency, as some reformers have proposed, would be almost to guarantee that the agency's clients with the least political clout would find their government benefits reduced the most. Some would perhaps not regret this consequence in the case of certain agencies (e.g. Department of Defense), but we should disapprove of it in the case of others (e.g. Health and Human Services).

This objection may have some validity where the form of punishment is a scattergun sanction like the fine but is unpersuasive where an organisation is subject to a more direct and selectively targetted sanction such as the punitive injunction. As a sanction dedicated to institutional reform, the punitive injuntion is the antithesis of the mindless money-grabbing sanction caricatured by Thompson.

Of much greater moment is the risk of overdeterrence if heavy reliance is placed on individual criminal liability in the public sector. This dimension has been nicely drawn by Stone:[35]

> In the for-profit sector, there at least exists a set of clear, positive rewards for the manager who can show an ability for reasonable, competent performance of his duties. The prospect of positive rewards counterbalances the disincentives for negligence and delay. For example, the officer of a pharmaceutical house, faced with the decision whether to subject a new product to additional testing, or to put it on the market at once, weights the disincentives of lawsuits, should the drug cause harm, against the rewards of profits (and the presumption of social benefit that they carry), should it cure and save. This sets up a crude balancing that may, if doctored appropriately by the law, tend to assure that the pharmaceutical executives' incentives and disincentives play in tune with the social ideal. With highly visible elected officials, the positive rewards are clear enough: reelection, with prestige, power, and so on, exercise their influence. But as we go to lower levels, the civil servant in the Food and Drug Administration is not in exactly the same position as his pharmaceutical company counterpart. One of the problems with achieving good government is that we lack a system of positive incentives that are quite so nicely discriminating. The incentives of the FDA official may already be skewed towards an exercise of excess caution from a social point of view. That is, one may well worry that faced with two alternatives: (1) expediting the processing of the drug application, with a 0.5 probability of saving a thousand lives, and (2) delaying for further testing, with a 0.5 probability of saving only a hundred lives, the official will incline to delay, even if the expected social benefit is less. He knows that if he expedites the license and the drug causes measurable injuries - creates another thalidomide scandal - he or his agency will be dragged before Congressional hearings, denounced in the press, and so on. If we add to the official's environment another downside risk - the prospect of a criminal prosecution - we could tilt the balance even further in the direction of excess caution.

One implication of Stone's analysis is that the downside risk of individual criminal liability should not be accentuated but moderated by relying on corporate liability as a surrogate for individual liability in cases where the blameworthiness of a public official is not clear-cut.

(4) Subjecting governmental organisations to criminal liability would lead to the recognition of protective rights, and it would be dangerous to increase the degree of political autonomy conferred on arms of government.

Thompson again:[36]

> If the practice of punishment implies a respect for the rights of all agents potentially subject to its sanctions, then we should be even more hesitant about accepting the practice for governmental than for other kinds of organisations. As we noticed earlier, there are dangers in granting any organisation the kind of autonomy we recognise in persons. But nongovernmental organisations can sometimes claim independent rights against government insofar as the organisations express the rights of particular individuals or groups in society. Democratic theory, at least in its liberal versions, assumes that individuals and groups do not have to justify their autonomy by showing that every activity they pursue positively contributes to the good of the whole society. Any autonomy that governmental organisations enjoy, however, must be justified on precisely those grounds. An agency may legitimately claim rights against the rest of the government only when citizens, through the democratic process, determine that these rights would ultimately serve collective purposes. As long as we wish to treat governmental organisations as solely means to our common ends, we should deny them the status of moral agency, and therefore exclude them from the practice of punishment. This exclusion does not imply that we should not impose sanctions on the organisations of government. Indeed, in grave cases of reiterated crime, we may need to have recourse to the analogue of capital punishment - the elimination of the agency. But this and similar sanctions are not, or should not be understood as, punishment: they are political policies, and need neither respect the same moral constraints nor express the same moral force as the practice of punishment. To suppose otherwise would be to misapprehend the moral and political foundations of criminal responsibility.

This line of argument is unconvincing, as Stone has indicated:[37]

> Where does such an implication come from: I cannot find it in the course of history or the crannies of logic. Look at the record. True, centuries ago, qualms about hauling the corporation into court, not unlike those Thompson invokes, were common. But since then we have come to accept as a matter of course a legal system in which corporations are expected to pay up on their contracts, make good for their torts - even intentional torts - and, more recently, not to discriminate in hiring. Criminalizing their conduct might be regarded as a more morally significant move, and in fact was so viewed. But we hashed that out nearly a century ago, and gradually decided that corporations are the sort of "persons" whose conduct can be criminalized. What have been the dire implications for corporate rights? Obviously, the imposition of some liabilities raises some questions of rights that would otherwise not have come up. Once we decided that a corporation could be tried, then we had to decide whether it had a right to jury trial. (It was decided that it did). But while we have conferred some rights on corporations, we have not conferred all; nor have we conferred on them the full moral status of persons, nor is there much clamor that we relent and do so. (Somewhat the same history, I think, could be written of fetuses, animals, species, and even, in some circumstances, the dead). Corporations do not enjoy the benefit of the privileges and immunities clause. Nor do they have Fifth Amendment rights, nor, as I read the cases, do they have rights equally with a person under the First or Fourth Amendments. They cannot vote. Their participation in political campaigns is restricted.

(5) Wrongdoing by governmental agencies often stems from deep-seated structural problems within an organization, and institutional reform is best left to politicians and bureaucrats rather than to the courts.

This familiar argument has been rewoven by Thompson with one new twist:[38]

> The sanction of probation that some legal reformers would impose on corporations seems inappropriate for governmental organizations. Here we might reasonably object that the judiciary would be usurping functions that the legislature or citizens more generally should exercise. Judicial oversight, even the increasingly common use of "special masters", may be warranted in some instances. But if the structures and procedures of a whole agency are the source of persistent crime, the agency is likely to require massive reorganization and continual review. Such extensive intervention should fall within the province of a

> legislature, which can consider what changes are appropriate in light of the needs of other governmental agencies and policies. Furthermore, if the legislature takes temporary control of an agency in this way, the stigma of a criminal conviction would probably lose most of its significance (since the agency would have become a different organization in critical respects). To the extent that the stigma has any force, it could unfairly discredit officials in the agency who are working to improve it, and discourage others who are considering whether to join it. The social harm could be greater from these effects on government than on a corporation since a discredited governmental agency may be the only provider of certain essential services for citizens.

The initial flaw in this argument is that it tends to dismiss institutional reform as being largely beyond the proper role of the judiciary. The validity of judicially-administered institutional reform is of course a fundamental issue in U.S. constitutional law, and many constitutional lawyers have argued at length that, although institutional reform by the judiciary is highly problematic, it is nonetheless a legitimate and indeed essential means of protecting basic rights.[39]

A second problem with Thompson's position is that it depends on the new twist that the effect of criminally stigmatising organisations is necessarily long-lived and inimical to constructive reform. This assumption seems unwarranted; certainly there is empirical evidence which suggests the opposite, namely that although organisations are sensitive to stigmatisation, the effects tend to be short-lived because, unlike human beings, organisations are not sentient creatures and are much more capable of bouncing back after a bout of shame.[40]

IV CONCLUSION

There are many reasons why individuals are often not prosecuted for corporate crime and why reliance is placed on corporate criminal liability instead. Once these reasons are understood, it becomes apparent that individual criminal liability, even if radically reformed, cannot be expected to do the same work. This is not to deny the value of revising individual criminal liability so as to equip it more adequately for the task of combatting corporate crime but there are limits as to how far this can be taken. However, it is futile to try to solve corporate problems of crime control by exclusively individualistic means.

If it is agreed that a mixed strategy of corporate and individual criminal liability is desirable for controlling corporate crime in the private sector, the question provoked is why organisations in the public sector should be exempt from criminal liability. A variety of assumptions appear to underlie the exemption now generally conferred. Folklore as these assumptions may be, they proceed on a short-sighted view of the nature and limits of corporate criminal liability as a means of achieving effective social control over governmental agencies. Governmental as well as private enterprises engage in serious wrongdoing and to immunise the former from criminal liability represents a dangerously lop-sided approach to the control of organisational lawlessness.

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[1] See further Peter W. Hogg, Liability of the Crown (Sydney: Law Book Co., 1971), 175-180. For individual agents of the Crown it is no excuse that a breach of the law was authorised by the Executive or by a superior officer: A and Others v. Hayden and Others (No 2) (1984) 56 A.L.R. 82.

[2] A leading example of individualistic preoccupation in the context of governmental wrongdoing is Owen Fiss' attempt to reject the concept of wrongdoing in the context of institutional reform of governmental bureaucracies:

> The concept of wrongdoer is highly individualistic. It presupposes personal qualities: the capacity to have an intention and to choose. Paradigmatically, a wrongdoer is one who intentionally inflicts harm in violation of an established norm. In the structural context, there may be individual wrongdoers, the police officer who hits the citizen, the principal who turns away the black child at the schoolhouse door, the prison guard who abuses the inmate; they are not, however, the target of the suit. The focus is on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition. In a sense, a structural suit is an in rem proceeding where the res is the state bureaucracy. The costs and burdens of reformation are placed on the organization, not because it has "done wrong", in either a literal or metaphorical sense, for it has neither an intention nor a will, but because reform is needed to remove a threat to constitutional values posed by the operation of the organization. (Owen Fiss, "The Supreme Court 1978 Term - Foreword: The Forms of Justice", Harvard Law Review 93 (1979): 1-76, 22-23).

This assessment, however, is highly questionable. First, organisations are capable of manifesting intent in the form of policy. Second, organisational conduct is not always determined by structural and bureaucratic constraints; there is room for corporate freedom of choice. Third, if organisational behaviour is assessed by reference to patterns of behaviour and systems of control, organisational blameworthiness if not confined

to "incidents of wrongdoing". Bad patterns of behaviour and poor systems of control can be the subjects of corporate blame. Although many corporate offences are now defined in a way which focuses upon incidents of wrongdoing, that focus could and shall be changed by legislative redefinition. Fourth, when institutional reform by a corporation is necessary, blameworthiness may be used as an additional justification for placing the costs and burdens of reformation on the corporation. In fact, punitive injunctions could require more exacting institutional reforms than are possible through a remedial civil injunction. Fifth, the fact is that organisations have often been blamed in a manner which cannot persuasively be explained in terms of blame of individual officers or employees. See further Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions", Southern California Law Review 56 (1983); 1141-246.

3 This debate goes back to the discredited theory of methodological individualism. See e.g., Fontana Dictionary of Modern Thought, 387: "It can be argued that the whole dispute [over methodological individualism] is as futile as a dispute between engineers as to whether what is important in a building or mechanism is its structure of the materials or components used. Clearly both are important, but in different ways." See further Peter French, Collective and Corporate Responsibility (New York: Columbia University Press, 1984); Meir Dan-Cohen, Rights, Persons, and Organizations (Berkeley: University of California Press, 1986), chs. 2-3.

4 New Zealand, Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand (Wellington: N.Z. Government Printer, 1981), 393.

5 French, Collective and Corporate Responsibility.

6 See Thomas Donaldson, Corporations and Morality (Englewood Cliffs, N.J.: Prentice Hall, 1982), 125-56.

7 See further Ellen Hochstedler, ed., Corporations as Criminals (Beverly Hills: Sage Publications, 1984); Christopher D. Stone, "The Place of Enterprise Liability in the Control of Corporate Conduct", Yale Law Journal 90 (1980): 1-77; John Braithwaite, To Punish or Persuade (Albany, N.Y.: State University of New York Press, 1985).

[8] Some exceptional entrepreneurs have been known to run their businesses successfully from behind bars. See e.g., Ulrike Horster-Philipps, Im Schatten Des Grossen Gelde (Koln: Pahl-Rugenstein, 1985), 80-83 (Friedrich Flick launched his post-Second World War commercial empire from Landsberg jail while doing time as a convicted war criminal; meetings with key managers posing as legal advisors were held during visiting hours).

[9] See generally John Braithwaite, "Paradoxes of Class Bias in Criminal Justice", in Harold Pepinsky, ed., Rethinking Criminology (Beverly Hills: Sage Publications, 1982): 61-85.

[10] See e.g., "Bhopal Disaster Spurs Debate over Usefulness of Criminal Sanctions in Industrial Accidents", Wall Street Journal, 7 Jan. 1985, 18; J.G. Fuller, The Poison that Fell from the Sky (New York: Colophon, 1978).

[11] For one exception see Financial Times, 11 Nov. 1985, 2 (Magistrates in Palermo charge 475 Mafia suspects).

[12] See further John C. Coffee, Jr., "'No Soul to Damn; No Body to Kick:' An Unscandalized Inquiry into the Problem of Corporate Punishment", Michigan Law Review 79 (1981): 386-459.

[13] Dennis F. Thompson, "Criminal Responsibility in Government", in Nomos XXVII, J. Roland Pennock and John W. Chapman, eds., Criminal Justice (New York: New York University Press, 1985): 201-240, 208-209.

[14] Christopher D. Stone, "A Comment on 'Criminal Responsibility in Government'" in Nomos XXVII, J. Roland Pennock and John W. Chapman, eds., Criminal Justice (New York: New York University Press, 1985): 241-266, 246.

[15] See e.g., Anonymous, "Developments in the Law - Corporate Crime: Regulating Corporate Criminal Behavior Through Criminal Sanctions", Harvard Law Review 92 (1979): 1227-375; Eliezer Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle", Journal of Criminal Law & Criminology 76 (1985): 285-340; Jameson W. Doig, Douglas E. Phillips, and Tycho Manson, "Deterring Illegal Behavior by Officials of Complex Organizations", Criminal Justice Ethics (1984): 27-56. To the contrary see Francis T. Cullen and Paula J. Bubeck, "The Myth of Corporate Immunity to Deterrence: Ideology and the Creation of the Invincible Criminal", Federal Probation (Sept. 1985):

3-9; John Braithwaite and Gilbert Geis, "On Theory and Action for Corporate Crime Control", Crime and Delinquency 28 (1982): 292-314; Coffee, "'No Soul To Damn; No Body to Kick'"; James A. Geraghty, "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing", Yale Law Journal 89 (1979): 353-75; Stephen A. Yoder, "Criminal Sanctions for Corporate Illegality", Journal of Criminal Law and Criminology 69 (1978): 40-48.

16 Lederman, "Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle", 296.

17 See further Fisse, "Reconstructing Corporate Criminal Law".

18 Stone, "A Comment on 'Criminal Responsibility in Government'", 243.

19 See Coffee, "'No Soul To Damn; No Body to Kick'"; Fisse, "Reconstructing Corporate Criminal Law"; Brent Fisse and John Braithwaite, "Sanctions Against Corporations: Dissolving the Monopoly of Fines", in Roman Tomasic, ed., Business Regulation in Australia (Sydney: CCH, 1984): 129-146.

20 Coffee, "'No Soul To Damn; No Body to Kick'", 459.

21 See e.g., Diane Vaughan, Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct (Chicago: University of Chicago Press, 1983).

22 Kriesberg, Simeon M., "Decisionmaking Models and the Control of Corporate Crime", Yale Law Journal 85 (1976): 1091-129.

23 Canada, Law Reform Commission, Working Paper 16, Criminal Responsibility for Group Action (Ottawa: Information Canada, 1976), 31.

24 (1946) 72 C.L.R. 409, 418.

25 See generally James Vorenberg, "Decent Restraint of Prosecutorial Power", Harvard Law Review 94 (1981): 1521-73.

26 Stone, "A Comment on 'Criminal Responsibility in Goverment'", 256.

27 See Thompson, "Criminal Responsibility in Government", 223.

[28] Stone, "A Comment on 'Criminal Responsibility in Government'", 256-257. See further Christopher D. Stone, "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" University of Pennsylvania Law Review 130 (1982): 1441-1509.

[29] (1946) 72 C.L.R. 409, 418.

[30] Hogg, Liability of the Crown, 178-179.

[31] For a critique of fines see Fisse and Braithwaite, "Sanctions against Corporations".

[32] See e.g., Anonymous, "Complex Enforcement: Unconstitutional Prison Conditions", Harvard Law Review 94 (1981): 626-646.

[33] See further Stone, "A Comment on 'Criminal Responsibility in Government'", 258-259.

[34] Thompson, "Criminal Responsibility in Government", 224.

[35] Stone, "A Comment on 'Criminal Responsibility in Government'", 261-262.

[36] Thompson, "Criminal Responsibility in Government", 225.

[37] Stone, "A Comment on 'Criminal Responsibility in Government'", 250-251.

[38] Thompson, "Criminal Responsibility in Government", 224-225.

[39] See e.g., Fiss, "The Supreme Court 1978 Term - Foreword: The Forms of Justice", Harvard Law Review 93 (1979): 1-76; Anonymous, "Complex Enforcement: Unconstitutional Prison Conditions".

[40] Brent Fisse and John Braithwaite, The Impact of Publicity on Corporate Offenders (Albany, N.Y.: State University of New York Press, 1983), esp. ch. 19.

SELF-REGULATION: INTERNAL COMPLIANCE STRATEGIES TO PREVENT CRIME BY PUBLIC ORGANISATIONS

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Most of the program for this seminar is about getting public organisations to comply with the law by putting external pressures on them - Public Service Boards, Auditors General and other regulatory bodies, Royal Commissions, Parliamentary Committees, investigative journalists, administrative lawyers and civil litigants. I'm all for that, but at some stage we also have to give consideration to what public organisations can do to respond to those outside pressures to ensure that illegality does not occur or is not repeated. My purpose in this paper is to give some very preliminary consideration to the internal compliance strategies to prevent law violations which socially responsible public organisations might put in place.

I will do this by drawing on experience from the private sector, because I have little direct research experience of public sector illegality. Over the past decade Brent Fisse and I have been involved in three empirical studies of how corporations regulate themselves (Fisse and Braithwaite, 1983; Braithwaite, 1984; Braithwaite, 1985). Most of the illustrations in this paper are drawn from these studies; they describe the situation as it existed in the companies at the time of our fieldwork between 1978 and 1983.

Before embarking on a short exposition on the benefits of self-regulation, I wish to set the record straight that while I see self-regulation as having a very important place as an alternative and complement to law enforcement with all types of law breaking, I do not see it as obviating the need for criminal law enforcement. There is a constant tension in my thinking between seeing self-regulation and corporate social responsibility as the most efficient and effective ways of getting compliance, and seeing this

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This paper draws heavily on John Braithwaite and Brent Fisse, "Self-Regulation and the Control of Corporate Crime", in C. Shearing and P. Stenning (eds.), Private Policing, Beverly Hills: Sage, in press.

result as more achievable to the extent that external pressures provide an incentive to self-regulation and a moral climate in the community which nurtures social responsibility.

NOBLESSE OBLIGE

While I see potent self-regulation as reducing the need for law enforcement directed at public organisations and their officers, this is not to deny the existence of competing considerations which point in the opposite direction. The most important of these if noblesse oblige. To paraphrase Eugen Ehrlich's dictum we must be concerned that the more the powerful and the powerless are dealt with according to the same legal propositions, the more the advantage of the powerful is increased (Ehrlich, 1936: 238).

Noblesse oblige remedies this situation through a recognition that the holders of public office and the primary beneficiaries of the economic system have a special obligation to obey the law and to resist temptation. Having more advantages than other people they have an extra responsibility to set a good example.

Noblesse oblige has a long tradition in the English-speaking world, a tradition stretching back from contemporary studies of community attitudes to white-collar crime (which show extraordinarily punitive attitudes toward white-collar offenders: see the review in Grabosky et al, 1987) to the middle ages. St. Jerome's directions for confessors adopted by the English church of the 12th century stated: "And always as a man is mightier, or of higher degree, so shall he the more deeply amend wrong, before God and before the world" (Beckerman, 1981, p. 162). The detailed implementation of noblesse oblige in medieval Europe was sometimes colorful. For example, the Roman Penitential specified:

> 10. If anyone commits fornication by himself or with a beast of burden or with any quadruped, he shall do penance for three years; if [he has] clerical rank ... seven years. (McNeill and Gamer, 1965, p. 303).

Various medieval handbooks of penance detailed different penalties according to the status of offenders for offenses ranging from homicide to drunkenness.

There is merit in the way the legal systems of some non-literate societies provide for more severe sanctions on powerful than on powerless offenders (Nader and Todd, 1978, p. 20) and in the way

the Polish Penal Code provides higher penalties for economic crimes in proportion to the seniority of the offender (Lernell, personal communication, August, 1979).

Beyond this, when an offender is a senior public official - whether a judge, a Prime Minister, a school principal, or a law enforcement official - there is the special responsibility of the public office holder to be a moral examplar. As Justice Brandeis noted in his famous dissent in Olmstead v United States (1928): "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example". Christopher Stone (1982, p. 1497) agrees:

> If an actor or action is identified in the public mind with the government, we should be more demanding for that reason alone ... For example, it is true that General Motors is big and powerful; nonetheless, its actions are not likely to be interpreted as the expression of the collective will. Similarly, when a private club is tolerated to discriminate against Negroes, it does not convey the message that racial discrimination is an accepted norm in the same way that message was conveyed, for example, when the United Stated Armed Services were segregated.

To the extent that a society is seen by its citizens to have an actual policy of immunity for the apparatchiks and legal oppression for the poor, that society commits moral suicide. It foregoes the right to demand order and morality from its citizens, and it will not get order and morality from them.

THE VIRTUES OF SELF-REGULATION

Self-regulation by public and private organisations to secure compliance with the law is rendered necessary by the limited capacities of outside forces of social control, be they the police or Jack Waterford, to look into every shady corner of organisational practice. If organisations can be induced to put in place effective compliance systems, more systematic social control is possible than from outside.

In addition to a capacity to achieve wider coverage, self-regulation can achieve greater inspectorial depth. In the international pharmaceutical industry, for example, a number of the more reputable companies have corporate compliance groups, which send teams of scientists to audit subsidiaries' compliance with

production quality codes. In one Australian subsidiary of an American firm visited, inspections by the headquarters compliance group were conducted twice yearly and were normally undertaken by three inspectors who spent over a week in the plant. The health department inspection, on the other hand, consisted of an annual one-day visit by a single inspector. While employees had advance warning of the outside inspection, the corporate compliance group arrived unannounced.

Corporate inspectors also tend, at least in the pharmaceutical industry, to be better trained than their counterparts from outside. It is commonplace for corporate inspectors to have PhDs. Corporate inspectors' specialised knowledge of their employer's product lines also make them more effective probers than outside inspectors, who are forced to be generalists. Their greater technical capacity to spot problems is enhanced by a greater social capacity to do so. Internal compliance personnel are more likely than outside inspectors to know where "the bodies were buried," and to be able to detect cover-ups. One American pharmaceutical executive explained in part why this is so:

> Our instructions to officers when dealing with FDA inspectors is to only answer the questions asked, not to provide any extra information, not to volunteer anything, and not to answer any questions outside your area of competence. On the other hand we [the corporate compliance staff] can ask anyone anything and expect an answer. They are told that we are part of the same family, and unlike the government, we are working for the same final objectives.

Perhaps this statement exaggerates the good will between company employees and internal compliance inspectors. The production manager of the Guatemalan subsidiary of another company was asked: "Do you think of the internal quality auditors from headquarters as part of the same team as you?" His answer probably grasped the reality: "I think of them as a pain in the ass."

The power of internal inspectors to trap suspected wrongdoers is often greater than that possessed by outside investigators. One quality assurance manager told of an instance where this power was used. His assay staff was routinely obtaining test results showing the product to be at full strength. When they found a result of eighty percent strength, the manager suspected, the laboratory staff would assume that the assay was erroneous, simply mark the strength at 100 per cent, and not recalculate the test. The

manager's solution was periodically to "spike" the samples with understrength product to see whether his staff would pick out the defects. If not, they could be dismissed or sanctioned in some other way. Outside inspectors do not have the legal authority to enter a plant and entrap employees with a spiked production run.

Another example of the greater effectiveness of internal inspectors concerns a medical director who suspected that one of his scientists was "graphiting" safety testing data. His hunch was that the scientist, whose job was to run 100 trials on a drug, instead ran 10 and fabricated the other 90 so they would be consistent with the first 10. The medical director possessed investigative abilities that would have been practically impossible for a outside investigator. He could verify the number of animals taken from the animal store, the amount of drug substance that had been used, the number of samples that had been tested, as well as other facts. His familiarity with the laboratory made this easy. As an insider, he could probe quietly without raising the kind of alarm that might lead the criminal to pour an appropriate amount of drug substance down the sink.

We have seen that the organisation itself may be more capable than the external regulators of preventing white-collar crime. But if they are more capable, they are not necessarily more willing to regulate more effectively. While self-regulation can be potent in theory, all too often in practice it is little more than a symbolic activity.

This is why elsewhere I have developed the idea of enforced self-regulation - a proposal for exploiting the superior breadth and depth of self-regulatory surveillance by forcing it upon organisations, as it were (Braithwaite, 1982; Braithwaite and Fisse, 1985). This is also why sophisticated regulatory agencies often effectively compel self-regulation by threatening draconian outside intervention unless industry produces solid evidence that self-regulation is working well. Moreover, one of the best ways of securing industry commitment to making corporate compliance systems work is by prosecutions of senior executives: executives, particularly chief executives, who are afraid of conviction will impose much greater demands on their self-regulatory systems.

This article is not about how to force industry to self regulate; it is about how to make self-regulation effective, given a commitment to this approach. But this does not imply any naive assumption that we need rely only on the goodwill of public or

private organisations to secure these achievements.

THE ESSENTIAL REQUIREMENTS OF AN EFFECTIVE SELF-REGULATORY SYSTEM

In the past I have examined, largely on the basis of interviews with executives, the characteristics of the internal compliance systems of the five American coal mining companies with the best occupational health and safety record for the industry in the early 1980s, and also reviewed other empirical work on the organisational characteristics associated with safety in mines (Braithwaite, 1985: 41-71). A characteristic which consistently emerged was that companies with good safety records had detailed plans of attack to deal with identifiable hazards. This may be a characteristic which is not as relevant to determining the effectiveness of other kinds of internal compliance functions as it is for occupational health and safety. However, the other features which emerged from this empirical work seem to us of likely general relevance. Effectively self-regulating companies:

1. Give a lot of informal clout and top management backing to their compliance personnel (safety inspectors in the case of mine safety).

2. Make sure that clearly defined accountability for compliance performance is placed on line managers.

3. Monitor that performance carefully and let managers know when it is not up to standard.

4. Have effective communication of compliance problems to those capable of acting on them.

5. Do not neglect training and supervision (especially by front line supervisors) for compliance.

These characteristics of successfully self-regulated organisations will be considered in turn.

CLOUT FOR INTERNAL COMPLIANCE GROUPS

At a recent seminar on laws to control animal experimentation I asked the animal welfare officer from a very large Australian research institution how she dealt with researchers who refused to comply with Australia's voluntary code on the use of animals in experiments. "Easy", she said, "If they don't do what I ask, I

don't give them any more animals." Her role encompassed the ordering and delivery of animals to experimenters. This gave her organisational clout in dealing with researchers. Most fundamentally, then, clout for internal compliance groups comes from their control of resources which are important to those who must be made to comply.

Clout is central in the same way to the success of government regulators. Health departments find it easier to control drug companies than food outlets, and find it much less necessary to resort to law enforcement to do so, because health departments hold sway over so many decisions which affect the success of pharmaceutical companies. They decide whether new drugs will be allowed on the market, and if so, with what promotional claims, at what price and with what quality control requirements during manufacture. Organisational actors are more compliant with requests from actors who control vital resources (such as approvals and licences) for the organisation.

Often it is organisationally difficult to give compliance staff control over contingencies which matter to those regulated. In these circumstances, it is important for top management clearly to communicate the message to the organisation that in any dispute it is likely to stand behind its compliance staff. Regrettably, in most organisations the opposite message is part of the folklore of the corporate culture - that when the crunch comes management will stand behind its line managers and allow them to push aside that which impedes output. In contrast, with the coal mining safety leaders visited, when a company inspector recommended that a section of a mine be closed down because it was unsafe, in all five companies it was considered inadvisable for line managers to ignore the recommendation because of the substantial risk that top management would back the safety staff rather than themselves.

Quality control directors in many pharmaceutical companies are given clout by quite formal requirements that their decisions can only be overruled by a written directive of the chief executive of the corporation. This gives quality control unusual authority because not many chief executives want to risk their career by overruling their technical people for the sake of a single batch of drugs, when the danger, however remote, is that this batch could kill someone.

CLEARLY DEFINED ACCOUNTABILITY

A senior pharmaceutical company executive once explained: "There's a Murphy's Law of a kind: If someone else can be blamed, they will." Active policies to resist this tendency are needed for organisations to be effectively self-regulating. At all five coal mining safety leaders, the line manager, not the safety staff, was held accountable for the safety of his workforce. A universal feature was also clear definition of the level of the hierarchy which would be held responsible for different types of safety breakdowns. They were all companies which avoided the problem of diffused accountability: People knew where the buck stopped for different kinds of failures.

In contrast, organisations with little commitment to compliance sometimes draw lines of accountability with a view to creating a picture of diffused responsibility so that no one can be called to account should a court enquire into the affairs of the organisation. Everyone is given a credible organisational alibi for blaming someone else. Perhaps worse, other non-self-regulating organisations calculatedly set out to pass blame onto others. Thus some pharmaceutical and pesticide companies have some of their most dicey toxicological testing done by contract laboratories which survive by telling large companies what they want to hear. They get results which indicate the safety of their products without risking the consequences of a conviction for the presentation of fraudulent data. The use of sales agents to pay bribes is perhaps the best documented device of this sort in the corporate crime literature (Reisman, 1979; Boulton, 1978; Coffee, 1977).

At three of the large American pharmaceutical companies I visited it was revealed that there was a "vice-president responsible for going to jail", and two of these were interviewed. Lines of accountability had been drawn in these organisations such that if there were a problem and someone's head had to go on the chopping block, it would be that of the "vice-president responsible for going to jail". These executives probably would not have been promoted to vice-president had they not been willing to act as scapegoats. If they performed well, presumably they would be shifted sideways to a safer vice-presidency. Corporations can pay someone to be their fall-guy in many ways. Exceptionally generous severance pay is the simplest method.

In summary, most organisations make little effort clearly to define lines of responsibility for compliance with the law: The result is that when something does go wrong the complexity of the organisation is usually sufficient to make it difficult to convict any individual. Calculatedly non-compliant organisations sometimes create lines of accountability which will point the finger of responsibility away from their top managers. And effectively self-regulating companies have principles of responsibility which make it clear in advance which line managers will be held responsible should certain types of non-compliance occur. However, a number of the pharmaceutical companies visited had an each way bet: They had clearly defined lines of accountability for their internal disciplinary purposes, while contriving to portray a picture of confused accountability to the outside world. The fact that the latter does occur is one reason why "private police" can be more effective than "public police", and why self-regulation has the potential more effectively to punish individuals than outside regulation.

MONITORING COMPLIANCE PERFORMANCE

Two of the surprising findings from the survey of the organisational characteristics of coal mining safety leaders were that the size of the safety staffs of these companies varied enormously, as did the punitiveness of their approach to disciplining individuals who breached safety rules. It was expected that among the defining characteristics of companies which were leaders in safety would be that they would spend a lot of money on safety staff and would be very tough on safety offenders. While a large safety staff is not necessarily a characteristic of safety leaders, putting enormous accountability pressures for safety on line managers is. While a policy of sacking or fining safety offenders on the spot is not typical, communication of the message that higher management is deeply concerned when individuals break the rules is universal for safety leaders.

There is no magic formula for how this is achieved, because, as Bethlehem Steel's Director of Safety pointed out, "You can't cookbook safety". Each organisation must find a solution appropriate to its corporate culture. But to illustrate how one company monitors safety performance and communicates the message that top management cares about safety, I will use U.S. Steel. This will be followed by case studies of Exxon and IBM.

U.S. Steel

U.S. Steel leaves no ambiguity in its official communications about where safety stands in the hierarchy of priorities. For example, the corporate "Safety Program" document states:

> It is doubtful that any company ever made significant safety progress just by being "interested in" or "concerned about" safety, as it is so often expressed. Rather, management - top management - must have strong convictions on the necessity for placing safety first, above all other business considerations (p. 4).

On the monitoring side, foremen, departments, and entire plants must all produce summary safety activity reports either weekly or monthly. These indicate how many safety contacts, observations, injuries, disciplinary actions, job safety analysis conferences, unsafe conditions, and inspections there have been during each week. These reports ensure the accountability of foremen, department heads, and superintendents for the safety performance of their units.

The accountability mechanism for general superintendents of mining districts is more interesting. The general superintendents attend a monthly meeting with the president of the mining company and other senior executives, at corporate headquarters. Each general superintendent, in turn, makes a presentation on his district's performance during the previous month - first, on safety performance (i.e., accident rates) and, second, on productive performance (tons of coal mined). After the safety presentation, the corporate chief inspector of mines has the first opportunity to ask questions. If the accident rate has worsened in comparison to previous months, or to other districts, the question invariably asked is, Why? The 24 or 25 senior people who attend these meetings exert a powerful peer-group pressure on general superintendents whose safety performance is poor. It is an extreme embarassment for general superintendents to have to come back month after month and report safety performances falling behind those of other districts.

These meetings, incidentally, also fulfill the function of regulatory innovation. Each mining district, rather than the corporation as a whole, writes its own rule book. General superintendents who have introduced new rules or technologies

that have worked well in reducing accidents will score points by mentioning these successes in their reports. Other districts will then adopt these controls. An advantage of the combination of decentralised rule making and centralised performance assessment is that creative approaches to reducing accidents may be more likely to emerge than under the stultifying influence of a corporate book of rules.

Exxon

A different example of how a large corporation can monitor the compliance performance of its far-flung operations is provided by the oil giant, Exxon. Exxon has a Controller, a vice-president who has responsibility for monitoring compliance with all types of corporate rules - from environmental protection to accounting rules. Each region (e.g. Esso Europe) has a regional controller, and each subsidiary within the region has a controller. In addition to reporting directly to the chief executive of the subsidiary, the local controller has an important dotted-line reporting relationship through the regional controller up to the Controller's office in New York. Even though the local organisation is paying for its controller and the local auditing staff, the corporate Controller ultimately determines the size of the local controller's work force. Auditors are therefore not tied to the purse strings of those whom they are auditing.

The controller is given responsibility for operational as well as financial auditing. Audits serve the dual purpose of improving operational efficiency and detecting deviations from proper book-keeping procedures. Control activities, such as inventory, which were formerly independent of the auditing function, are now integrated into a total system of audit and control. Audits incorporate an assessment of whether standard operating procedures adequate to ensure compliance with company policies are in place, and whether these procedures are being consistently followed. An audit of a manufacturing facility includes, for example, an assessment of whether corporate industrial safety policies are being followed. Because of the range of skills which such operational audits demand, interdisciplinary teams which include engineers as well as financial auditors are used. The internal auditing function involves more than 400 people worldwide.

Responsibility for the accounting integrity side of the audit rests with the General Auditor who reports administratively to the Vice-President and Controller. However, the General Auditor can by-pass

the Controller and report directly to the audit committee of the board, which is composed entirely of outside directors.

Like U.S. Steel, Exxon therefore has centralised monitoring of compliance, albeit covering a more all-embracing range of areas of compliance under one controller function. Even though Exxon has much more centralised rule-making than U.S. Steel, with detailed manuals of standard operating procedures being issued by the Controller in New York, there is provision for local units to engage in principled dissent from the manuals. For example, deviations from corporate accounting principles are allowed, but must be approved "by the appropriate Regional Controller and Regional General Auditor in writing, and will be recorded in a central registry in the regional office, and at the affiliates' offices." (Exxon, 1973).

The controller function aims to create an organisation full of "antennas". It was set up in response to the shock to top management when it was discovered that bribery was happening on a massive scale in its Italian subsidiary during the 1970s. But like U.S. Steel, and like all companies with outstanding compliance systems, control is a line, not a staff, responsibility. The job of the Controller's staff is to monitor and ring alarm bells to top management when corporate policies are not being enforced by line management. In the words of the Controller: "Audit is not the control. Audit is the monitor of the control."

An underlying principle of the Exxon system is that no one is to have unaccountable power. Consider the question, "Who audits the auditors?" This problem is dealt with by peer review. The headquarters auditing group might audit the Asian Regional Auditing Group and the European Regional Group might audit the headquarters auditing group. Auditors are auditing other auditors all over the world.

In addition to formal audits, all subsidiaries have a kind of self-audit in the form of a triennial "business practice review." In this review, managers, after having refreshed their memories of the objectives of corporate ethics policies, assess all their current practices - bookkeeping, bidding, making gifts to customers, expense accounts, the lot - to root out any areas which leave open the possibility of abuse. It is a kind of corporate "cultural revolution," an attempt to keep alive among the masses the fervor to be watchful against unethical practices. Business practice reviews were introduced in 1976 in part as a way of dealing with

Exxon's morale problems from the Italian bribery disclosures. Exxon management wanted to make their employees believe in the honesty and integrity of the company. The business practice reviews achieved that goal. By involving middle and junior managers in the campaign to eliminate unethical practices, Exxon convinced its own people that it was serious about its new ethics policy. Some company units found that the reviews were so effective and so good for morale that they involved lower level employees such as salespeople, in the process. The Controller had never really intended that the reviews widely involve these lower levels; but he was happy enough with the result. Quite apart from the other favorable effects, he felt that the reviews had helped managers in the field to understand the reasons for many of the requirements imposed on them, and therefore made the task of the auditors easier. The reviews must also help keep the Controller's staff on its toes to ensure that a problem which should have been identified does not surface in a business practice review.

IBM

To ensure compliance with its corporate policies, indeed in all areas of business, IBM relies heavily on its so-called "contention system". All the contention system means is setting up a friendly adversariness between staff and line. If the general-counsel of a subsidiary objects to the subsidiary chief over a marketing practice perceived as contravening company policy, and if that objection is overruled, she must report this to division counsel. If the latter agrees with the local counsel, the objection is taken up with the division chief executive to whom the local chief answers. Should the division chief executive support the local chief while the division counsel supports the local counsel, the contention will move up to a higher level of the organisation. Ultimately, it might be decided in a discussion between the Chairman and the General-Counsel, in which the Chairman will have the final say. Such a formalised contention system between the line and staff reporting relationships increases the probability that problems will be flushed out into the open.

At the outset, we said that the contention system was friendly. Organisations cannot afford to undermine cooperation by fostering a war of all against all. So certain informal codes of fair play are followed. When a staff person feels compelled to blow the whistle on a line manager up through the staff channels, good form is to warn the line manager before the event. This gives the line manager two possible outs. Recognising that the staff person means

business, the line manager can back down. Or, line can itself report the problem up through staff channels. The latter protects the line manager from any accusation that he or she was trying to cover up problems from staff scrutiny.

IBM has a control function run by the Internal Audit group which monitors compliance with both financial and non-financial policies in a way similar to the Exxon Controller. As in Exxon, their role is to assist the control of top management over the total management system. Two hundred and sixty internal auditors check compliance with all corporate policies within each subunit on approximately a three year cycle.

IBM executives, like those at Exxon, argue that the costs of the control function are paid for by the savings it generates in rooting out inefficiency or catching employees who are ripping off the company. A pleasant irony of self-regulation is that programs to detect corporate crime also uncover crimes against the corportion by employees (Fisse and Braithwaite, 1983: 180). Overly costly controls are reduced or eliminated by challenging employees to identify controls which have proven cost-ineffective. The control function also pays its way through being vital to the corporation's system for monitoring performance. IBM is a corporation based on action plans, and individuals and subunits are evaluated according to comparisons between actual results and those which are projected in the action plan. An important efficiency rationale for the control function is, therefore, that it ensures that the performance indicated in the books (be it production, profits, or industrial accidents) reflects the reality. If you manage by commitment, control over the measurement of performance is essential. By ensuring that everyone's performance is measured by the same yardsticks, the control function minimises the loss of motivation which comes from feeling that others are exceeding their targets because they are using different counting rules.

Important among the action plans are those that result from the discovery of deficiencies in audits. A determinate period for the implementation of measures to rectify the deficiency will be set and at the end of the period there will be an audit of compliance with the remedial requirements. The IBM management system is based on the notion that "we don't want surprises". Each year the local controller sends up an "early warning system report" to the divisional controller and so on up to the corporate Controller. The early warning report is to identify any business control problem which may be emerging. It is a way of dealing with the

problem of the executive who says, "I would have reported it up, but first I wanted to be sure that something was wrong". Any problem which suddenly emerges in full-blown form will attract a reprimand of "How come I wasn't seeing that in the early warning report?".

We asked representatives from the environmental, health and safety management areas what they thought of the job which auditors did at ensuring compliance with environmental, health and safety policies. The responses were guardedly critical. Executives from specialist areas see the internal audits as broad brush and, at three year intervals, too infrequent for their specialised compliance purposes. Internal audits tend to ignore detail which is vital to assessing environmental, health and safety compliance (such as checking the calibration of equipment) and lack a sophisticated understanding of what constitutes reasonable levels of exposure to dangerous substances. Generalist auditors, in spite of any scientific training they might have, are seen as lacking the specialised training and experience to pick the real problems (which might have nothing to do with observance of the rules) that could cause an environmental or safety crisis.

On the other hand, there are important advantages in having non-financial compliance audits conducted together with financial audits. The whole point of the control function is to alert top management to control deficiencies. In contrast, normal environmental and health and safety management systems are not designed as vertical reporting systems right up to the top management suites. They are partly horizontal, partly vertical mixes of dotted and solid line reporting and or advisory relationships which have built into them various possibilities for communication blockages capable of preventing "bad news" from getting up the organisation. Hence, it would be undesirable to limit the Controller's role or the role of the Internal Audit Group to reporting up only financial violations unearthed in audits. Interdisciplinary auditors are capable of picking up many, if not most, gross deviations from prudent environmental, health and safety standards. To the extent that auditors do expose such deviations to the purview of top management, middle managers with the power to prevent the deviations will get busy doing so.

It may be that corporations can get the best of both worlds with a dual system which combines (a) the total performance assessment of an interdisciplinary control function with its stronger guarantees that the bad news will reach the top, and (b) the more frequent and

intensive specialised compliance audits by relevant technical experts with their stronger guarantees that the real problems will be identified. Further, when the former audit the latter there is a synergy unattainable under any other compliance structure. The specialists ensure that the real problems are identified and the control function ensures that these problems are communicated to top management and rectified to the satisfaction of top management. Both IBM and Exxon have such a dual system. The control function has by no means completely replaced environmental, occupational health and safety and other specialist staff.

COMMUNICATION OF COMPLIANCE PROBLEMS

It has already been suggested that a fundamental requirement of effective internal compliance systems is that there be provision to ensure that bad news gets to the top of the organisation. There are two reasons for this. First, when top management gets to know about a crime which achieves certain subunit goals, but which is not in the overall interests of the organisation, top management will stop the crime. Second, when top management is forced to know about activities which it would rather not know about, it will often be forced to "cover its backside" by putting a stop to it. Gross (1978: 203) has explained how criminogenic organisations frequently build in assurances that the taint of knowledge does not touch those at the top:

> A job of the lawyers is often to prevent such information from reaching the top officers so as to protect them from the taint of knowledge should the company later end up in court. One of the reasons former President Nixon got into such trouble was that those near him did not feel such solicitude but, from self-protective motives presumably, made sure he did know every detail of the illegal activities that were going on.

There are many reasons why bad news does not get to the top. Stone (1975: 190) points out that it would be no surprise if environmental problems were not dealt with by the board of a major public utility company which proudly told him that it had hired an environmental engineer: The touted environmentalist reported to the vice-president for public relations! More frequently, the problem is that people lower down have an interest in keeping the lid on their failures. Consider how a "cover-up" of bad news about the safety and efficacy of a pharmaceutical product can occur.

At first, perhaps, the laboratory scientists believe that their failure can be turned into success. Time is lost. Further investigation reveals that their miscalculation was even more extensive than they had imagined. The hierarchy will not be pleased. More time is wasted drafting memoranda which communicate that there is a problem, but in a gentle fashion so that the shock to middle management is not too severe. Middle managers who had waxed eloquent to their supervisors about the great breakthrough are reluctant to accept the sugar-coated bad news. They tell the scientists to "really check" their gloomy predictions. Once that is done, they must attempt to design corrective strategies. Perhaps the problem can be covered by modifying the contra-indications or the dosage level? Further delay. If the bad news must go up, it should be accompanied by optimistic action alternatives.

Finally persuaded that the situation is irretrievable, middle managers send up some of the adverse findings. But they want to dip their toes in the water on this. Accordingly, they first send up some unfavourable results which the middle managers earlier predicted could materialise and then gradually reveal more bad news for which they are not so well covered. If the shockwaves are too big, too sudden, they'll just have to go back and have another try at patching things up. The result is that busy top management get a fragmented picture which they never find time to put together. This picture plays down the problem and overstates the corrective measures being taken below. Consequently, they have little reason but to continue extolling the virtues of the product. Otherwise, the board might pull the plug on their financial backing, and the sales force might lose that faith in the product which is imperative for commercial success.

In addition, there is the more conspiratorial type of communication blockage orchestrated from above. Here, more senior managers intentionally rupture line reporting actively to prevent low-level employees from passing up their concern over illegalities. The classic illustration was U.S. the heavy electrical equipment price-fixing conspiracy of the late 1950s:

> Even when subordinates had sought to protest orders they considered questionable, they found themselves checked by the linear structure of authority, which effectively denied them any means by which to appeal. For example, one almost Kafkaesque ploy utilised to prevent an appeal by a subordinate was to have a person substantially above the level of his

> immediate superior ask him to engage in the questionable practice. The immediate superior would then be told not to supervise the activities of the subordinate in the given area. Thus, both the subordinate and the supervisor would be left in the dark regarding the level of authority from which the order had come, to whom an appeal might lie, and whether they would violate company policy by even discussing the matter between themselves. By in effect removing the subject employee from his normal organisational terrain, this stratagem effectively structured an information blockage into the corporate communication system. Interestingly, there are striking similarities between such an organisational pattern and the manner in which control over corporate slush funds (in the 1970s foreign bribery scandals) deliberately was given to low-level employees, whose activities then were carefully exempted from the supervision of their immediate superiors (Coffee, 1977: 1133).

The solution to this problem is a free route to the top. The lowly disillusioned scientist who can see that people could be dying while middle managers equivocate about what sort of memo will go up should be able to bypass line management and send the information to an internal ombudsman, answerable only to the chief executive, whose job it is to receive bad news. General Electric, Dow Chemical and American Airlines now all have such short-circuiting mechanisms to allow employees anonymously to get their message about a middle management cover-up to the top.

The internal ombudsman solution is simply a specific example of the general proposition that if there are two lines to the top, adverse information will get up much more quickly than if there is only one. For example, if an independent compliance group answering to top management periodically audits a laboratory, scientists in the laboratory have another channel up the organisation through the audit group. Naturally, the middle managers responsible for the laboratory would prefer that they, rather than the compliance group, give senior management the bad news.

The control function at Exxon and IBM is in part a systematic approach to sniffing out bad news and reporting it to top management. But there are also ways of creating *de facto* alternative channels up the organisation. Exxon have a requirement that employees who spot activities which cause them to suspect illegality must report these suspicions to the Law Department. Say a financial auditor notices in the course of his or her work a memo

which suggests a trade practices offense. In most companies, auditors would ignore such evidence because it is not their responsibility and because of the reasonable presumption that they are not expected to be experts in trade practices law. Exxon internal auditors, however, would be in hot water if they did not report their grounds for suspicion to the Law Department.

Once a violation is reported, there is an obligation on the part of the recipient of the report to send back a determination as to whether a violation has occurred, and if it has, what remedial or disciplinary action is to be taken. Thus, the junior auditor who reports an offense and hears nothing back about it knows that the report has been blocked somewhere. She must then report the unresolved allegation direct to the audit committee of the board in New York. At the time of the fieldwork, this free channel to the top has never been used by a junior auditor. However, the fact that it exists, and that everybody is reminded annually that it does, makes it less likely that it will have to be used. The most effective control system is one incorporating such strong situational incentives to compliance that it never has to be used.

Of course many communication problems are more mundane than the failure of top management to become aware of the slush funds which were being used to pay bribes at Exxon. A worker notices chemicals dripping from a pipe outside the plant and does not think or bother to report it to someone with responsibility for environmental matters. A design engineer notices a claim in an advertisement for a technical capacity of a company product which she knows it does not have, yet she does not report this to the advertising department. Getting the bad news to the right desk is not always easy in large organisations. But any organisation can do at least three things:

(a) Make sure that routine formal reporting relationships are designed well enough, and appropriately enough to the unique environment of the organisation, to ensure that most recurrent problems of non-compliance are reported to those with the power to correct them.

(b) Make sure there is a free route to the top, by-passing line reporting relationships, to reduce the likely success of conspiratorial blocking of bad news.

(c) Create a corporate culture with a climate of concern for compliance problems which are not an employee's own responsibility, an organisation "full of antennas". There are formal ways of fostering communication of problems which fall outside routine reporting relationships, from the Japanese ringi (Clark, 1979) to the free floating matrix management of many high-tech American companies (Kanter, 1983). But the fundamental solution is not formal, it lies in the corporate culture. Organisations must strive for a culture of compliance, a commitment to being alert to noticing and reporting how others, as well as oneself, can solve compliance problems.

TRAINING AND SUPERVISION FOR COMPLIANCE

It is not enough for top management to know when non-compliance is occurring and to then tell those with clearly defined responsibility for the problem to bring the company into compliance. Often the problems are complex and formal and systematic training is needed to ensure that all employees know _how_ to comply in their area of responsibility, and supervision is needed to ensure that the lessons of the training have been learnt.

Thus all legal, purchasing and marketing personnel may require training in trade practices law and related organisational policies. Industrial relations staff need training in labour relations and anti-discrimination law. All production people need occupational health and safety training. The mistake which many non-compliant organisations make is in communicating the relevant knowledge to middle management and then glibly assuming that they will pass it down.

The five coal mine safety leaders were all characterised by extraordinary measures to ensure that first line supervisors were training and supervising their workers. At U.S. Steel, for example, department heads are responsible for developing training plans which ensure that foremen provide all workers with training in a set of safe job procedures which are written by the foreman for the job of each employee in his care. Each foreman must make at least one individual contact each week with each employee under his supervision to consolidate this training. With inexperienced workers, these contacts are usually "tell-show" checks whereby the worker is asked to explain what should and should not be done and why the approved procedure is the safest one. Foremen are required to make at least two planned safety observations of each employee

each month. The safety observations are planned so that they cover systematically all job operations for which the employee has received instruction. In addition to the safety observations, which are planned and scheduled at the beginning of each week, foremen are expected to perform additional "impromptu observations" following chance recognition of unsafe practices. Whenever a foreman observes an unsafe condition or work method, whether in a planned or impromptu safety observation, he must correct it immediately and report the occurrence to higher management on a "supervisor's safety report." The foreman can tell whether a worker who deviates from a procedure or rule has been trained in it by looking at the employee's record. For all employees a record is maintained by their foreman, noting their safety history - basic training, safety contacts, planned safety observations, unsafe acts, violations, discipline, and injuries. When workers move from foreman to foreman, their records move with them, so a new foreman can discover at a glance what safety training a worker lacks for her new job.

In short, effectively self-regulating companies do not tell middle managers how to comply and assume they will tell the troops; they have training policies and programs to guarantee that training is happening and working down to the lowest reaches of the organisation. They audit compliance with compliance training programs as assiduously as they audit compliance itself.

WATCHING PRESSURES FOR NON-COMPLIANCE

Having covered the five basic principles for creating an effectively self-regulating organisation, consideration might be given to another even more basic principle. This is that public organisations must be concerned not to put employees under so much pressure to achieve the goals of the organisation that they cut corners with the law. The role of excessive performance pressures on middle managers in creating corporate crime has been frequently pointed to by the literature (Clinard, 1983; Cressey and Moore, 1980: 48). Corporate Crime in the Pharmaceutical Industry illustrated the problem thus:

> Take the situation of Riker, a pharmaceutical subsidiary of the 3M corporation. In order to foster innovation, 3M imposes on Riker a goal that each year 25 percent of gross sales should be of products introduced in the last five years. Now if Riker's research division were to have a long dry spell through no fault of its own, but because all of its compounds had turned

out to have toxic effects, the organisation would be under pressure to churn something out to meet the goal imposed by headquarters. Riker would not have to yield to this pressure. It could presumably go to 3M and explain the reasons for its run of bad luck. The fact that such goal requirements do put research directors under pressure was well illustrated by one American executive who explained that research directors often forestall criticism of long dry spells by spreading out discoveries - scheduling the programme so that something new is always on the horizon.

Sometimes the goal performance criterion which creates pressure for fraud/bias is not for the production of a certain number of winners but simply for completing a predetermined number of evaluations in a given year. One medical director told me that one of his staff had run 10 trials which showed a drug to be clear on a certain test, then fabricated data on the remaining 90 trials to show the same result. The fraud had been perpetrated by a scientist who was falling behind in his workload and who had an obligation to complete a certain number of evaluations for the year (Braithwaite, 1984: 94).

One might say that this is an inevitable problem for any organisation that is serious about setting its people performance goals. But there are differences in the degrees of seriousness of the problem. At one extreme are organisations which calculatedly set their managers goals that they know can only be achieved by breaking the law. Thus, the pharmaceutical chief executive may tell her regional medical director to do whatever he has to do to get a product approved for marketing in a Latin American country, when she knows this will mean paying a bribe. Likewise, the coal mining executive may tell his mine manager to cut costs when he knows this will mean cutting corners on safety.

The mentality of "Do what you have to do but don't tell me how you do it" is widespread in the private sector and perhaps not so uncommon in the public sector. Eliminating it is easy for managers who are prepared to set targets which are achievable in a responsible way. It is a question of top management attitudes. IBM is one example of a company which we found to have the approach to target setting which we have in mind. IBM representatives do have a sales quota to meet. There is what is called a "100 Percent Club" of representatives who have achieved 100 percent or more of their quota. A majority of representatives make the 100 Percent Club, so the quotas are achievable by ethical sales practices. IBM

in fact has a policy of ensuring that targets are attainable by legal means. Accordingly, quotas are adjusted downwards when times are bad.

As Clinard (1983: 91-102, 140-44) found, unreasonable pressure on middle managers comes from the top, and most top managers have a fairly clear idea of how hard they can squeeze without creating a criminogenic organisation. In the words of C.F. Luce, Chairman of Consolidated Edison: "The top manager has a duty not to push so hard that middle managers are pushed to unethical compromises." (Clinard, 1983: 142).

This "duty", however, takes us back to the fundamental problem of self-regulation. Public organisations have got to want to make themselves comply with the law sufficiently strongly to let this override other corporate goals. This sixth "principle" therefore really reduces to organisations being motivated to be effectively self-regulating. As I said earlier, I believe public organisations can be so motivated both from their internal deliberations as collective moral agents, but more importantly, from external pressures calculated to make effective self-regulation an attractive policy. The design of these external pressures is the topic for another paper.

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FREEDOM OF INFORMATION: A REMEDY FOR GOVERNMENT ILLEGALITY?

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When Australia's first Freedom of Information Act was introduced by the Federal government in 1982, "revealing illegalities in government decisions or practices" was not listed as one of the four key objectives underlying the new laws. Rather, the objectives of the FOI laws were presented as improving the quality of decision-making by reducing secrecy, providing information about government decisions and functions, increasing opportunities for public participation in decision-making, and allowing people to see and correct information about themselves which is held on government files.[1] Although FOI was not then being touted openly as either a vaccine against or an antidote for instances of government illegality, clearly some of the short-listed objectives of the new laws reflected an understanding that allowing public access to government documents would inevitably disclose some occasions where government illegalities had occurred.

Various forms of 'illegality' which may appear on government documents could be seen as falling within the class which could potentially be revealed under freedom of information. At the most serious end of the scale, manifestly unlawful conduct of some kind may be disclosed, or the documents could show that illegal practices had been followed in the handling of a particular matter. If an agency has breached certain statutory requirements in performing its functions, such illegalities might be the subject of an FOI disclosure. Instances of maladministration might also qualify as unlawful actions by bureaucrats, such as failing to make some required response on an issue within statutory time limits, or failing to consult where consultation is required by law.

The package of federal administrative review rights give rise to a further range of possible illegalities which FOI may reveal. Perhaps irrelevant considerations were taken into account in reaching a decision, or some power was exercised unreasonably, or a decision was unlawful for uncertainty.[2] Other possible instances of illegalities could include cases where a policy followed was itself unlawful,[3] or where a decision is unlawful simply by virtue of being a bad decision on the merits of the particular case.[4]

In theory, freedom of information has the capacity to reveal all of these various forms of illegalities as detailed or displayed in

agency documents. Bureaucratic concerns about FOI, given the possibility of multiple embarassing disclosures of illegality, impropriety or maladministration, can be readily appreciated. While overtly the arguments which some bureaucrats used very successfully to try to delay FOI were based on the impact of FOI in a Westminster model of government, as well as the issue of costs and resources, it seems reasonable to assume that a residual concern about the move to open government for many bureaucrats might have been that with the increase in public scrutiny of the administrative process would come increased review of decision-making, ongoing monitoring of performance, more vocal criticism of any instances of maladministration, and greater disclosure of government illegalities. [5]

It should not have been unexpected that senior bureaucrats were worried by the prospect of freedom of information laws looking sneakily over their shoulders as they prepared sensitive policy advice or deliberated on highly political issues. Such bureaucratic fears were undoubtedly based on a sound working knowledge of the political process - including as it does disgruntled members of the opposition looking for trouble, investigative journalists looking for an exposé, lobby groups of all shapes, sizes and varieties pushing for policies and decisions which serve their interests, public interest groups trying to re-arrange the political agenda, and academics waiting for the chance to sift through documents and construct worrisome critiques of agency performances.

It is possible that this over-simplified outline of the different points of view about FOI when it was first introduced distorts a more complex reality of bureaucratic and political attitudes to the new laws. While the concerns and roles I have suggested may not have been as universal or as clear-cut as proposed, it is probably fair to concede that FOI was greeted with excitement from some quarters outside the bureaucracy, and trepidation from some quarters within. Certainly there were some widespread assumptions on all sides about how the Act would operate in practice, about who would use it and why, and about what kinds of exciting documents would emerge from dusty files in closed office onto the front pages of the newspapers.

Even if only in such a black and white form, however, some understanding of the inital objectives of the laws, and some appreciation of the range of assumptions which created the political context for FOI, are both critical to any useful analysis of whether FOI has played an effective role in monitoring, exposing or reducing government illegalities.

Now that the Act has been operating for over three years, it should be possible to look back at the objectives and assumptions which

prevailed when FOI was introduced, and review any effects of FOI on instances of government illegalities.

The Public Interest Advocacy Centre (PIAC) was an early user of the FOI laws, making a considerable number of requests for access to documents on public interest issues relating to the Centre's work, and later representing a number of FOI applicants challenging denials of access through the appeals processes. The Centre has considerable experience in applying to see personal files for clients, and policy files on current political issues. The range of documents requested and agencies involved has given PIAC a wide range of FOI experiences on which to base comments about how the Act is operating, and attempt to review any impact of FOI on government illegality. [6]

It is useful to initially outline the ways in which freedom of information could affect instances of government illegality. First, freedom of information could be seen as a means of restraining illegality in the direct sense that documents disclosed under FOI might contain evidence of illegality, which can then be used to found a cause of action against the government. This could be called restraint by revelation of illegality.

The second way in which freedom of information might be seen as a control on government illegality is less direct, relating to the broader impact of freedom of information on particular administrative practices, rather than on specific illegalities in particular cases. In this sense freedom of information may impact on illegalities not because any particular instance of unlawful practice is disclosed, but because the whole process of disclosing documents has a feed-back effect on decision-makers. The supposed effect is to instill in bureaucrats a different approach to decision-making, encompassing more careful consideration of decisions, and a more reasoned application of policy, statutory or administrative discretions. In short, FOI may affect illegality through its general influence on bureaucrats to make decisions more carefully and deliberately, and to thereby avoid some of the instances of illegalities which might have otherwise occurred. This could be termed restraint by prevention of illegality.

Identifying the ways in which FOI might impact on the problem of government illegalities, however, does not overcome the more difficult problem of trying to assess what effect FOI may have had in this regard. While it is dangerous to generalise about FOI, given the considerable variations in the way different agencies deal with different requests, the Centre's experiences with FOI have provided some examples of both forms of restraint of illegality by FOI.

Restraint by Revelation - Personal Files

To look first at the more direct impact, one can readily come up with some cases where released documents have revealed clear illegalities. In the area of personal records, files released under freedom of information often reveal some unlawful, or at least legally challengeable decision made on an individual's case. In such situations, the illegality can be used as evidence, or as the basis for an argument that the person is entitled to a different decision on their case from the agency in question.

Indeed, it is in this area that FOI has been most successful, and has operated most efficiently. FOI has become an essential tool for the individual who is seeking some evidence that a decision in relation to their case was unlawful. The social security applicant seeking to challenge the Department's decision to refuse a pension, or the immigrant wanting to challenge a deportation order, can now read the file kept on their case by the relevant agency, or at least some of it, and examine whether the legislation or guidelines have been lawfully applied in their case.

The significance of FOI's impact in revealing personal files should not be underestimated. The vast bulk of FOI applications are from individuals wanting to see the files on their own cases. The Department of Social Security estimates that 97% of their freedom of information requests were from clients seeking information on income security matters.[7] Similarly high levels of requests for access to personal files are reported from the other agencies with large 'client' groups, which together form the small group of agencies who receive most of the FOI requests - Veterans' Affairs, Taxation and Immigration and Ethnic Affairs.[8]

While it is encouraging that FOI is playing such a significant role in disclosing illegalities on personal records, it must be noted that finding the illegality on the file is not always easy. Agencies do not release files with a big red star on the particular illegality or even on the various documents which might be put together and examined carefully to indicate some unlawful act. Indeed for many people who obtain their files under freedom of information, and look at them without the assistance of a community worker or lawyer, the files may prove unexpectedly difficult to decipher.

Rather, the task of examining the file has become specialized. If any illegalities are there to be found, then the file needs to be reviewed by someone with a clear understanding of administrative law principles, and a knowledge of when policy itself can be challenged, as well as an up to date knowledge of the particular agencies' internal guidelines. The task of examining a personal file is frequently one of sifting carefully through a very large number of pages, piecing together a number of comments, notations

or other items of evidence, and reviewing decisions against outside guidelines.

The issue of how comprehensive files are to the average applicant suggests some further problems in assessing how much of an impact FOI may have had by revealing illegalities. If most illegalities will only be spotted by lawyers or trained community workers, then presumably many illegalities are revealed, but not interpreted as such by the individuals concerned. The cases in which the illegality is taken further will be those where some problem was initially perceived in the way the agency handled the case, and specialist assistance was sought.

In many cases, of course, freedom of information is being initially used to obtain a personal file in a situation where an incorrect or unlawful decision is suspected, and the intention of seeking access was to provide evidence for a challenge to a decision. The Department of Social Security estimates that 45% of their FOI requests for income security files were from clients who were in dispute with the Department over their claim, and were seeking the information to prepare or present an appeal. [9]

FOI's role in disclosing illegalities on personal records is therefore most accurately characterised as a form of early discovery in cases where legal action is contemplated. FOI is, however, a more useful tool than discovery in that it can be used without initiating any legal action, and framed so as to seek access to all the documents on the relevant file. FOI can be a fishing expedition in a way that discovery cannot, an open offer to lawyers to search for any possible illegalities in the particular case, and then build a case on any which are revealed. Indeed, FOI can be an extremely useful tool for lawyers preparing most types of administrative law actions.[10]

An assessment of FOI's impact in revealing illegalities must also take into account the fact that disclosure of an illegality does not in itself suggest or provide a remedy. Rather, disclosure is only the first step towards more complex and drawn-out legal action to redress the particular unlawful act in question. For most individuals, an effective response to the discovery of an illegality in their case will require legal advice and assistance to select and pursue the appropriate remedy. Thus, in many cases an illegality disclosed by FOI to the individual concerned remains an illegality, with no further corrective action. FOI may reveal, but revelation in itself may be of limited value.

Restraint by Revelation - Policy Documents

Doubts about the impact of any revelation of illegality in personal files may not be as problematic in relation to policy documents. When FOI begins to open a window onto illegalities in policy

documents, the potentially broader nature of illegalities on policy documents may give their disclosure a wider political significance than would disclosing any error on a personal file.

A good example of policy documents revealing illegalities with a significant political impact was the release under FOI of documents relating to the so-called social security conspiracy case. In 1983, in the early days of FOI, sixteen cartons of such material were released to the Public Interest Advocacy Centre. That was when a more expansive view was being taken by agencies as to the acceptance of broadly worded requests. The documents revealed a number of government 'illegalities' which had occurred during the handling of the case, such as the cancellation of pensions without proper cause, and unreasonable delay in the determination of appeals. The documents provided valuable evidence for proceedings which were instituted for a number of the individuals concerned.[11]

Indeed, PIAC's experience has shown that freedom of information can uncover the odd breach of a statute even where access to the documents is denied. For example, we acted for Actors Equity and the Australian Consumers Association who in 1983 applied for access to financial statements lodged by commercial television stations with the Australian Broadcasting Tribunal (ABT). Access to those statements was denied, on the basis of their commercial nature, first by the ABT and then by the Administrative Appeals Tribunal.[12] Despite the refusal of access to the data, the release of an empty pro forma of the financial return form revealed that although the Act required licensees to submit profit and loss accounts and balance sheets "in respect of the service provided", the Tribunal was accepting consolidated balance sheets from parent companies. The Tribunal has now changed their reporting requirements - although still not disclosing any of the individual profit figures.

<u>Restraint by Prevention</u>

While it is possible to cite cases where illegalities on both personal and policy documents have been disclosed under FOI, it is considerably more difficult to examine the more indirect ways in which FOI may be operating as a preventative restraint on illegality, through the revision of administrative practices or decision-making processes to avoid illegalities taking place. The difficulties of collecting evidence in this regard are obvious - no agency is going to want to admit that its processes were a shambles before FOI, or that the fear of embarassing disclosures of unlawful practices led to their alteration.

While not suggesting that these agencies were engaging in any illegal practices prior to FOI, it is interesting to note that some agencies have pointed out improvements in their own administrative practices which have emerged as a result of freedom of information. In the 1984-85 Annual Report on Freedom of

Information, the Department of Social Security, for example, said that freedom of information had "encouraged officers to be more precise in documenting their work".[13] The Department of Immigration and Ethnic Affairs noted that freedom of information had improved their record keeping procedures and file maintenance, and perceived a "noticeable improvement in recording matters taken into account in decision making".[14]

Although most agencies were silent in reply to questions about the positive benefits freedom of information legislation had conferred, a number thought freedom of information encouraged the maintenance of accurate records, improved communications between clients and agencies, and even improved the quality of decision-making. Veterans' Affairs saw important benefits flowing from the Act in terms of their clients, saying that access to files had helped to resolve grievances that might have led to protracted correspondence, and made errors easier to rectify by focusing complaints on the areas of possible error.[15]

Although the list of agencies' perceived detriments of freedom of information is somewhat longer than this brief catalogue of benefits, their comments do suggest that freedom of information is having a significant effect in some departments - improving the documentation, the accuracy, and the communication surrounding particular decisions. More careful processing of decisions along these lines might, one could argue, lead to a reduction in the number of inadvertant illegalities which have crept into decisions through less systematic record-keeping or decision-making practices.

Limitations of FOI

We should also consider, however, the alternative possibility that FOI is not in fact having such a major impact on the practices of government and has not lived up to its early promise that it would be a consistent exposer of government errors, embarassments and illegalities. In the social security conspiracy case, for example, where some illegalities were revealed, by the time the documents were released the general nature of the illegalities was well known, and the documents only filled in the details. Perhaps it is not irrelevant that those documents were released shortly after the 1983 change of government, and related to an issue on which the incoming government had expressed strongly critical views.

How good is the track record of freedom of information so far in revealing illegalities in other policy areas? How consistently is freedom of information being used to reveal significant information on important political or legal issues? After the heady success of our 16 carton victory, we are concerned that most of our later requests have been less successful. We had to litigate to see any

documents held by the Ombudsman, and most of our later attempts to obtain policy documents which might be even slightly incriminating have met with a brick wall of exemptions or denials.

Some departments have even argued strongly against releasing documents containing policy options on the grounds that draft policies should not be disclosed since they might confuse, or falsely excite the interest group affected, who may not understand the difference between a draft and a final policy.[16] Such an approach to disclosure illustrates just how far some agencies have departed from the initial objective of the Act to involve the public in bureaucratic decision-making.

While it is difficult to generalise about trends in agencies' responses to requests for policy documents, the growing number of appeals to the AAT against decisions refusing access to policy documents does suggest that the spirit of disclosure which is supposed to underpin the operation of freedom of information is being quietly quelled. Of course, it is difficult to provide evidence for such suspicions, although the number of refusals which are withdrawn by departments on the doorstep of the AAT do indicate that the instinctive "refuse" reaction is alive and well in some agencies. More worrying are the cases where some relatively unimportant documents are provided in response to a request, with all the key documents, on the "hot" policy issues, exempted.

The blame for the reticence about disclosure of key policy documents cannot be laid solely at the feet of the bureaucrats, but also reflects the number and scope of exemptions from disclosure under the legislation. The scope of some exemptions is potentially so broad, with no "public interest" balancing test in favour of disclosure, that they must provide an irresistable temptation to some bureaucrats to opt for non-disclosure. The breadth of the exemptions covering business documents, or internal working documents, remains such that the categories would come readily to hand when agencies are determining whether to release documents. Other categories of exemption which cover a broad range of documents include documents covered by secrecy exemptions, documents containing material obtained in confidence, documents subject to legal professional privilege, and documents affecting law enforcement. The pernicious conclusive certificates still operate to protect the very very secret documents from any risk of disclosure, even by the AAT on review.

It could be argued that there are so many exemptions one of them must always fit, making it unnecessary to create a special exemption of "troublesome documents", or in our case "documents revealing an illegality". At the same time, cases are difficult to fight in the AAT without having seen the documents, and the AAT must be seen as following a generally conservative line in its review of FOI decisions. Indeed, in some cases the AAT's

interpretation of exemptions gives agencies carte blanche to refuse access with the most fleeting of considerations of whether denial of access is warranted for the particular documents. For example, the AAT's view of the exemption for documents where disclosure would affect Commonwealth-State relations seems unduly restrictive. The AAT appears to treat the States' objections to release as virtually conclusive evidence that release would in fact damage Commonwealth - State relations.[17]

Further doubt is thrown on the assumption that freedom of information can play a major role in disclosing significant government illegalities when we examine the way freedom of information has been used by journalists. For the first year or so of the Act's operation, one could have been forgiven for thinking that Jack Waterford was the only print journalist who knew it existed. Since then other journalists have started to feel out the parameters and usefulness of FOI, and one newspaper, the Age, has invested considerable resources in promoting and using freedom of information. [18]

In evidence to the Senate Standing Committee examining the operation of FOI legislation, the Age discussed its use of the Act, based on its 82 requests under the Commonwealth Act and hundreds under the Victorian Act. The paper trained its journalists to use FOI, co-published an FOI guide, and took a policy decision to contest decisions denying access to documents in the courts. [19]

The Age lists 23 'press disclosures' under the Commonwealth Act, and the list provides an interesting overview of the Act's potential and limitations for the investigative journalist. Ministers' travel allowances and spending on overseas trips appear to be popular freedom of information requests. Other stories fall into the category of embarassing disclosures - such as "Cabinet ignored advice before buying Australia II" or "Pre-columbian art collection tax fraud". Only a few, however, could really be put into the category of major stories which might reveal some unlawfulness in the government's actions - including one on consumer product safety legislation, one on welfare overpayments, dangerous chemicals, and Health Department investigations of doctors. On the basis of the list presented by the Age we need to re-think any earlier assumptions about freedom of information blazing new paths in investigative reporting on government illegalities. Rather, the experience of the Age seems to accord more closely with our own recent experience in requests for policy documents - marked by long delays and heavy reliance on exemptions. The press itself appears to be looking on FOI as a useful way to obtain background information, not as a way to break major news scandals of government illegalities.

Indeed, this view that FOI is only a very limited tool for those trying to uncover major government illegalities in the policy area

is supported by some common sense reasoning about the position the FOI decision-maker is in. Use the test of the reasonable bureaucrat. They might look at a request, find the document, realise what it reveals, "oh my god - an illegality", and promptly consider what exemptions might apply to it. The list of available exemptions is such that it is not usually too hard to find one that fits.

Of course, it is extremely difficult at this stage to come to fixed or final conclusions on the fundamental question of whether FOI has fulfilled its promise as the great exposer. The problems in drawing such conclusions are obvious - first, decisions on FOI requests are inherently hard to either assess or compare, since they are specific to the documents requested. A denial of a request for national security documents bears no relation to the denial of an employee's staff file. A second problem in trying to assess the operation of the Act is that it is still very early in the history of FOI in Australia. There are few Federal Court decisions, and bureaucrats may still be feeling the way with the limits of the Act in practice.

Even recognising these problems, however, we do need to question the assumption that FOI will ever play a major role in exposing government illegalities in the policy area, and in my view, it would be unwise to rely on it to do so. It is probably a clear sign that Jack Waterford has moved off FOI and into investigative journalism instead. Or perhaps whistle blowing will turn out to be the restraint on illegality that FOI was once hoped to be. In any case, FOI's effect as a force of restraint through relevation seems doubtful.

What of the more indirect ways in which FOI could impinge on government illegalities - through influencing changes in administrative practices? To what extent should we also question the assumption that FOI is in fact leading to better note-taking, better record-keeping or more reasoned decision-making? Or it is just that files are now being kept in a more sanitized way - suitable for publication. Perhaps reasons for decisions have now become better stated and more defendable, but the real issue to consider is whether the final decisions are any different. Going back to the reasonable bureaucrat test, we could ask what we would do under an FOI administrative rule, and the answer again seems obvious. We would sort information into separate categories - the "not very useful or interesting", information which would be recorded in the traditional way, the "information needing documentation or justification", which we would take pains to explain and protect on paper, and the "hot" information, which we positively encrypt, or no longer put on paper. All the choicest items for those searching for illegalities would be in the last category - perhaps now to be found in telephone calls, discussions, oral advice, written in pencil, in personal notes, or on those

little yellow stick-on and lift-off notes. Despite the lack of evidence, there is an argument to be made that the impact of FOI may well be not to reduce illegalities, but rather to make them almost impossible to detect, to pinpoint or to evidence.

New Barriers : Increased Charges

If we conclude that FOI over the last three years has not functioned as a very significant restraint on government illegality, we should also have no illusions about whether FOI will develop any more effective monitoring role over the next few years. In 1986 the Hawke government, a proponent of freedom of information in its early days in office,[20] significantly undermined the future operation and impact of FOI by increasing FOI charges to levels that border on prohibitive for many potential applicants.[21]

While the charges do not apply to those wanting to see their income maintenance files, they do apply to those wanting to see other personal files, such as their Immigration or Tax file, and most importantly, they do apply to requests for access to policy documents.

Applicants for documents under FOI are now required to pay an initial $30.00 'application fee', a $40.00 fee to apply for an internal review of a decision, and a $200.00 fee to apply for an AAT review of a decision. Such 'application' charges are only part of the costs the unsuspecting applicant could end up paying - with a $15.00 an hour charge for searching for or retrieving documents, and a new $20.00 an hour charge for deciding whether they should be disclosed.

The time involved in retrieving documents or in reviewing them to decide whether they are exempt may be substantial. In particular the open-ended charge for "decision time" leaves applicants completely uncertain as to what they might have to pay. An applicant may well find themselves paying some hundreds of dollars only to be told that the documents they want to see are exempt. Only if they are willing to then pay the additional $240.00 for an internal review and an AAT appeal can most applicants pursue their claims beyond Departmental refusals.

Although the government intended to remove the public interest ground for remission of charges, the Senate amended the Bill to provide for public interest grounds for applicants to seek remission of both the initial application fee and charges. The grounds for remission of application fees generally mirror those for remission of other charges, but the discretion to remit application fees is framed slightly more narrowly, and as a result, is being interpreted far more restrictively by agencies.[23] How far the new remission of charges provisions will work in practice to re-assert the public's rights of access remains to be seen, but the

initial cost disincentive and uncertainty about whether charges will be remitted will undoubtedly deter many potential applicants.[24]

The impact of these new costs on the operation of freedom of information is likely to be dramatic. The new charges will effectively undercut the initial scope of the Act in creating a general right for citizens to see government documents, and instead affirm only the rights of the more affluent citizen, the salaried journalist, or the commercial user. The charges will probably ensure that the Australian pattern of FOI use will follow the United States pattern, where business groups are the largest category of users of FOI.[25]

It has been argued that the costs of FOI to the government are increasing and that a user-pays philosophy is necessary if FOI is to survive the cost-cutting approach of 1980s. The estimated costs of administering the FOI Act fell from $16.5 million in 1984-85 to $14 million in 1985-86, but it can be argued that these costs are calculated in an inflated way by use of a 60% overheads figure on salaries.[26] Yet the government hopes to raise only $4 million from the new charges, and the new charges were brought in before the Senate Committee examining the issue in some detail had even completed its report.[27]

The combination of potentially high charges, with no guarantee of even seeing any documents, and agencies who may be even more willing under the new charges regime to deny access and then see if they are taken to the AAT, adds up to a very bleak future for FOI. Business use will undoubtedly continue, on a paying basis, and free access for the poor to their income maintenance files will be maintained. But for the average citizen in between, the costs of FOI may mean that in the future FOI will be used less often, and refusals will not be as frequently challenged. A year or two from now, FOI may effectively lack even any limited capacity it has had to date to restrain or to disclose improper or unlawful government practices.

Conclusions

The concerns which this paper has discussed about how effective FOI can be as a restraint on government illegality should prompt demands for improvement in the operation and costs of FOI. At the same time, however, we also need to engage in greater examination of alternative mechanisms for monitoring, controlling and reducing illegalities. Perhaps the administrative review skeptics had some validity to their arguments, and as well as trying to make existing administrative review procedures work more effectively, we should also be increasing our focus on administrative processes.[28] The solution to the illegality problem may in the long run be more effectively located in staff training, performance reviews,

standardisation of internal procedures, clarification of policy guidelines and their application to cases, increased internal review and evaluation of decision-making, and improved working conditions, than it is in freedom of information. In an administrative situation where fewer of the bungles are recorded on paper, where those that are on paper are well protected by a wall of exemptions, and where prohibitive costs of access now operate, we should not rely on FOI as the primary means of revealing or restraining government illegalities.

FOOTNOTES

1 Australia, Attorney-General's Department, Freedom of Information Act 1982 Annual Report 1982-83, Canberra, AGPS, 1983, p.xi.

2 Administrative Decisions (Judicial Review) Act 1977, s.5.

3 Re Drake and Minister for Immigration and Ethnic Affairs (No.2) (1979) 2 A.L.D. 634 at 640-641.

4 Administrative Appeals Tribunal Act 1975, s.25.

5 Bayne, P., Freedom of Information, Sydney, Law Book Co., 1984, pp.13-18; see also McMillan, J., "Freedom of Information : An Analysis of Arguments about Official Secrecy and Proposals by the Federal Government to Enact a Freedom of Information Bill", (1981) 57 Current Affairs Bulletin 4.

6 For further information about PIAC's involvement in freedom of information matters, see PIAC : The First Five Years, Sydney, PIAC, forthcoming.

7 Australia, Attorney-General's Department, Freedom of Information Act 1982 Annual Report 1984-85, Canberra, AGPS, 1985, p.335.

8 Ibid, p.29.

9 Ibid, p.335.

10 Griffiths, J., "Strategies in Administrative Law Litigation - Recent Development", Unpublished Paper, 1987.

11 Cashman, P., "The Ombudsman - Another View", 12 Canberra Bulletin of Public Administration, 4 Summer 1985, pp.228-239.

12 Re Actors Equity Association of Australia and the Australian Broadcasting Tribunal (No.2) 7 A.L.D. 584.

13 Freedom of Information Act 1982 Annual Report 1984-85, op. cit., p.335.

14 Ibid, p.343.

15 Ibid, p.136.

16 Re Hounslow and Department of Immigration and Ethnic Affairs, 7 A.L.N. 362.

17 Re Angel and Department of Arts Heritage and Environment, 9 A.L.D. 113; Re State of Queensland and Australian National Parks and Wildlife Service and Australians for Animals (party joined), AAT No. N85/335, August 1986.

18 See The Age, Submission to the Senate Standing Committee on Constitutional and Legal Affairs, Reference : The Operation and Administration of the Freedom of Information Legislation, 1986.

19 Senate Standing Committee on Constitutional and Legal Affairs, Reference : The Operation and Administration of the Freedom of Information Legislation, 1986, Hansard Report of Evidence, 27 June 1986, pp.182-301, proof copy.

20 The Freedom of Information Act 1982 Annual Report 1982-83, op. cit., for example, refers to the Hawke government's commitment to broadening citizens rights under FOI and implementing the principles of open government, pp.xiii-xiv.

21 Freedom of Information Laws Amendment Act 1986, ss.13, 24, 26.

22 Ibid, s.24.

23 The Attorney-General's Department has issued a memorandum to agencies on the application of the new charges, Memorandum No.84, 1986.

24 The United States experience with arbitrary application of fee waivers for FOI requests on public interest grounds suggests that strong guidelines are necessary to protect free access to public interest users such as the media, non-profit community groups and researchers. O'Hanlon, Nancyanne, "Fee or Free : Public Interest and the Freedom of Information Act", 1 Government Information Quarterly, 4, pp.365-378.

25 "Use of the FOIA", Freedom of Information Centre Report No.457, 1982, and "FOIA : What's a Trade Secret?", Freedom of Information Centre Report No.393, 1978, School of Journalism, University of Missouri at Columbia.

26 See Freedom of Information Laws Amendment Bill 1986, Explanatory Memorandum, p.2.

27 See Public Interest Advocacy Centre, Welfare Rights Centre, Inter-agency Migration Centre and Australian Consumers' Association, Submission to Senate Standing Committee on Constitutional and Legal Affairs, Reference : The Operation and Administration of the Freedom of Information Legislation, 1986.

28 Jinks, B., "The New Administrative Law : Some Assumptions and Questions", XLI, Australian Journal of Public Administration, 3, September 1982, pp.209-218.

INVESTIGATIVE JOURNALISM AND GOVERNMENT ILLEGALITY

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I have a rag bag of ideas to put before you - all premised, I suppose, on the idea that sunlight is the best disinfectant, and that fear of exposure in the press, if that fear has any basis, acts as some sort of check on corruption becoming institutionalised. In some systems, (it is Queensland which comes to mind) where either other public accountability mechanisms do not exist, or, if they do, enjoy neither indicia of effectiveness nor public confidence, the role of the media can be even more significant.

Can be, but often is not. The media, after all, is often very much a part of a cosy establishment, and disclosure is not necessarily its bread and butter. And the system of journalism has its own corruptions as well. Just as in 'Yes Minister' it was noted that departments tend to be nothing more than lobbyists for the interests with which the department has to deal, journalists have had the same tendency. There are honourable exceptions, of course, but it is a remarkable fact that so few police reporters write critically of their subject, just as few defence writers do, or few industrial or financial writers do. In return they are fed a steady diet of material quite saleable in its own right, but rarely of a nature which allows the grand picture to be drawn by the discerning reader.

Moreover, the publication of analytical and critical material is not necessarily the commercially prudent thing for a proprietor - especially in this day and age when a number of the more significant proprietors have a wide range of interests outside journalism - capable of being affected if certain people get too upset. I must confess that while I have some slight reservations about some of the mosaic-drawing by some of the Fairfax journalists engaged in what is said to be the great Fairfax plot against the Labor Party, I think the weakest argument used by those who claim a Fairfax conspiracy is the argument that since the Australian and the Telegraph are not writing on the subjects in question, there is something suspicious about the fact that Fairfax newspapers do. My suspicions go in the exact opposite direction.

Again, investigative journalism is very expensive, not only in wages and other resources, but in legal fees and expenses - though one might note that there are in the end few libel writs. The laws of contempt and defamation are a substantial inhibition. And at the end of the day, there is not a great deal of circulation in it. Believe it or not, the impulse which spurs much of the more investigative and critical material is not commercial self-interest as such so much as some vague concept, often naive, whether on the part of journalists or their proprietors of public interest. But therein lie some of the dangers.

Naivity itself is one of the dangers. Some of the people most besotted with ideas about the potential of investigative journalism, spurred on by the idea that they might uncover the great Watergate of St Bob Woodward or St Carl Bernstein actually believe that there is a massive conspiracy out there. The view is not a left-wing one, though many of the practitioners of the trade might think themselves left-wing; it is a populist one of an order not much higher than a rigid belief that the Jews are running the world, or that the Council for Foreign Relations is.

This is not to say that there is not, within Australia, a massive problem of organised crime, or a massive and institutional problem in sectors of the criminal justice system - particularly in the police forces of New South Wales and Queensland.

Even on the government illegality front, one can think of a number of instances of government action which was plainly illegal, and, at least by some people's estimation, morally wrong, but which does not normally figure in any discussion of organised crime.

The best example which comes to mind was the action of the Northern Territory Government in attempting to gazette large slabs of the Northern Territory as part of the Darwin, Katherine, Tennant Creek and Alice Springs town areas - with the plain intention of depriving Aborigines of their right to make land claims. Indeed, one could characterise much of that government's activities in relation to Aboriginal land claims as manifesting a plain intention to frustrate the law. Sitting here, we might agree that this is wrong and nasty - but we could also be characterising it as a part of lawlessness. For myself, I regard problems of this order as being more prevalent, and more disturbing than the stories of the odd policeman or official copping a bribe.

We characterise one as criminal, but we do not always have a characterisation for the other.

Journalism does have a major role to play in disclosing and in dealing with problems of illegality in government, but in talking about this, I do not want to give you the impression that I regard systematic corruption or lawbreaking by public officials as among the most major of Australia's problems. There is certainly plenty of corruption, and there is certainly more than a little lawbreaking of a wider sort, but there are probably only a few areas of public administration where such illegality is institutionalised, or systematic; suffered and endured but not tackled by the various public defence mechanisms. No doubt there are exceptions - police and prison administrations in New South Wales and Queensland are supposed to be two - and maybe if I had been able to spend longer here I would know of more. That they exist at all anywhere is I suppose serious enough. But I put my caveat in right from the start because if there is anything bedevilling much of the argument and romance of investigative journalism it is the notion that there is an organised conspiracy lurking behind every corner, waiting only for the new Woodward or Bernstein to find it out.

I think I could say that over my journalistic career, I have had as much opportunity to examine the way various government administrations, and sectors of administrations do things as anyone else. I have certainly seen a lot of incompetence, a little personal dishonesty, many hundreds of decisions taken, important and unimportant, which I think are wrong. But it has been only relatively rarely that I have come out of any such examination thinking that the system in question was fundamentally corrupt, or was consciously perpetrating breaches of the law. In some cases, of course, the system in question has shown itself so ill-suited to the problem at hand, or the officials charged with doing their duty so ill-equipped to perform it that one is naturally led to ask for fundamental change. Much, much more often than not, however it is regularity one sees, not corruption. People of levels of integrity well within the normal (and generally legal) range with degrees of energy and competence again well within the normal range have been doing their job routinely, without any big conspiracy in mind. An act of maladministration is not hard to find, but it is much more likely to be an evidence of a human frailty than of a systematic breakdown of law and order.

I am sorry to have to hammer this point, but it is, I think necessary. I do believe that those journalists who devote time and energy to stories, who focus not only on day to day reportage but also on long term analysis and criticism, who go beyond the bland press statements and official reports, who ask questions that almost everyone would rather not have asked and so on - all the things we like to think we are doing - are doing a better job than those who merely recycle the official handouts and wait for

crumbs and rewards from the official dispensers of journalistic favours. But if those who do it think that there is a Watergate behind every stuff-up, a Walkley award for every lifting of the veil, then they are kidding themselves. Yet it is precisely when one has invested most time and energy, has spent most of one's master's resources, that one is under most pressure to show some results.

One hears so much, positive and negative, about investigative journalism, most on a premise that it is some sort of new thing, perhaps invented by Bob Woodward and Carl Bernstein, that you will forgive me, I hope, if I express some doubts about what on earth it is, or at least, what there is about it which distinguishes it from ordinary journalism.

There probably are some differences in the popular mind. For starters, we think of investigative journalism as involving more time, more research, more use of the information-gathering tricks of the trade than ordinary day to day journalism. Most journalists work for daily newspapers or for daily news or views broadcast programs, and the focus of their editors and producers, naturally, tends to be very much of tonight or tomorrow's product rather than on some long term project which, necessarily is going to chew up wages, involve other costs as well, and often, not have a clear end in view. To my mind it is a rather dangerous thing to dismiss day to day journalism as not being investigative, or as being pedestrian and unquestioning - for more stories, and often, more stories of long term significance, are broken by journalists who could not possibly focus more than a day or two ahead than by any number of Insight teams, special reporters or whatever. Much of what they write, including news breaking disclosure pieces, does not involve special research, or jigsaw puzzling, though it certainly can and often does.

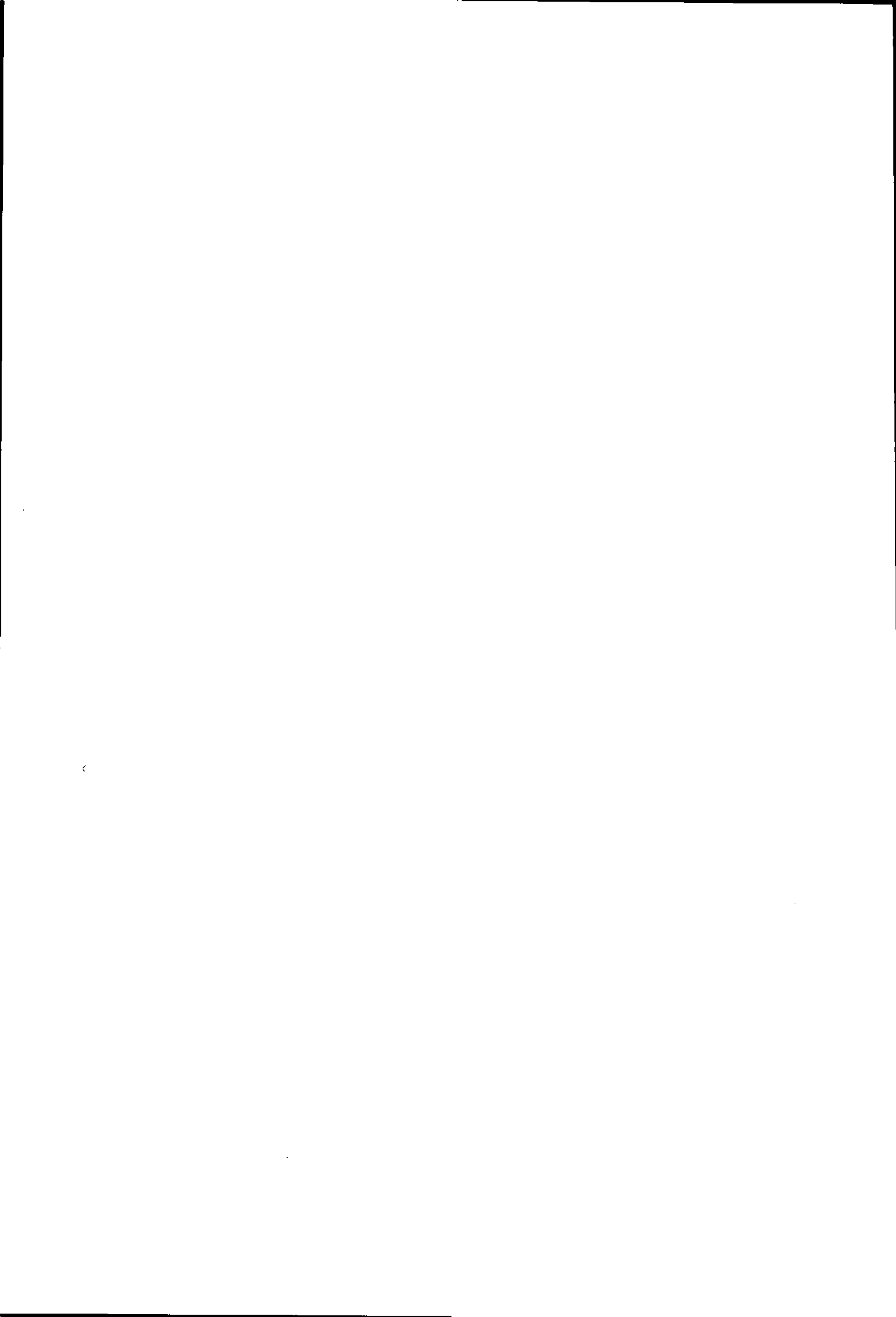
The second thing that people think of is focus - and, I suppose, particularly a focus on wrongdoing - whether government corruption, hypocrisy or duplicity, organised crime, systematic fraud or whatever. It is stories in this area that we think of when we talk of investigative journalism; a piece, no matter how well researched, on bonsai is not normally characterised as investigative. The old Izzy Stone definition of news - that 'news is something that someone does not want you to print; everything else is advertising' is particularly apt. By such a definition, at least 95 per cent of the contents of most newspapers are advertising.

And, particularly from the critics of some of the supposedly new techniques, there is also the image of the political focus. Much of it might be characterised as 'left-liberal'; proceeding upon the assumption that the system, in theory, is fine enough, but that there are a few rotten apples in the barrel who are making a

meal of things, abusing their privileges, failing to permit others to exercise their rights and so on. The exposure and punishment of such abuses is seen as an essential part of the system itself.

Others, however, see more fundamental problems in a particular situation, asking not, merely, whether things are working as they ought to be, but whether a system in which some abuses appear to be institutionalised is worth having at all.

There is no doubt that journalism, and public exposure, has a role to play in attaching issues of illegality in government. But, as I hope I have made plain, it is only one of many roles, and not necessarily one which will be done well. Indeed, I worry that investing people with titles such as of 'investigative journalist' is more on the problem side of the equation than the solution side.



WHISTLEBLOWING

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If I report that a neighbour or even my relative is defrauding the Social Security Department I will be regarded as a model citizen.

If I observe a colleague selling the Government's or the corporation's secrets, I probably have a duty to report that knowledge to the law enforcement authorities.

If I inform the police of some criminal activity that I witnessed, I may even be paid money from public funds in return for demonstrating loyalty to the State.

But if, by contrast, I am a Daniel Ellsberg who reports how the public was misled over the Vietnam War, ... or a Clive Ponting who claims that the Government has mislead Parliament and the community over the Belgrano affair, ... or a Stanley Adams who exposes my employer's illegal price-fixing methods, ... or a Phillip Arantz, a Karen Silkwood, a Tony Mayhew, a Frank Serpico, or a Don Witherford, I may, variously, be publicly ridiculed, referred for psychiatric treatment, sacked and, very likely, prosecuted.

The distinction between the loyal citizen who reports fraud, illegality or mismanagement, and the whistleblower who publicly highlights the same iniquity, is for most purposes a simple one. The loyal citizen is one who demonstrates a loyalty to those institutions, whether governmental or corporate, which personify the State. Citizenship of that kind is encouraged: the State and other institutions have designed their laws and employment practices to protect those who assist it. The genuine whistleblower is one who believes as a matter of conscience that loyalty to organisations or institutions must be subordinate to loyalty to society or the State itself. Often the whistleblower will, whether intentionally or by circumstance, ultimately accept public responsibility for disclosing private information. Usually too the whistleblower is not protected by the law, or institutional practices, but instead faces persecution and prosecution.

One of the main reasons why whistleblowing is classified as a crime and as disloyal conduct is that our State is essentially corporatist in ideology. It is run by governments - elected governments and private governments - which demand of all employees that their first loyalty be to the organisation itself. Dissent is

permitted, within the organisation but not against the organisation. It is a condition which Ralph Nader has called the 'new serfdom':

> The large organisation is lord and manor, and most of its employees have been desensitized much as were mediaeval peasants who never knew they were serfs. It is true that often the immediate physical deprivations are far fewer, but the price of this fragile shield has been the dulling of the senses and perceptions of new perils and pressures of a far more embracing consequence.[1]

It is as well to note at the outset that the concept of whistle-blowing does not usually include in its scope every person who publicly speaks out against the organisation of which he or she is a member. Many instances occur in which people leak or trade information that is simply inaccurate, or who betray an institution for reasons of private gain or in a spirit of nothing more than malevolence. Joseph McCarthy, for example, claimed that he was a whistleblower, eradicating communists and other subversives from the executive government. It is admittedly difficult to construct a definition of "whistleblower" that adequately distinguishes one class from the other. The difficulty is eased slightly if we first identify the purpose for which any definition is to be made: usually this is done with a view to identifying a class of whistleblowers on whom the law might appropriately confer some protection and remedies. The form which that legal protection might take is discussed later in this paper.

Legal protection is appropriate at any rate only if it is first established that whistleblowing is civically responsible and defensible. Two main lines of justification are usually advanced.

In the first place it is pointed out that many large organisations in our society harbour illegal, hazardous or similarly notorious practices that would excite public concern, and that these practices would simply go undetected or unrestrained but for whistleblowing. Some particular and general instances:

- Ralph Nader's interest in the design defects of the Corvair came first from a General Motors engineer;

- In Australia the Colour Television Affair ultimately brought down two ministers, in part because of the determination of a Customs Officer to pursue the breach of law involved;

- In Canberra, allegations of poor management and over-spending on legal aid funds were disclosed by a community representative on the ACT Legal Aid Commission, Mr Tom Brennan;

- In New South Wales allegations concerning the Humphries case, which led to a Royal Commission and ultimately the dismissal of a Chief Magistrate, were known to a number of magistrates and Public Service Board employees five or six years before these matters were officially addressed;

- Police officers will often be the only ones to know if their colleagues are corrupt;

- Company chemists will usually be the first to know if drugs manufactured by the company contain hazardous properties;

- Public servants will often be the only ones who will ever know if their colleagues or ministers are lying or breaking the law.

- Speaking generally, almost any crime committed by or within an organisation, almost any hazard perpetrated by a manufacturer, a nuclear facility, or a polluter, will be known first, and often known only, by those within the organisation.

As to this line of justification it must be said that it does little more than establish a broader context in which to assess the ethics of whistleblowing. It does not provide a particularly viable basis for the legal protection of whistleblowers; it is hard to imagine that Parliament would legislate for protection, on the assumption that Parliament itself is superintending a system that is so irrational or uncontrollable that its salvation lies in decisions made unilaterally by unelected and unrepresentative individuals to swim against the current.

The second line of justification has more bearing on the question of legal protection. Here it is argued that our system should be civilised enough to protect acts of conscience that are expressed in the exposure of illegal or improper practices. In accommodating that behaviour, we enable individuals to make an ethical choice, to place their responsibility or obligations to society generally above their obligations to an employing organisation. To demand otherwise of people may be to require their complicity in activities which they abhor.

This principle is not of course a novel one. Its high-water mark is often recognised as the Nuremburg dictum, that individuals have a conscientious duty to defy inhumane laws and practices. There are also some more immediate precedents. A good example is the Ponting case, resolved recently in the United Kingdom.[2] Clive Ponting was prosecuted under s.2 of the Official Secrets Act for providing to a member of Parliament information which cast doubt on the accuracy of statements made to Parliament by a minister concerning the sinking of the Argentinian ship, the General Belgrano. Mr Ponting's defence relied in part on the terms of s.2, which provides that it is not an offence where a person communicates information to 'a person to whom it is in the interests of the State his duty to communicate it'. The issue arising then was whether unauthorised disclosure to a member of Parliament was in the interests of the State. Ultimately the trial judge directed the jury in accordance with the arguments of the prosecution, namely that the interests of the State meant the policies of the Government. Seemingly, if this direction had been accepted by the jury, conviction was inevitable, since the policy of the Government was clearly against unilateral and unauthorised disclosure by civil servants to parliamentarians. Ponting's acquittal by the jury perhaps indicates that on the yardstick of 'judgment by peers' the public perceived the interests of the State differently, and most importantly were willing to tolerate individual acts of conscience and courage.

In other ways too, whistleblowing which is directed at the public disclosure and restraint of Executive illegality runs in tandem with other basic principles of our legal system. Nowadays, for example, we regard it as axiomatic that the Executive cannot suspend the law or dispense with its application to executive activities. Likewise, officials who break the law, even under orders, can be personally liable for that breach. A recent and clear declaration of those fundamental principles was made by some justices of the High Court in A v. Hayden.[3] In that case the High Court refused to restrain the Commonwealth from handing to the Victorian law enforcement authorities the names of the ASIS officers who participated in the events at the Sheraton Hotel in Melbourne. The Chief Justice, Sir Harry Gibbs, declared that 'It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer'.[4] The same point was made forcefully also by Mr Justice Mason: 'For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.'[5]

There are some limited ways in which our laws at present protect individuals who blow the whistle on their colleagues. An individual

who complains to the Sex Discrimination Commissioner about harassment by colleagues is protected by the Sex Discrimination Act 1984 against any intimidation or victimisation (s.117). Equally, it is clear that the Freedom of Information Act can be used to expose an internal broil about mismanagement or illegality. Such an example is Re Corbett and the Australian Federal Police,[6] in which a former Department of Health investigator in the Medifraud area used the FOI Act to expose a row that occurred between Health and the AFP over alleged lax prosecution of Medifraud malefactors.

These points cannot, however, mask the fact that in one important respect our legal framework is decidedly inhospitable to whistle-blowing: namely, our laws are so numerous that the discretionary power of the State to squash any dissident is immense. In particular, where whistleblowing is concerned, an official response can usually be selected which avoids the need to confront the central issue of whether the unlawful act of public disclosure was excuseble or justifiable in any way. Accordingly, it is rare that a whistleblower is charged directly under the official secrets legislation with unlawful disclosure of information. Daniel Ellsberg and Don Witherford were prosecuted instead for unlawful possession of government documents. Some whistleblowers, like Mr Toomer, are simply isolated in their workplace by being deprived of any work or being transferred to some distant outpost. Others, like Phillip Arantz, are referred immediately for psychiatric treatment. Parliamentary privilege too can be used by ministers as a cloak to engage in a direct personal attack upon a whistleblower.

It is interesting, by contrast, that in one of the few instances where a whistleblower was prosecuted directly for unlawful disclosure - the Ponting case - judgment was given that the activity was not contrary to the interests of the State.

In that legal climate, whistleblowers can be protected effectively only if we have laws and practices that are designed specifically to protect those who engage in acts of conscience. Though it is beyond the scope of this address to examine that issue in depth, it is important to acknowledge that the question of legal protection is both a difficult and a sensitive issue. At the outset it is necessary to recognise that there are some interests other than those of the whistleblower that undoubtedly demand protection. A distinction must be drawn, for example, between 'genuine whistle-blowers' and those who are simply malevolent or mischievous. Equally, it could probably be stated as a general rule that individuals who have a grievance against their employer should first raise the matter internally before taking any other action. That point is of particular importance to a system of government such as we have, where ministers who are ultimately responsible to Parliament and the public can expect

both a high degree of loyalty from their employees and forewarning of disputes and grievances.

Protection of whistleblowers will only be effective if the protection comes in a variety of forms. In the first place, there is much that professional societies can do, variously by incorporating recognition of acts of conscience in their professional codes of ethics, by undertaking an active role in negotiating and conciliating disputes arising between whistleblowers and their employers, and perhaps even by establishing superannuation schemes to provide financial assistance for employees who are summarily dismissed for blowing the whistle. Parliamentary committees too have a unique opportunity to furnish a forum and provide protection for those who are driven to a public forum when other attempts to restrain or check illegality have been ignored. An entirely different form of protection that has received considerable attention recently in the United States is the enactment of whistleblower protection legislation.[7] An early precedent was the Civil Service Reform Act of 1978,[8] which protects public sector employees against reprisal for disclosing information which the employee reasonably believes evidences a violation of the law, mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety. In addition, the Act designates certain officers to whom disclosures can be made (such as the Special Counsel of the Merit Systems Protection Board); it is not obligatory for any disclosure to be made to one of these officers, but additional protection is available where the disclosure is so made.

In the event that whistleblower protection legislation is considered, a number of important issues need to be addressed.[9] Some examples:

- What range of persons and activities are to be protected: Private as well as public sector whistleblowers? Unlawful disclosure to the media? Whistleblowing occurring internally within an organisation? Testimony given to a parliamentary or other inquiry? A refusal by an employee to undertake some action in accordance with directions? Pre-emptive action taken by an employer against a prospective whistleblower?

- Is there any sequence of steps that a whistleblower must first follow to obtain protection: Complaint first to a particular officer? Within the employee's own agency? To some other agency?

- In what circumstances does protection apply: Only if the person discloses accurate information? Is protection confined to disclosures of any or all of complaints on

matters such as illegality, mismanagement, negligence, or perceived or prospective dangers? Does protection still apply when the employee discloses national security information, trade secrets, or matters of personal privacy?

- Fourthly, what type of remedy or protection is available for a whistleblower: Damages? Compensation for legal expenses? Reinstatement to a former position or office? Protection of superannuation rights? Injunctive orders to restrain victimisation of a person?

- Should an entirely different and less structured approach to protection be adopted - for example, designating a Special Commissioner with a variety of optional functions, such as the receipt of whistle-blowing disclosures, the investigation of matters received, or the investigation of complaints of victimization against whistleblowers?

Apart from those questions of legal form and nicety, the issue ultimately to be addressed is a more singular one. Does employment in an organisation entail, as a necessary consequence, that a person can be compelled by the employer to accept complicity in all activities which that employer has decided to pursue or conceal? Already it would seem, there is a substantial number of people who believe that employment should not inevitably require a person to abandon private ethical standards, and to trade one set of responsibilities for another.

NOTES

1. Nader, R. 'An Anatomy of Whistleblowing', in Nader R., Petkas, P. and Blackwell K (eds) (1972) *Whistleblowing*, Grossman (Bantam), New York, 3.

2. See, e.g., G. Drewry, 'The Ponting Case - Leaking in the Public Interest', (1985) *Public Law* 203; A.I.L. Campbell, 'Ponting and Privilege', (1985) *Public Law* 212.

3. *A* v. *Hayden (No. 2)* (1984) 59 ALJR 6.

4. *Id*, p. 7.

5. *Id*., pp. 111-12.

6. 30 May 1986, decision of Administrative Appeals Tribunal; to be published in *Administrative Law Service*, Butterworths.

7. See, e.g. R.G. Vaughn, 'Statutory Protection of Whistleblowers in the Federal Executive Branch', (1982) *University of Illinois Law Review* 615-667.

8. 5 U.S.C. No. 2303 (b) (8) (Supp. IV 1980).

9. This summary is, in the main, condensed from an article that examines this issue: J. Wood, 'Whistleblower Protection Legislation', (1984) 10 *Rupert Public Interest Movement Journal* 26.

ADMINISTRATIVE LAW

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Many of the things that I would like to say about the relevance of Administrative Law to the control of unlawful behaviour by governments can be illustrated by a case study. I shall refer to a particular case which we have been through over the last three years, and which still stretches ahead of us as we seek to stop two departments from carrying on unlawful activity. You probably have heard the notorious Sir Humphrey Appleby referred to already, but this case makes him look like a dynamo compared to the Departments of Immigration and Social Security.

A Case History

The basic issue in the case relates to Assurances of Support. These are undertakings that need to be entered into by the relatives of older migrants who are coming out to settle in Australia, in most instances, but would not become residentially eligible for age pension for ten years. Therefore, in order to ensure that these older migrants do not become a 'burden on the State', their children, or other relatives, are required to sign assurances, which assure the Government that the living expenses of these people will be met. If these costs are not met, and as a result the elderly migrants have to call on government assistance - particularly in the form of Special Benefit from the Department of Social Security - then the assuror will undertake to repay any benefit paid to the migrant.

These assurances have been stated to be valid for ten years from the date of the migrant's entry to Australia.

It often becomes impossible, or exceedingly difficult, for assurors to comply with these assurances. After all, when one enters into such an assurance, one has to make a prediction about one's financial situation for the next ten years at least. The assuror may lose his or her job, quite unexpectedly, and therefore be unable to meet the relative's living expenses. Inter-generational conflict may force the family to split up; the parents may no longer be able to stay with the assuror, as originally intended. When these parents go out and live on their own, extra expenses are incurred.

So for a number of reasons, often entirely understandable and 'justifiable', people are sometimes unable to comply with the assurances. The Immigration Department has issued thousands of these each year - it does not know exactly how many, or to whom, but it has - and the Department of Social Security has recovered tens or perhaps hundreds of thousands of dollars for a number of years in Special Benefits which have been paid out to people whose assuror has been unable to continue to support them.

In 1977, the Government was advised by its legal advisers that, for constitutional reasons, these assurances were probably invalid once the elderly migrants had become 'absorbed' into the community. Similar legal advice was subsequently given to the Government on several occasions.

However, one adviser indicated that as no objections had been raised, then perhaps there was no need to take any remedial action. And so they did not. The Department of Social Security continued therefore to maintain that the assurances were valid for ten years, and continued to recover large sums of money from recipients.

The one change which the Government did make in the light of this legal advice was not to pursue any particular recovery action right through the door of the court. They pursued assurors right up to the door of the court, but the Government folded at that time because presumably - I hope I am not being too cynical - the Government decided it would be better not to elicit a court decision on the legal validity of the assurances. But of course, the overwhelming majority of assurors had acquiesced and agreed to pay, or to start paying as best they could, long before a court hearing became imminent.

We at the Welfare Rights Centre became aware of this situation in 1982, our first year of existence, and we have been working on it ever since. We have pursued it with the two departments and with the relevant ministers, in person. We sought acknowledgment by them of the legal position as described by their own advisers. We sought notification of those individuals who had been affected in the past by assurances, and who in some cases had repaid money in response to demands which were unlawful. We sought reimbursement of money wrongfully recovered. And we sought notice to all people who are presently on assurances to tell them that the assurance is valid not for ten years, but only up to the time at which the migrants become absorbed into the community.

In particular, we sought formal and public acknowledgment that acquisition of citizenship constitutes absorption into the community. As one can now become a citizen after two years, this would mean that many assurances could become invalid after two years rather than ten.

The Government has not agreed to any of the types of notification which we requested. I might mention, incidentally, one very interesting decision which we relied upon. It was a decision of Mr Justice Wolff in the High Court of England which held that the Department of Health and Social Security there, was required to undertake a publicity campaign to inform people throughout England that they were entitled to money which they had been wrongly denied.

The judge in fact held that general publicity was not sufficient, and that the Department would have to go through many thousands of files to identify the people who were entitled to the money, and then to tell them. We were able to rely on that judgment only briefly because it was overturned by the Court of Appeal, which was a great shame. But the basic principle, I think, is still important.

The Welfare Rights Centre has had extensive dealings with the two departments, indeed at one stage we acted as a messenger between them. It does seem to me that with the considerable degree of preferential funding from the Commonwealth Government that the Australian Capital Territory gets, there must be a simpler way of getting from the Department of Social Security in Woden to the Immigration Department in Belconnen than to go via the Welfare Rights Centre in Sydney - yet that was in fact what happened. Of course you can understand the delicate, and somewhat cryptological task that we were engaged in, if you bear in mind that we were trying to interpret to one department what another department in fact wanted us to say. But it was quite remarkable to me, as someone not particularly naive about public service ways, how little co-ordination there was between those two departments. Some of it, I think, was to some extent deliberate procrastination, but some of it was really just quite lamentable lack of consultation between them.

We then went through a multi-stage process of gradual strategic withdrawal by the departments concerned. Their first step was to reject any general changes of the kind that we had sought but to concede some cases that we brought to them involving future recoveries, where the Department of Social Security had threatened that they would recover money, but had not yet acted. The Department desisted from pursuing those cases.

The second step was to amend the basic legislation, so that for assurances entered into after the amendment, citizenship now is clearly the legal terminating point. But that did not affect the situation for past assurances, of which there are still many thousands.

After another six months, during which the Welfare Rights Centre raised the general issue in the media and pursued a number of individual cases the Department of Social Security decided to

'write off', as they say, money paid to the migrant after he or she had become a citizen. In other words the Department did not actually concede that the assurance was invalid, but said it it would 'write off', as an exercise of discretion, the money which it claimed to be owing. The Government did not say 'you do not owe it anymore', which was the correct legal position. It said 'you owe it, but we will write it off'. As many of you know, 'writing off' does not mean 'writing off' in the sense of forgetting about it forever, it just means that the Government will not try to recover it at the moment but may come back for it later.

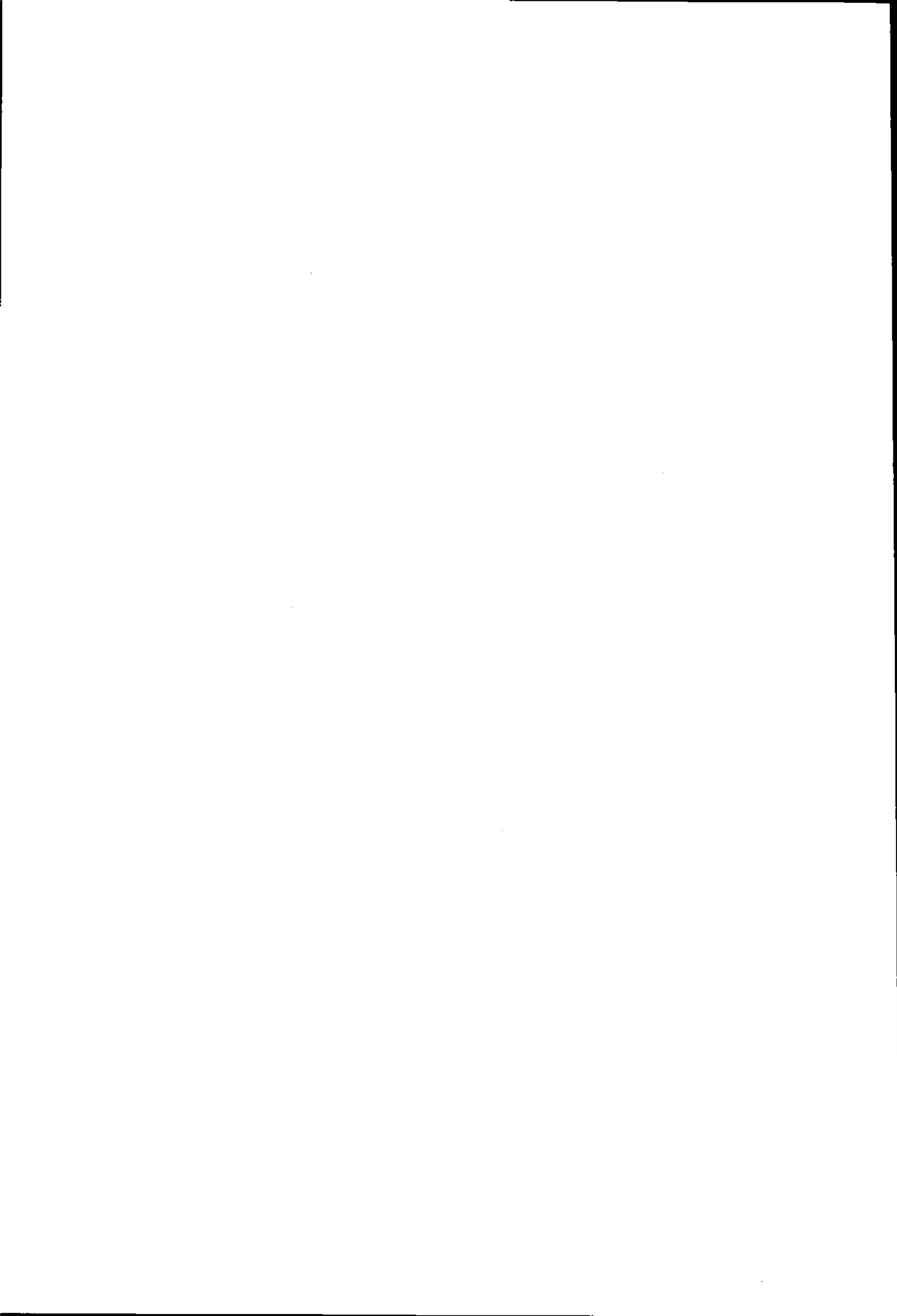
The Department decided to 'write off' in such situations and sent a telex to that effect to the State headquarters of each Department of Social Security in each State. At least in New South Wales, the State headquarters decided that there was no need to send that telex on to the regional offices, which is where all cases are handled, because all 'write offs' have to come through State headquarters. Therefore if an application for 'write off' came in, State headquarters would know and would say 'yes, well that has got quite a chance of success, because the telex tells us so'. But they did not tell the regional offices, and therefore many regional offices never even thought of applying for a 'write off' and continued to recover money because they had not been notified.

The Department's next step was to notify the regional offices - a task which, at least in New South Wales, took six months. This was done, however, in a very convoluted way which we predicted the regional offices would not understand. We have just had confirmation of this prediction because the State headquarters in New South Wales, to their credit, have conducted a survey of their regional offices to find out how the amended procedures for dealing with assurances of support are working. It found that in the vast majority of cases, the procedures are not being properly applied.

The Department did change the assurance of support form eventually, so that although the assurance is clearly stated at the top of the form as lasting for ten years, there is now a rather cryptic indication that if one becomes a citizen, the assurance may no longer be binding. But the Department still has not given guidelines for what (other than citizenship) may constitute absorption. This is a very important matter. Moreover, they have not notified those people who are still on assurances that in a sense the 'rules of the game' have been changed. And they have not notified those people from whom money has wrongfully been recovered in the past. Hundreds of people, at least, would fall into this category, and in some cases as much as $20,000 or more might have been recovered wrongfully.

The Department has continued to concede individual cases brought by the Welfare Rights Centre. At the risk of sounding too cynical, this has the effect that, because it is in our individual client's interest to accept the concession we cannot pursue a case to get a judicial decision which the Department would then have to apply in all cases. They have just recently conceded the first case that we took where we were seeking repayment of money. We are now trying to persuade them to indicate in their Manuals that money recovered on invalid assurances must be repaid. Of course, without these terms going in their Manuals, Department of Social Security regional offices will not apply that concession in future situations.

This sorry saga has been going on for several years now, and it is still not rectified. Unlawful behaviour still occurs and wrongfully recovered money has still not been repaid. I would readily admit that we probably have not been sufficiently ingenious in some of the measures that we could have used. But one of the problems in this whole area is that for an organisation with very limited resources, it can take quite a dauntingly long time to bring the slow juggernaut of the law to bear on the situation. It also requires great persistence in the face of inertia, and often bloody-mindedness on the part of senior departmental staff.



CIVIL LITIGATION : PROSPECTS AND PROBLEMS

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1 Introduction

In this paper I examine the role of civil litigation in the area of public sector illegality, with particular reference to some of the cases handled by the Public Interest Advocacy Centre in Sydney.

The first part of the paper describes the history and objects of the Public Interest Advocacy Centre. The second part of the paper refers to a number of cases involving 'public sector' conduct in which the Centre has been involved over the past five years. These cases involve legal challenges arising out of:

(a) actions by government;

(b) actions by government departments and statutory authorities, at both a state and federal level;

(c) the failure of regulatory agencies;

and

(d) refusal to supply documents pursuant to requests made under freedom of information legislation.

The third part of the paper briefly reviews some of the impediments to civil litigation. These relate to:

(a) the substantive law concerning the liability in tort of government authorities;

(b) the requirements of standing which need to be satisfied before legal proceedings can be brought;

(c) the problem of costs in civil litigation;

(d) current restrictions on fee arrangements with particular reference to contingent fees;

(e) limitations on the availability of legal aid for the purpose of civil proceedings;

(f) the unavailability of collective or group remedies in civil litigation;

(g) the traditional focus on remedial rather than preventive measures;

(h) the difficulties of test case litigation;

and

(i) restrictive laws governing the time period during which legal proceedings may be brought.

The final section of the paper examines some alternatives to civil litigation which may be cheaper, more expeditious and frequently more effective.

2 What is the Public Interest Advocacy Centre?

PIAC was established in 1982 with funding from the Law Foundation of New South Wales and with the support of the New South Wales Legal Aid Commission. It arose out of a well-recognised need for some form of 'public interest' advocacy body to undertake test case and other major litigation in areas which had hitherto been poorly served by the private legal profession and traditional legal aid organisations.

Since its inception, PIAC has been involved in a wide range of cases and projects which have mainly focused on:

(a) government accountability and accessibility;

(b) corporate responsibility;

(c) communications and the use of new technology;

(d) the rights of disadvantaged groups and children;

(e) civil rights;

(f) professional practices;

and

(g) reform of the law and administrative practices.

It is obviously outside the scope of the present paper to review the work of the Centre in detail. However, some of the cases and projects in which the Centre has been involved which are of direct relevance to the topic of the present seminar are discussed below.

The Centre currently has a full-time staff of 16, approximately half of whom are lawyers. Work at the Centre is divided between litigation and project and law reform work. The Centre is independent of government and although it operates in conjunction with members of the private profession and those working in legal aid organisations, it in fact represents a hybrid model for the delivery of legal services.

Projects or cases may be undertaken where:

(1) an important public interest is at stake;

(2) the interests of the public or certain sections of the public are in need or protection, advancement or representation in a court, tribunal or inquiry, or in connection with some other decision-making process;

(3) the individuals and/or groups are disadvantaged in that they do not have sufficient financial or other resources, or access to such resources, adequately to protect, advance or represent their interests;

(4) the Centre is the most appropriate body to provide the assistance sought;

(5) the issues of law or policy provide opportunities for innovation or change;

(6) there is a clearly definable and achievable goal that justifies the utilisation of the Centre's resources;

and

(7) the goal is to affect some change in an area of law, administrative practice or policy.

3 Some Cases Involving Public Sector Conduct

Participants at this seminar will be well aware of the increasing impact of government decision-making and the increased scope for administrative and judicial review of public sector decision-making. Since its inception, PIAC has been actively involved in seeking to review government decisions in a variety of areas and in seeking compensation and damages on behalf of persons adversely effected by government decisions.

3.1 Actions by Governments

Soon after the Centre commenced operation it mounted a constitutional challenge in the High Court, seeking mandamus and declarations, pursuant to Section 41 of the Australian Constitution and Section 39B of the Electoral Act, 1918 (C'wth). The case arose out of the decision to close the electoral rolls following the snap announcement by the then Liberal Government of a federal election. The case was undertaken because the announcement of an early federal election and the premature closure of the electoral rolls had the effect of disenfranchising approximatey 500,000 people. The case was however lost. Those who had been unable to get on to the electoral rolls before the closure were not able to cast a vote in the election. One member of the High Court, Mr Justice Murphy, was prepared to give effect to the constitutional right to vote which was alleged to have been undermined by the closure of the rolls (see Sipka and Others v. Pearson and Others, (1983) 45 A.L.R. 1).

At around the same time as the electoral rolls case, the Centre received instructions to commence proceedings in the New South Wales Supreme Court for a declaration that the various county councils were exceeding their statutory powers in seeking retrospectively to increase electricity charges in New South Wales. However, the matter did not proceed to hearing because the State Government intervened and the powers of the county councils were subsequently curbed by legislation.

3.2 Actions by Government Departments and Statutory Authorities

There have been a number of areas in which actions by government departments or statutory authorities have given rise to legal proceedings for damages instituted by the Centre on behalf of its clients. Some time ago the Centre commenced to act for a large number of Greek persons whose invalid pensions had been cancelled, en masse, at the time of the alleged and so-called Greek social security conspiracy in 1978 and 1979. Upon receipt of instructions, the Centre commenced proceedings in the High Court, in the Supreme Court, in the Federal Court and in the Administrative Appeals Tribunal in connection with this matter. The major proceedings, which were in the Supreme and High Courts, sought damages from the Commonwealth, the former Director of Social Security, and others arising out of the cancellation of pensions. One of the cases in the High Court involved a representative action on behalf of 135 persons whose pensions were simultaneously cancelled whilst they were in Greece. Proceedings in the AAT sought:

(a) access to documents pursuant to the Freedom of Information Act;

and

(b) the restoration of pensions to those individuals who had not had them restored.

Additional proceedings were undertaken in the Federal Court against the Commonwealth Ombudsman, pursuant to the provisions of the Freedom of Information Act and the Administrative Decisions (Judicial Review) Act and arose out of his refusal to provide the complainants with a copy of the draft report which he had forwarded to the Department of Social Security for comment in March 1983.

As participants at this seminar will be aware, this matter ultimately gave rise to a Commission of Inquiry, presided over by Dame Roma Mitchell, and various other internal investigations and inquiries, together with a formal investigation conducted by the Commonwealth Ombudsman. The Commonwealth Ombudsman in his report ultimately recommended that compensation be paid to various persons affected by the actions of the Department of Social Security. Most of the legal proceedings have been in abeyance given the announcement by the Government to pay compensation to those affected following the recommendations of the Roma Mitchell inquiry and the various other inquiries undertaken. Compensation payments are now being made, almost ten years after the date on which the pensions and benefits were originally cancelled. It is estimated that compensation payments may total $10 million and that the total cost to the Commonwealth of this whole exercise, including both the criminal and the civil proceedings, may well exceed $100 million.

It is perhaps of interest to note that in the course of its work in the product liability area, the Centre has had frequent occasion to examine the possible civil liability of government agencies and instrumentalities with various statutory responsibilities in connection with the manufacture, distribution and importation of pharmaceutical products and medical devices. In this respect it is of some interest to refer to the recent 'Opren' litigation in the United Kingdom. The litigation is against the multi-national pharmaceutical company 'Lilly' and various other co-defendants including the representatives of various regulatory agencies and health authorities. The proceedings against the public sector parties arise out of their alleged failure to regulate the drug 'Opren' which is now proved to have caused widespread injuries and harm. It was marketed as an anti-arthritis product and the English proceedings have arisen out of personal injuries suffered by approximately 1,000 English consumers of the drug. The statement of claim in the proceedings, which is about 200 pages long, raises a number of quite interesting and novel questions about the liability of government agencies where consumers suffer personal injuries as a consequence of using pharmaceutical products which are subject to regulatory scrutiny.

3.3 The Failure of Regulatory Agencies

PIAC has been involved in a number of cases which have arisen out of delays or inactivity on the part of various state and federal regulatory authorities. In the Greek social security litigation, as noted above, proceedings were ultimately brought against the Commonwealth Ombudsman arising out of the delays in his investigation and his refusal to supply the complainants with a copy of a draft report which had been forwarded to the Department of Social Security for comment.

In New South Wales, Supreme Court proceedings were instituted against the Investigating Committee set up under the Medical Practitioners Act in connection with the investigation of complaints made against various doctors involved in the administration of 'deep sleep therapy', and the operation of the now somewhat infamous Chelmsford Private Hospital in Sydney. The proceedings against the doctors which were up until recently being conducted before the Disciplinary Tribunal established under the New South Wales Medical Practitioners Act have recently been stopped following a successful appeal by the doctors to the New South Wales Court of Appeal and following the refusal of the High Court to grant special leave for an appeal against the decision of the Court of Appeal. It is unfortunately beyond the scope of the present paper to examine these proceedings in detail. However, the whole history of the Chelmsford litigation highlights a number of problems in seeking to bring proceedings against medical practitioners and bodies with statutory responsibility for investigating complaints against the doctors.

In 1984 the Centre became actively involved in the investigation of the operation of an asbestos mine at Baryulgil, in northern New South Wales, which was previously owned and operated by a subsidiary of the James Hardie group of companies. The investigation arose out of relatively widespread illness and premature death amongst former workers at the mine, who were predominantly Aboriginal. The matter became the subject of an inquiry by the House of Representatives Standing Committee on Aboriginal Affairs. Both the litigation which has arisen out of the operation of the mine, and the proceedings of the inquiry, focused on the role of various New South Wales statutory and other bodies including the Mines Inspectorate, the Division of Occupational Health, the Department of Education, the State Pollution Control Commission, and the local shire council. It has been established that the workers at the mine were exposed to asbestos dust levels which were considerably in excess of the prescribed statutory maximum levels and that various statutory authorities had failed adequately to investigate or to monitor the operations of the mine.

After reviewing the role of the various statutory authorities the Standing Committee on Aboriginal Affairs concluded that there were serious shortcomings in the way in which the Mines Inspectorate administered occupational health and safety controls. Prior notification of inspections was given and those who inspected the mine rarely, if ever, saw it operating in its normal condition. The Inspectorate also failed to conduct sufficiently frequent inspections and even where it did discover excessive dust levels, it failed to exercise any of its statutory powers to improve the hazardous working conditions. Reliance was placed on the good faith of the company in complying with various recommendations which were rarely followed up. Vigorous enforcement action was never contemplated and an adequate program of dust control was not implemented. The State Pollution Control Commission similarly failed to prevent workers at the mine being exposed to dangerous asbestos dust levels.

The Baryulgil saga illustrates not only the well documented failure of some regulatory authorities to properly discharge their statutory responsibilities but also highlights formidable problems to be overcome by those, like the injured Aboriginal workers, who seek legal redress.

3.4 Exposing Government Decision Making to Public Scrutiny

PIAC has been active in its efforts to expose government decision making to public scrutiny through its use of the Freedom of Information Act. In some areas, for example in relation to the abovementioned Greek social security litigation and in the product liability area, FOI has been utilised in conjunction with civil litigation. The strengths and weaknesses of FOI in exposing government illegality are discussed in the paper presented by Kate Harrison at this seminar and thus I need not consider it in further detail.

4 Impediments to Civil Litigation

Notwithstanding its major successes in a number of areas, the work undertaken by PIAC over the past five years has clearly illustrated the limitations of reliance on civil litigation as a remedy against public sector illegality. The courts are not always the most appropriate forum in which to seek redress. Moreover, those who wish to resort to litigation in their pursuit of remedies against either corporate or public sector wrongdoers will have to overcome a number of formidable barriers. I refer to a number of these below.

In the final section of the paper I examine a number of alternatives to civil litigation which may prove to be less expensive and more expeditious, if not more fruitful.

4.1 The Substantive Law

Errors, negligence and/or other forms of illegality by public bodies can, in certain circumstances, give individuals who have suffered damage a right to bring civil proceedings against such bodies. Legislation provides that in proceedings against the government the proceedings and rights of the parties shall, as near as possible, be the same as in an ordinary action between individuals. (See Claims Against the Government and Crown Suits Act, 1912 (N.S.W. Section 64 of the Judiciary Act, 1903 (C'wth) provides that in any suit to which the Commonwealth or a state is a party, the rights of the parties shall as nearly as possible be the same as in a suit between individuals. See generally, Aronson and Whitmore Public Torts and Contracts, 1982).

However, in proceedings against public authorities it is necessary to consider the distinction between 'misfeasance' and 'nonfeasance'. In other words, the distinction between doing an act carelessly and carelessly failing to do an act. Also, it is necessary to consider whether the public body was in breach of a statutory duty or merely failing to act on the basis of discretion and in the light of policy considerations. It is beyond the scope of the present paper to consider in detail the liability in negligence of public authorities. However, it should not be assumed that the courts will readily impose liability on public bodies in connection with every instance of seemingly negligent or unlawful conduct.

Apart from the question of possibly liability for negligence or breach of statutory duty, there may be circumstances in which the public body or person occupying public office will be liable on the grounds of 'misfeasance in public office'. (See generally: Galy, 'Civil Liability of Public Authorities', 136 New Law Journal 495 (May 1986); Tomlinson and Clayton, 'Damages From Public Authorities: Misfeasance in a Public Office', 130 Solicitors' Journal 363 (May 1986); Baker, 'Maladministration and the Law of Torts' 10 Adelaide Law Review 207 (December, 1985); Schuck, Suing Government: Citizen Remedies for Official Wrongs, Yale University Press, 1983).

4.2 Restrictive Laws on Standing

Assuming that there is a good cause of action against a public authority it is necessary to consider who may bring proceedings. There are of course a number of different remedies which may be sought against public authorities. In many respects, the standing criteria adopted in a number of statutes vary from those requirements of the common law. Under the general law a person who wishes to bring proceedings will normally be required to have a 'special interest'. In order to establish a special interest

the prospective litigant must establish that it is likely that he or she will gain some advantage, other than the mere satisfaction of righting a wrong, upholding a principle or winning a contest, if the action succeeds. Australian courts have not been prepared to liberalise rights of access to the courts (see Onus v. Alcoa of Australia Limited (1981) 149 CLR 272 and Australian Conservation Foundation Inc. v. Commonwealth (1980) 146 CLR 493). Where the person seeking to bring the proceedings does not have the requisite degree of standing an application may be made to the Attorney-General for his permission to bring the proceedings. However it will often be the case that the Attorney-General will not be prepared to consent to proceedings being brought against a government of which he is a member.

The restrictive rules in relation to standing have been the subject of investigation by the Australian Law Reform Commission and in a recent report the Commission recommended that the standing rules should be reformed (see Report No. 27, Australian Law Reform Commission, 'Standing in a Public Interest Litigation'). In simplified terms, the Law Reform Commission recommended that any person should have standing to initiate public interest litigation unless the court finds that, in instituting the proceedings, he or she is 'merely meddling'. Other commentators have recommended that any person should be able to bring proceedings without qualification.

4.3 The Problem of Costs

The problem of costs inevitably arises in any litigation. Not only will the plaintiff have to have some mechanism for paying his or her lawyer's fees but he or she will also run the risk of being ordered to pay the other side's costs in the event that the action is unsuccessful. This will frequently act as a significant deterrent to both meritorious and unmeritorious litigation. Although courts have a discretion in relation to costs it is normally the case that the unsuccessful party is ordered to pay the successful party's costs. Some statutory protection is provided in New South Wales where the person is assisted by the Legal Aid Commission. However, this protection is not available under other state legal aid legislation or in proceedings in which legal assistance is provided by the Australian Legal Aid Office.

4.4 Restrictions on Fee Arrangements

A litigant seeking redress who is not eligible for legal aid will often be unable to afford the cost of conducting the proceedings or unwilling to run the risk of having to pay the other side's costs in the event that the action is unsuccessful. The problems involved in seeking privately to finance civil litigation are

exacerbated by restrictions on fee arrangements. In Australia, it is not permissible to enter into some forms of contingent arrangement with a lawyer. Lawyers are not able to act for people on the basis that they will charge a percentage of the amount recovered if the action is successful but nothing if the action is unsuccessful. This method of privately financing litigation is extremely common in the United States but is unlawful and unethical in Australian jurisdictions. It is however now possible, in a number of jurisdictions in Australia, to instruct a lawyer on the basis that normal fees will be charged (i.e. not as a percentage of the amount recovered) in the event that the action is successful but no fees will be charged if the action is unsuccessful.

4.5 Legal Aid

Although legal aid has become much more generally available for the purpose of civil proceedings in Australian jurisdictions in recent years, the means tests currently applied by legal aid authorities in determining eligibility for legal aid are somewhat restrictive. Accordingly, many people may not qualify for legal aid but may still be unable to afford the high cost of civil litigation.

4.6 The Lack of Group Action Procedures

It will often be the case that government illegality, like corporate illegality, will effect large numbers of people. At present there is no generally available procedure for seeking damages in group or class action litigation in most Australian jurisdictions. There are however signs of change. There have been recent changes to the law in both Victoria and South Australia so as to permit a representative action to be brought where a number of people are seeking damages against a particular defendant. Although the court rules in other jurisdictions do not expressly preclude representative actions being brought for damages, historically the courts have denied the right of persons to use the representative action procedure in damages actions. This approach has been followed in anti-discrimination legislation in Australia which permits representative actions to be brought except where damages are claimed. The question of whether or not there should be an extended form of representative action or class action procedure in federal proceedings is currently being examined by the Australian Law Reform Commission and a report will be completed in the near future.

4.7 Limitations of Test Case Litigation

Important legal questions concerning government illegality and the civil liability of public authorities will often be sought to be determined in test case litigation. Particular problems may

arise where the outcome of the case may turn on idiosyncratic features of the case. The object of the litigation may also be frustrated where, for personal reasons, the test case plaintiff wishes to settle or abandon the proceedings. Obviously a lawyer's primary obligation is to his or her individual client and thus the client's instructions must be adhered to. However, important legal questions in issue may not be determined and other people with similar cases may not derive any benefit from the outcome of the proceedings. Many may be unaware of the fact that they have a remedy available to them.

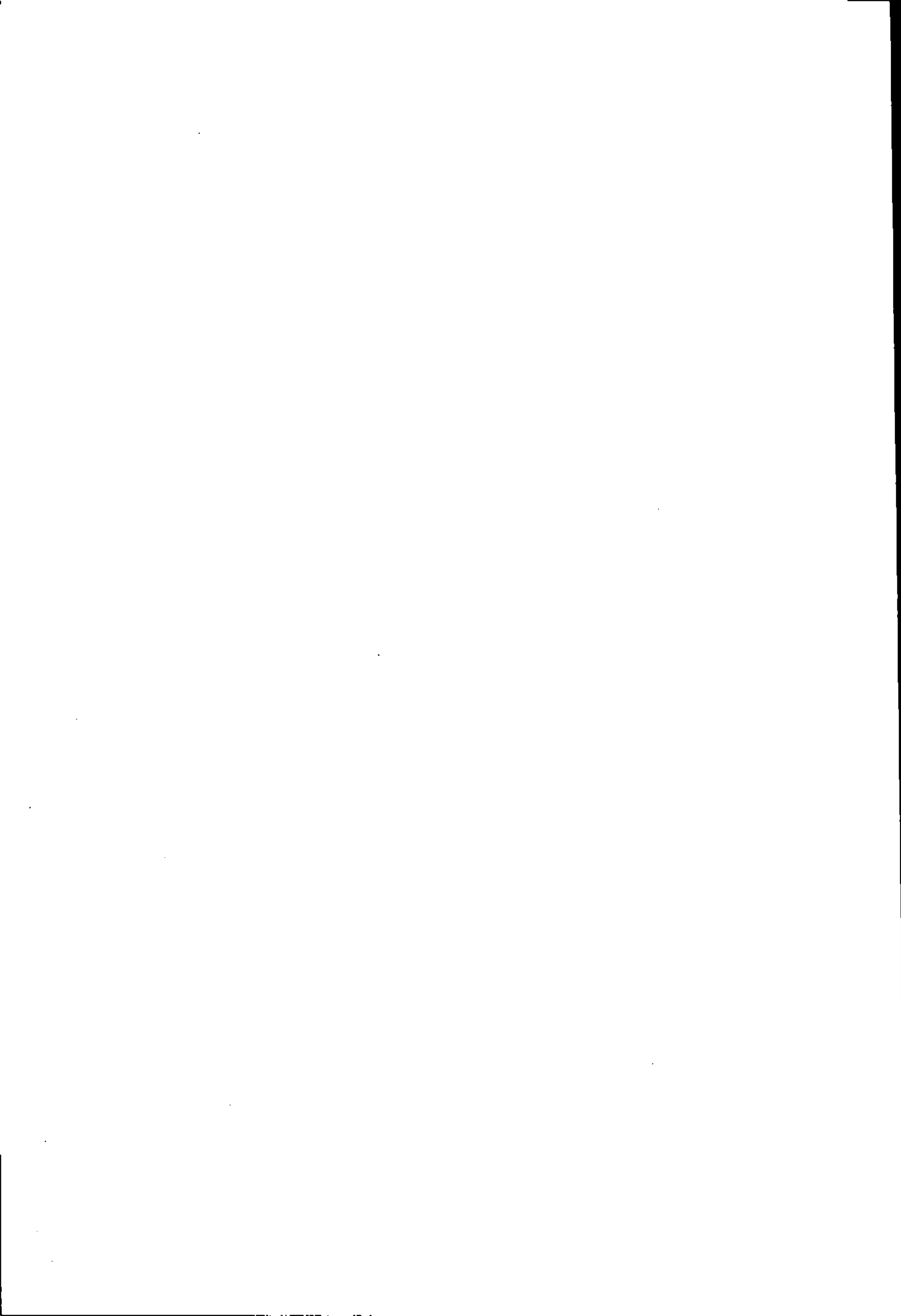
4.8 Other Technical Problems

There are a multitude of other procedural and substantive legal difficulties to be overcome in litigation against public authorities. It is beyond the scope of the current paper to examine these in detail. Some problems, such as those which arise out of restrictive legislation governing the period in which litigation may be brought, are not peculiar to this area.

The litigant seeking a remedy against a public authority will need to have considerable courage, conviction and resources. In many areas, alternatives to civil litigation may be preferable.

5 Alternatives to Civil Litigation

Participants at this seminar will be aware that there are a variety of alternatives to civil litigation available to those who seek remedies against public authorities. The important role of the Ombudsman, the value of inquiries and special commissions, and the impact of political representations should not be underestimated. Such alternative remedies may be cheaper, more expeditious, and more effective. However, often these remedies will need to be pursued in conjunction with the threat or institution of civil litigation. This will often require considerable skill because the pursuit of one form of remedy may prejudice others. For example, the Ombudsman may decline to investigate a matter where civil proceedings are instituted. Similarly, political representations may serve little purpose where civil proceedings have been instituted and the government's attitude becomes subject to the advice of independent legal advisers. Where all else fails, it may be necessary to raise the issue in the public arena in the hope that media attention and public concern will give rise to a sympathetic, albeit politically motivated, response from public authorities. In recent years a number of inquiries and royal commissions which have been set up to consider or determine compensation for victims of government illegality have arisen out of political and public concern. The effectiveness of such strategies should not be underestimated.



CONCLUDING OBSERVATIONS ON PUBLIC SECTOR ILLEGALITY AND ITS CONTROL

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Australians are fortunate to live in a society which is basically well governed. As far as one can discern, political dissidents are not tortured and murdered by members of the defence forces, as they have been in Argentina.[1] Public health authorities do not conduct grotesque experiments on unwitting subjects, as they have in the United States.[2] Postal officials do not pass on mail illegally to law enforcement agencies as they have in Canada[3]. Australian intelligence agents do not detonate explosive devices in friendly foreign harbours, as have the French.[4]

Notwithstanding their relatively good showing by world standards, agencies within the Australian public sector are far from faultless. Australian citizens have died in the custody of police and prison authorities under circumstances which suggest negligence, if not intent. Quantities of plutonium, a highly toxic radioactive substance with a half-life of 24,000 years, are strewn about the centre of Australia as a consequence of our having hosted British nuclear weapons tests in the 1950s. An ineffective system of export meat inspection allowed kangaroo and horsemeat to be substituted for beef shipped to the United States in 1981. The acceptance of bribes by public servants in return for favourable action or inaction on their part is either occasional or endemic depending upon one's perspective. Other examples of misconduct, whether for personal gain, in furtherance of government policy, or perhaps some combination of the two, arise from carelessness or malevolence. Such misconduct is in turn facilitated by flawed bureaucratic structures and processes, and by inadequate organisational safeguards. The papers published in these proceedings have reviewed some of the institutions which stand between the citizen and the wayward government agency in present day Australia.

The following pages will canvass some of the issues raised at the seminar, not according to substantive or institutional categories but rather in light of those criteria against which countermeasures to government illegality might best be judged. These four criteria are deterrence, rehabilitation, victim compensation and moral condemnation. The ideal safeguard against the excesses of government would achieve each of these conditions, without inhibiting vigorous and energetic public administration.

The focus of the seminar and of these concluding pages has rested primarily on the organisational, as well as the individual, level of analysis. This is not to suggest that individual public officials should be immune from civil or criminal liability for their culpable or tortious conduct. Rather, strategies of social control which focus on the organisation are potentially more fruitful avenues to the reduction of individual misconduct, and complement traditional processes of individual liability.

I Deterrence and Oversight

Perhaps the most significant deterrent to misconduct on the part of a public authority or its officers is the threat of detection. The knowledge that one's work is subject to the scrutiny of a watchful eye can inhibit careless acts as well as malicious ones. So too can the looming presence of external oversight encourage the development of policies, procedures and organisational safeguards designed to minimise the likelihood of official misconduct.

Oversight of government operations may be provided by governmental institutions, or by private individuals.

Each of the first four contributions to these proceedings deals with oversight institutions common to state and federal governments in Australia. In theory, a combination of such varied safeguards as public service boards, parliamentary committees, systematic auditing, and ombudsmen's offices, can constitute an effective deterrent to official misconduct. But the institutions do not always live up to their potential.

Scrutiny of legislation before the Commonwealth Parliament may be rigorous, as can be the investigative efforts and oversight of administrative behaviour by bodies such as the Senate Standing Committee on Finance and Government Operations and the Joint Committee of Public Accounts. But one may be entitled to wonder whether the legislative and administrative processes of Queensland, for example, are subject to such close attention. Public servants are also at times able to deflect inquiry by claiming that matters of concern are privileged, or that they involve questions of 'policy' for which their minister alone is answerable.

Public service boards have no doubt played a constructive role in improving public sector personnel management practices and in monitoring the efficiency of government departments and statutory authorities. But as David Corbett noted, State governments appear to be moving in the direction of decentralised alternatives to public service boards, for better or worse.

Financial auditing has always been an important bulwark against fiscal profligacy. The establishment within some auditors-general offices of an efficiency and performance auditing function is an important development, as is the increased vigilance of finance departments over public administration.

Ombudsmen's offices constitute yet another safeguard against government wrongdoing, but one which can never be regarded as a universal panacea or as a substitute for other review mechanisms. Ombudsmen's offices are essentially reactive institutions - that is, they more often respond to complaints from members of the public than seek out questionable conduct off their own bat. Some ombudsmen have the power to initiate investigative action of their own motion. Such powers, where they exist, have been little used to date, however. To be sure, the _raison d'etre_ of the ombudsman is to serve the aggrieved citizen. But despite noble efforts on the part of some ombudsmen to make themselves more accessible to the public, some citizens nevertheless remain inclined to suffer in silence. As was noted at the seminar, there are hawks and doves amongst Australian ombudsmen. Public sector instrumentalities under the jurisdiction of a less aggressive ombudsman have that much less inducement to behave with propriety.

Those agencies of government which wield and occasionally abuse very great power, but which are perhaps least subject to the deterrent influence of the above institutions, are Australian police forces.

Whilst they may be accountable financially to the governments which they serve, police tend to resent any intrusion into operational matters. Whether police resources are being allocated efficiently or effectively is rarely subject to external scrutiny. And with the cost of policing Australia currently exceeding $1,300,000,000 per year, the sums involved are not trivial.

The more conventional abuses which are generally associated with police, the use of excessive force and the fabrication of evidence, often defy accountability. In Queensland, South Australia, and Victoria, police are beyond the reach of an ombudsman. The specialist authorities or tribunals to which police are answerable vary in terms of both powers and resources. In South Australia and Western Australia especially, government attempts to establish a truly viable external review body were fiercely resisted, and ultimately thwarted by local police unions.

The other major deterrent threat to official misconduct is posed by public exposure of the illegal behaviour in question. One of the fundamental objectives of freedom of information legislation is to make governments more accountable to the public which they serve. But only two jurisdictions in Australia, the Commonwealth and the State of Victoria, have FOI legislation in place.

Even in these jurisdictions, exemptions in existing FOI legislation make it difficult to obtain access to information about the more sensitive areas of government activity, such as police operations. Both the Commonwealth and Victorian Governments, moreover, are seeking further to narrow citizens' access to information whether by increasing costs to the applicant or by evasive administrative action.

Recent increases in costs[5] have dramatically reduced the number of Commonwealth FOI requests. Although intended primarily to discourage frivolous requests, the increase in costs has no doubt discouraged legitimate requests as well.

Public servants who might seek publicly to disclose evidence of maladministration run considerable risks. Both State and Federal legislation governing public employment threatens severe penalties, in some cases, imprisonment, for the unauthorised disclosure of information by a public servant. A wide range of informal administrative sanctions may be directed at the 'whistle blower' as well. Moreover, there are no meaningful safeguards against such victimisation. Public sector organisations could benefit from some of the measures identified by John Braithwaite in the private sector, including formal alternative information channels to an organisation's chief executive.

The organisational culture of some agencies also militates against whistleblowing. Here again, police may be cited as an example. Loyalty to one's colleagues often transcends one's obligation to uphold the law. The challenge facing such organisations as the Victorian Police Internal Affairs Division is to encourage the reporting of malpractice without jeopardising the mutual trust and cohesiveness which is so essential in police work.

In theory, the profession of journalism is one of the pillars of a democratic polity. The threat that one's transgressions will be publicised can be an important deterrent to official misconduct. But with few exceptions, the Australian news media have not realised their potential. The blame does not entirely rest on the press. The laws of libel in Australia are so broad that they have what may only be regarded as a chilling effect on press freedom. Public officials from all major political parties in Australia use the threat or reality of libel writs to

discourage criticism of their conduct. Public servants and police have followed suit. The price has been a failure of open and robust debate about the way Australia is governed. It is a disgrace to democratic principles when governments use their powers and the courts to stifle their critics.

Given the legal constraints under which they labour, it is perhaps not surprising that many journalists have been criticised for a certain lack of professional zeal. It is, after all, easy enough to report uncritically the handouts provided by press secretaries. Police, in particular, have significantly expanded their public relations and media liaison resources in recent years. Finally, in-depth journalism requires a resource commitment which many media organisations are unwilling to make.

Whilst the threat of civil action may serve to discourage official misconduct overseas, the deterrent efficacy of the civil process in Australia is limited. Damages are small, at least by American standards. And many public sector bodies are specifically immunised by statute against liability.[6]

The criminal process poses at best a modest threat. Here a distinction must be drawn between abuse of power for personal financial gain, and conduct in furtherance of government operations. Within the latter category, as Brent Fisse noted, government agencies as corporate bodies are often beyond the reach of the criminal law. There is, moreover, extreme reluctance to mobilize the criminal process against individuals who transgress in the line of duty. Nowhere is this more apparent than within the criminal justice system itself; the number of police or prison officers charged with criminal offences arising from the use of excessive force is rare indeed. Again, this reluctance arises in part from the fear of industrial militancy by the rank and file. Even on those rare occasions on which criminal charges have been laid, the prosecutions have been frequently unsuccessful, largely because of the superior evidentiary advantage enjoyed by police.

Perhaps the greatest potential for increased deterrence to official misconduct lies in the development of internal compliance controls. As John Braithwaite has noted, self regulatory mechanisms are capable of intelligence and omnipresence which external scrutineers simply cannot command. Not only do insiders 'know where the bodies are buried', they can be made part of the organisational woodwork. The collectivity of which one is a member often possesses more deterrent potential than a remote outside agency.

Similarly, ethical standards and professional values cannot be imposed upon an organisation, but can only develop from within. Certain practices, from the fabrication of confessions by police

('verbals') to the acceptance of free meat by government inspectors, had long been embedded in the respective organisational cultures. The challenge for those who manage organisations wherein such malpractice is endemic is to replace such values with standards of professionalism and civic virtue.

The development of an ethical system which demands the highest standards of comportment from members of an organisation does not occur overnight, but rather over a period of years. There can be little doubt that the institutionalisation of ethical standards can be instrumental in the prevention of government illegality.

It should be emphasised, however, that an adequate defence against abuse of power must not depend on a single strategy or institution. Internal and external control systems are essentially complementary. Internal controls are essential, particularly in such closed organisations as the police. But the vigilance and ultimately the effectiveness of these safeguards is enhanced when they themselves are subject to external oversight. The legitimacy of internal investigations is greatly enhanced when subsequently endorsed by an independent external body.

II Rehabilitation

The rehabilitation of errant public sector organisations has been inhibited significantly by poorly developed law. The use of structural injunctions, employed so successfully in the United States to reorganise malfunctioning public agencies and to monitor their subsequent operations, has no parallel in Australia. Similarly, the creative use of corporate probation or punitive injunctions following successful criminal proceedings remains a remote ideal.

The burden of rehabilitation thus falls largely on the political process. Organisational pathologies are identified often in the aftermath of embarrassing circumstances. Remedies may emerge from royal commissions, judicial inquiries or in-house damage control operations.

One may cite numerous examples of remedial measures which have been introduced in such a manner. Disclosures by the Costigan Royal Commission that the Deputy Crown Solicitor's office in Perth was less than aggressive in its pursuit of tax offenders, and too closely associated with a local escort service, led to the creation of a Federal Director of Public Prosecutions, and to a significant restructuring of the way in which the legal business of the Australian Government was managed. After two Royal Commissions and subsequent amendments to the Police Regulation Act, the constitutional status of the South Australian police and its Commissioner has been definitively resolved.

Following the Gowans Inquiry in Victoria, procedures for the acquisition of land for public housing have been modified to prevent the profligate waste of public funds such as that which characterised the Victorian land scandals.

There remains, however, one problem with political/administrative remedies. As they are introduced by elected governments they tend to reflect either majoritarian political considerations, or the disproportionate influence of affluent, well organised minorities. By contrast, those who are arguably most vulnerable to victimisation by government are those from small disadvantaged groups such as Aborigines or social outcasts such as accused or convicted criminals.

In other federal systems, the constitutional machinery exists to protect deprived minorities who lack the resources to defend themselves or to obtain redress through political means. But in Australia, the idea of a legally enforceable Bill of Rights to protect citizens from the excesses of State and Federal Governments has yet to receive widespread political support.

In theory, administrative law provides a means of redress against bureaucratic action that is wrong or unjust, irrespective of the motivation of the public officials whose decisions may be subject to challenge. But although the system is in place, as Julian Disney pointed out, the system itself can be used to thwart access by disadvantaged individuals. In this respect, the ability of powerful interests to exploit legal machinery designed to assist the less privileged is not limited to the processes of administrative law, but rather extends to law in general.

III Compensation

Those who are victimised or otherwise wronged by public sector agencies often sustain massive losses. Processes for compensation may be imperfect and vary in their accessibility to different sections of society.

Compensation to a person suffering loss or injury as a result of wrongful action by the government may take the form of an *ex gratia* payment, or as damages awarded in a court of law. For obvious reasons, governments are reluctant to open their coffers to anyone who may feel aggrieved. Indeed, claims are customarily contested with considerable ferocity. And the legal resources with which governments defend themselves are formidable. This makes life difficult for even the best endowed plaintiff, and all but impossible for the ordinary citizen.

As Peter Cashman advised, procedural impediments inhibit joint actions by similarly situated individual plaintiffs. Moreover, the structure of the legal profession creates economic

disincentives for private practitioners to act in public tort cases. And publicly funded legal assistance is rarely available for plaintiffs. For these reasons, in addition to more general factors such as lack of awareness of one's legal rights, the ordinary citizen's access to civil remedies for official wrongs is seriously constrained.

In addition to the conventional processes of civil justice, governments from time to time make ex gratia payments to injured citizens. Under the Ombudsman Act, the Commonwealth Ombudsman may recommend that an ex gratia payment be made to a complainant who suffers injury, loss or damage as a result of defective administration. The recommendation is not binding however, and the complainant must rely in the end on the largesse of the Department of Finance, an organisation not renowned for its beneficence.[7]

IV Denunciation

Procedures for reaffirming the rule of law are of considerable significance. Should governmental wrongs escape stern denunciation, the legitimacy of government itself and of the legal order generally may be called into question. If, as Brandeis says, the government is 'the potent, the omnipresent teacher', it is essential to repudiate government illegality, firmly and unambiguously.

In the Australian context, perhaps the most powerful institutions for reaffirming the rule of law are royal commissions. By virtue of their stature and independence, royal commissioners endow their denunciations with a moral force which cannot be matched from the floor of parliament.

Among the more vivid examples of such denunciation are the Report of the Royal Commission into NSW Prisons,[8] in which Mr Justice Nagle excoriated the regime of brutality which characterised the administration of NSW prisons from the 1930s to the 1970s, and the Report of the Royal Commissions into British Nuclear Tests in Australia,[9] in which Mr Justice McClelland condemned both the British and Australian governments for their conduct of the testing program. But one may say of royal commissioners what one has said of ombudsmen: there are hawks and doves amongst them. And the unwillingness of members of the Victorian judiciary to participate in inquiries means that the denunciatory impact of resulting reports may be that much less.

While some ombudsmen possess the stature and moral authority to denounce government illegality, they do not always do so. Some are seriously constrained by the secrecy provisions of the legislation governing their powers and responsibilities. Others are reluctant to publicise any but the most egregious cases of maladministration. Whether because of their own inhibitions, or political constraints under which ombudsmen labour, the denunciatory potential of the office remains largely unrealised.

To what extent does Australian public administration suffer from disincentives to the vigorous and energetic conduct of government business? One of the most salient characteristics distinguishing the public bureaucrat from the private entrepreneur is their respective orientation towards risk. The former are noted for risk aversion, the latter for their willingness to take risks. A system for the prevention and control of official misconduct must be developed with care not to compound what is already perceived to be a shortcoming of public servants.

When civil or criminal sanctions fall on the individual, they weigh heavily. They may destroy a person's career, or deprive him or her of most assets. Burdens such as these, moreover, are not borne by the individual alone but usually impact severely on family members as well.

This is not to suggest that individuals should be immune from civil or criminal liability. Individuals must be accountable for their actions. Immunity from personal libility can lead to carelessness, or worse; there are those who would readily embrace the Nuremburg defence. Where misconduct entails fraud, malice, or conduct outside the scope of one's employment, then individual liability should prevail, perhaps combined with a degree of corporate liability. A strong deterrent to the conscious abuse of power need not stifle the normal conduct of public administration. On the other hand, where misconduct flows from an error of judgment or an excess of zeal, corporate liability may be more appropriate. The restructuring of organisations and countermeasures along the lines discussed in the above proceedings would have a salutary effect on Australian governments.

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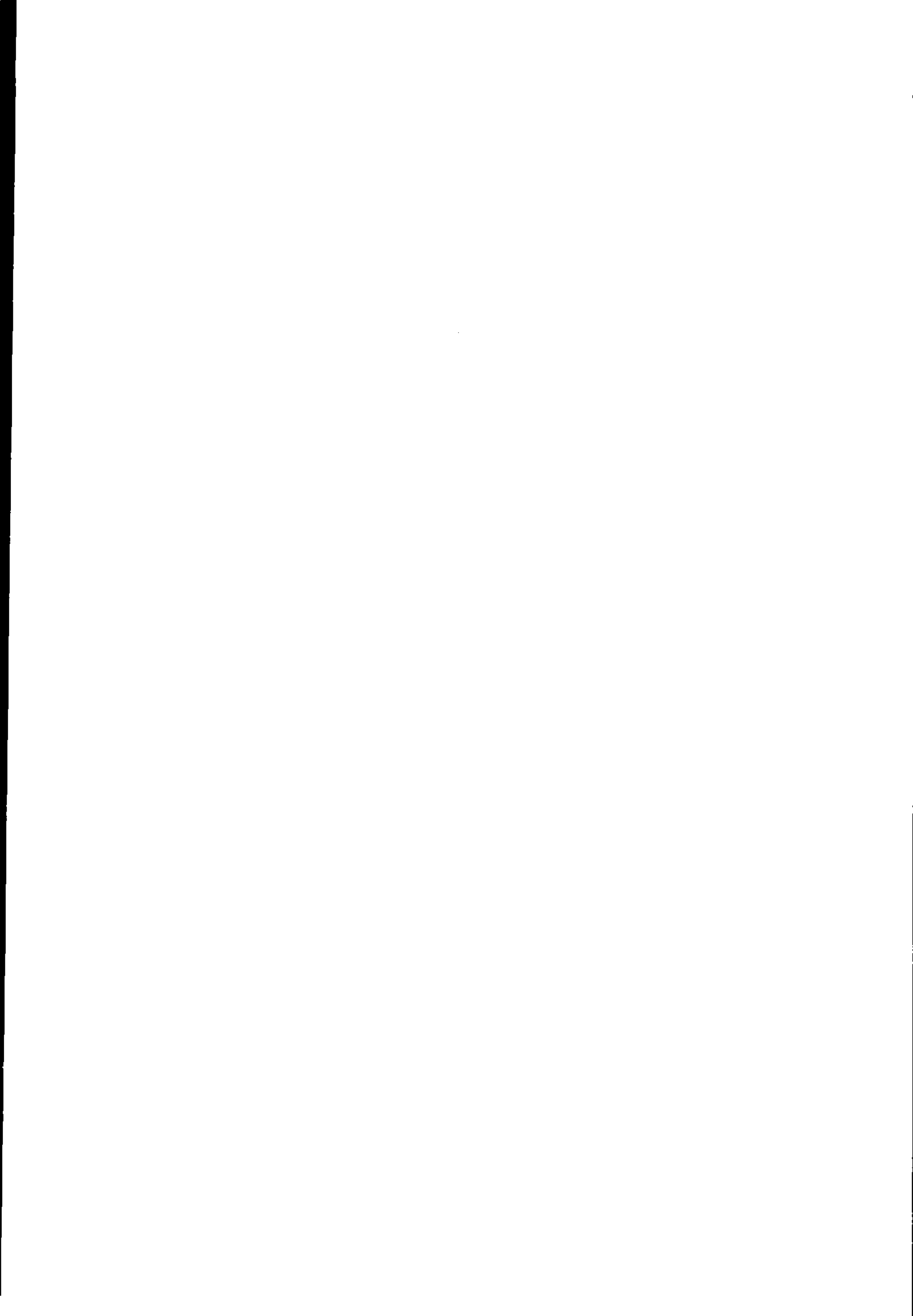

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