# *The Royal Commission into the NSW Police Service: Process Corruption and the Limits of Judicial Reflexivity*

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## Introduction

This paper will offer an examination of the Reports of the Royal Commission into the NSW Police Service (*Interim Report* February 1996; *Interim Report: Immediate Measures* November 1996; *Final Report Vol I: Corruption*; *Final Report Vol II: Reform*; *Final Report Vol III: Appendices* May 1997) excluding the *Report on Paedophilia*, August 1997. The examination will be confined essentially to one question: to what extent do the published Reports consider the part played by the judiciary, prosecutors and lawyers, in the construction of a form of criminal justice revealed by the Commission itself, to be disfigured by serious process corruption? The examination will be conducted by way of a chronological trawl through the Reports of the Commission in an attempt to identify all references to the role of the judiciary, prosecutors and lawyers. The adequacy of any such treatment will then be considered. In order to set the scene a brief and generalised overview of the Wood Commission will be offered together with the Commission's definition of process corruption.

## Overview

### *Hatton proved right: 'entrenched and systemic' corruption*

The establishment of the Wood Commission was a victory for the former independent member of the NSW parliament and long time anti-corruption campaigner John Hatton, and a corresponding defeat for the forces of complacency represented by then Commissioner Tony Lauer (who described suggestions of entrenched corruption as 'figments of the political imagination' *Sydney Morning Herald* 14/5/94), then NSW premier John Fahey (who described the parliamentary vote establishing the Commission as a 'tragedy' *Daily Telegraph* 12/5/94) and former Premier Nick Greiner ('an exercise in self-indulgence which would waste wads of money' *Sydney Morning Herald* 14/5/94). The findings of the Commission that there was 'entrenched' and 'systemic' corruption in the NSW Police Service was a vindication of John Hatton's position and discredited Lauer, Fahey and Greiner's opposition to its establishment. As early as February 1996 in its *Interim Report* the Commission was able to state that:

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

and that

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

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

- process corruption;
- gratuities and improper associations;
- substance abuse;
- fraudulent practices;
- assaults and abuse of police powers;
- prosecutions — compromise or favourable treatment;
- theft and extortion;
- protection of the drug trade;
- protection of club and vice operators;
- protection of gaming and betting interests;
- drug trafficking;
- interference with internal investigations, and the code of silence; and
- other circumstances suggestive of corruption (Vol I at 83–84).

The success in revealing extensive 'entrenched' and 'systemic' corruption was brought about in part by the 'power and resources' accorded the Commission (Vol I at 144), by some innovative investigative techniques, particularly the production of video evidence and the 'roll-over' of some key police witnesses such as Trevor Haken relatively early in the process. Selective examples of the video surveillance, in particular the 'crotch-cam' shots of 'Chook Fowler' trousering wads of cash and uttering endless permutations on the F word, achieved international media cult status. Such readily understandable and widely conveyed images grabbed public attention, helped build up a strong momentum for further revelation, swept aside the remnants of the 'rotten apple' thesis and created a strong public and political demand for reform. While not making specific published findings against individuals the Inquiry resulted in a significant number of police being dismissed or resigning ('separations' as the Commission puts it), and cleared the ground for later dismissals, and possible prosecutions or internal disciplinary actions.

### *Process corruption*

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

- perjury;
- planting of evidence;
- verbals in the form of unsigned records of interview and note book confessions;
- denial of basic rights in respect of matters such as the use of a caution, or detention for the purpose of interview;
- assaults and pressure to induce confessions;
- gilding the evidence to present a better case;

- posing as a solicitor to advise suspects to co-operate with police;
- tampering with the product of electronic interception to remove any matter that might prove embarrassing;
- unofficial and unauthorised practices such as putting suspected street drug dealers onto a train and 'banning' them from an area; and
- 'taxing' criminals who are seen as beyond the law (Vol I at 84).

As the Commission notes, process corruption 'is often directed at those members of the community who are least likely or least able to complain, and it is justified by police on the basis of procuring the conviction of persons suspected of criminal activity or anti-social conduct, or in order to exercise control over sections of the community'. The Reports give numerous examples of the various process corruption practices and some useful case studies across a range of different police sections including Kings Cross, a regional crime squad (north-west), a suburban patrol (Marrickville detectives) and an 'elite task force' (the joint Task Force — a combined Federal and NSW State police force). Many of the forms of process corruption were common across these quite different sectors, indicating its entrenched (police witnesses used the word 'routine': Interim Report at 46) nature. Among the consequences of corruption the Commission includes the observation that 'the innocent may be convicted of crimes they did not commit, and the guilty may escape justice' (Vol I at 46). It pointed out that process corruption 'commonly becomes linked with extortion, theft and other forms of corruption', going on usefully to 'expose the hypocrisy of the tag of 'noble cause corruption' sometimes given to this activity' (Vol I at 85). The Commission stated in its Interim Report that process corruption:

> strikes at the very heart of the administration of the criminal justice system, bringing it into disrepute. Moreover, once learned and practised, it can become an effective method of extortion in the hands of an officer lacking in integrity. If it is not checked, it will eventually destroy or so destabilise the Police Service and other institutions of criminal justice, such as the Courts, to the point where all confidence in and respect for them is lost (at 46).

Notice that at this point, process corruption is seen as having a significant effect on the conduct of the criminal process and the operation of the courts.

### *Failures and omissions*

I have elsewhere outlined what I consider to be a number of weaknesses in the Commission Reports (Brown 1997a). One weakness is the failure to squarely confront three key institutional components of the criminal justice system central to any analysis of the reasons for both the emergence of entrenched corruption and the failure to pick it up in the prosecutorial and judicial process. The judiciary, the Office of the Director of Public Prosecutions and the legal profession are to a significant extent missing players in the Reports of the Commission, indicating an inability to be reflexive about institutional conditions conducive to corruption. This is the issue which is pursued in this paper. Other weaknesses which will not be discusssed here are:

- an over-reliance by both the Commission and the NSW Government on the appointment of a new Commissioner, Peter Ryan, to ensure the cyclical processes of corruption are broken up, manifest in an over-concentration of power in the hands of the Commissioner at the expense of a role for democratic civilian input and in relation to the powers of dismissal;
- the lack of concern to address the plight of those convicted as a result of process corruption;
- recommendations for extensions to police powers (the recommendation for the re-creation of the abolished Special Branch as a Protective Security Group, justified in part by the Sydney 2000 Olympics), expanded surveillance powers, extended detention

powers without the full codes of conduct which are provided in the *Police and Criminal Evidence Act* (UK) and are linked to the legislation giving them the force of law, extended phone tapping powers, police immunities undermining the effect of *Ridgeway* (1995), are at odds with the overwhelming evidence of the misuse by police of existing powers and extensive process corruption.

## The missing players: on the bench, at the bar

Let us try to identify the points at which the judiciary, the DPP and to a lesser extent the legal profession, emerge as potential ethical agencies of responsibility and regulation in relation to police misconduct and corruption, only to often disappear again very quickly. The Reports provide a series of telling examples. I have tried to include nearly all references to the role of these three agencies throughout the Reports of the Royal Commission, although I note that there is no index to any of the Reports, which limits their utility as research sources, leading commentator Evan Whitton to remark that 'for $64 million, the customers might have expected at least that' (*Australian* 16/5/97).

### Interim Report*: Appearance and disappearance 1*

In Chapter 1 of the *Interim Report* under the heading 'The Disciplinary Structure' a list of eight organisations follows: 'Commissioner of Police; Police Tribunal; Police Board; Government and Related Employees Appeal Tribunal (GREAT); Minister of Police; Governor; *Director of Public Prosecutions; and courts*' (at 19, emphasis added). Yet the discussion which follows concentrates almost entirely on all the other agencies. The role of the DPP and courts are discussed only in relation to the potential prosecution of police in relation to matters referred to the Special Crime Unit in the DPP from the ICAC and the NSW Crimes Commission. It seems not to be envisaged at this stage that the DPP and the courts have any responsibility or role to play in bringing police misconduct and corruption to light. This omission is repeated in 'Complaints and Discipline' Chapter Vol II of the Report (at 327–372) only here the DPP and courts have disappeared altogether.

### *Appearance and disappearance 2*

The courts next pop up in Chapter 2 of the *Interim Report* assessing 'The Inquiry So Far (1)'. There we find some acknowledgment of the inadequacies of the court hearing as a forum for ventilating complaints about police fabrication of evidence. Astoundingly though, such an acknowledgment is not followed up in any way; the court process is characterised as having little or no role to play in bringing process corruption to light.

> Complaints made by accused persons of fabricated evidence being provided against them are rarely, if at all, investigated beyond the limitations of the trial process. It must be recognised that the trial process is an inappropriate forum for such complaints to be determined. Often this is because it is perceived that it may not be in the best interests of an accused to complain, either formally, or during the course of the trial process. To do so may only paint that person in a worse light in the eyes of the tribunal of fact. Alternatively, if such an allegation is maintained, it is commonly discounted as the standard response of a guilty accused. The confidence so derived largely permitted the 'police verbal' and 'loading' of accused to become an art form within certain sections of the NSW Police Service (at 40).

### *Fleeting appearance 3 (but kept entirely in the dark)*

Later in Chapter 2 of the *Interim Report* in the discussion of Process Corruption the prosecution and judiciary do make a fleeting appearance, but only to be absolved, they have alas,

been completely hoodwinked. In a discussion of 'misplaced loyalty which is at the core of organised corruption in the Police Service' it is noted that:

> police spoke of its existence as routine, and as something they believe was expected of them. Intelligence received and evidence yet to be called suggests that it was not confined to these areas. On the contrary, the suggestion is that it has been widespread, and has *escaped the attention of the Judiciary, and of those involved in the prosecution process, from whom the truth has been concealed* (at 46, emphasis added).

### *The missing judges: non-appearance 4*

A few pages later in the *Interim Report* in Chapter 3, The Inquiry So Far (II) 'Problems Arising in Dealing With Police Misconduct and Corruption' it is noted that 'investigation of police is potentially the most difficult area of criminal investigation, for many reasons, including':

- they are not easily fazed by interview, they are experienced in giving evidence, and they are capable of lying;
- their credibility and character are readily assumed by jurors and tribunals (at 49).

We might be forgiven for wondering at the ease with which judges have changed into tribunals, which along with juries have again proved rather gullible. And wonder why if this is already known it couldn't be taken into account in assessing credibility (by judges on tribunals or in instructing juries). Interestingly this absolution approach is followed a few pages later by a discussion of the 'stumbling block' which 'police culture' presents to the internal investigation process of police. 'In very many cases' we are informed, 'investigations have ground to a halt in the face of police turning a blind eye to obvious misconduct or corruption ...' (at 50). Am I being obtuse or is there a bit of a double standard in operation here? Might we be dancing to the tune of *Culture Club* rather than just *The Police*? At the end of this chapter it is noted that 'the role of the other external bodies', which seems to include the Police Board, The Auditor-General, the Inspector-General and the State Coroner (but not the DPP or judiciary) 'is not such that they have played any real part in discouraging or investigating serious misconduct or corruption' (at 69).

### *Disappearance 5*

In Chapter 5 of the *Interim Report* 'A New System' under the heading 'The Complaints and Corruption Investigation System' three possible sources of complaints are listed as 'members of the public, police; and other government agencies, including courts' (at 100). And yet there is no further discussion of any role the courts might play in dealing with these complaints. Again, courts as an institutional site and judges as agents with some responsibility for administering the criminal justice system within which police misconduct and corruption might come to light, seem to have disappeared.

### *More promising appearance 6*

Finally, in Chapter 6 'Anti-Corruption Measures — Other Issues' we gain a more promising glimpse of the DPP and the judiciary, heaven forbid, as potential players, budding ethical agents who may even have a responsible role to play in referring suspicions of serious misconduct or corruption on to the new Police Integrity Commission. Options include:

- the introduction of measures whereby suspicion of serious misconduct or corruption, arising on reasonable grounds in the course of criminal trials, might be brought to the notice of the PCC [now the PIC, Police Integrity Commission] and the police Service, by prosecutors and judicial officers (*Interim Report* Feb 1996 at 127).

It has only taken us 127 pages to get to this point, but don't get too excited, it is only an 'option'. Let us go to the *Final Report* to see how this limited suggestion is taken up.

### *Final Report: when cultures collide*

The relationship between police culture and 'the social, political and organisational context of policing, in which it takes place' (Vol I at 32) appears to open up a more than merely gestural analysis of the networks, the links between police culture and legal and judicial cultures. Certainly glimpses are provided, as in the discussion of process corruption in Vol I Chapter 2 which it is noted:

> • is compounded by ambiguities within the legal and regulatory environment in which police work, and by senior police and members of the judiciary apparently condoning it (at 36).

The problem is, that whenever such an object appears it does so elusively, only to be gone again. A few pages later under the 'Policing Environment' it rates not a mention (at 38–45).

### *Enter the High Court*

Later in Chapter 3 'A Selective History' under the sub-heading 'Oversight of the Service' we finally find a heading 'The Judicial Process' (at 79). But the treatment is brief (less than a page) and once again in the 'we was duped' vein. It is worth quoting at greater length.

> The period since 1970 has been marked by considerable concern within the Defence Bar of New South Wales as to the regularity with which their clients claimed to have been the subject of fabricated evidence in the form of:
> • notebook confessions;
> • unsigned records of interview;
> • assaults;
> • 'loading' (planting of weapons, drugs and money); and
> • police perjury to 'improve the evidence'.
> In the main, the courts were sceptical of these claims, although in the light of the evidence received by this Royal Commission it is now evident that there was much of substance in them, and that many persons were convicted on the basis of tainted evidence. This was a significant factor in the persistence of such a practice. Corrupt police were able to trade on the notion of the 'thin blue line' and urge that they had no motive falsely to implicate anyone or to do anything other than their honest duty. As experienced witnesses they were invariably impressive under cross examination (at 79).

However from 1986 onwards the High Court came to the rescue with increased scrutiny of the investigation process in decisions such as *Williams* (1986); *McKinney and Judge* (1991); *Clough* (1992) (sic — they mean *Pollitt* (1992)); *Domican* (1992); *Black* (1993); *Foster* (1993). Thus:

> the overall effect of the greater involvement of the High Court in criminal appeals and of a more intense scrutiny of procedural and evidentiary matters, has been to:
> • discourage corrupt investigative practices;
> • force police services generally to place greater reliance on physical evidence; and
> • encourage the introduction of electronic recording of interviews with suspects (at 80).

Full stop. All of which is heartening but rather begs a range of questions such as:

- the actual effect of these decisions 'on the ground'. Earlier for example, the Report notes the various ways in which *Williams* has been bypassed: by the consent 'fiction', by arrests at times magistrates were not available, by the lack of further inquiry if a guilty plea is forthcoming as a consequence of a confession, or through the likely failure of court to exclude evidence in the absence of a guilty plea (at 36; Dixon 1991);

- if these decisions had 'discouraged corrupt investigative practices' why was the Commission necessary and why was process corruption still so pervasive as evidenced in page after page of the Report?;
- the selective nature of the list omitting as it does cases such as *McDermott* (1948); *Lawless* (1979); *Alister* (1984); *Chamberlain* (1984) (Morling 1987); *Doney* (1990); *Chidiac* (1991) (Brown 1997b), before the High Court, not to mention others at a State level (see generally Carrington et al 1991, Hawkins 1977).

### *A rare glimpse of what can be done*

A long way from the majesty of the High Court we find in passing in a case study of 'The Sugar Reef Restaurant Incident' an example of what might be done to make the courts a more effective site of regulation of improper and corrupt police practice. In a humble Licensing Court proceedings were dismissed 'but as a result of critical remarks made by the magistrate regarding the truthfulness of WH's evidence, an internal investigation was conducted' (at 91).

### *A glimpse of (some) prosecutors*

In Chapter 4 Corruption Found By The Royal Commission under the heading 'Prosecutions — Compromise Or Favourable Treatment' it is noted that 'evidence was called of various ways in which police interfered with prosecutions, or provided favourable treatment to persons brought before the criminal justice system' (at 109). However the brief discussion is rather partial in that it seems to assume that interference runs only in the direction of favourable treatment, summarised as 'watering down of the available criminality', 'withholding material facts', the ''loss'of physical evidence or witnesses', creation of ''loopholes' in records of interview' and the 'provision of letters of comfort'. There was clearly evidence of such practices before the Commission and it is a serious matter which does great damage to the credibility and integrity of the criminal justice system when it appears that such favours can be negotiated or bought. But are we to believe that all police interference with prosecutions is favourable to suspects?

The Commission compounds its partial view when it continues:

> Without making findings as to the involvement of police prosecutors in these practices, the problem seemed confined, at least on any direct basis of complicity, to police concerned at the arrest, bail and brief preparation stages. In many instances, however, an astute and fair-minded prosecutor might well have been expected to entertain a suspicion that all was not above board, to the point of initiating an internal investigation (at 109).

Notice the crucial words of limitation '*police* prosecutors'. What was that about the 'brotherhood'? Do these practices only occur prior to committals or in summary matters? But we know from previous inquiries such as the ICAC and indeed the Commission itself that major problems of this sort, especially those in relation to favourable treatment of informers, occur in the higher courts where the cases are prosecuted by the DPP and by Crown Prosecutors (see for example Vol I at 113). It is in these forums, for example in applications for sentence discounts, that we have seen some of the most dubious 'letters of comfort' submitted, and some of the most partial recitations of the motives and past records of the applicant for a sentence discount, put forward by other than police prosecutors and accepted by judges. Indeed the Royal Commissioner Justice James Wood sat on the sentence redetermination of Ray Denning's life sentence which had the effect of Denning being released within three years of a major prison escape and commission of armed robbery and other crimes, in circumstances involving a very selective and favourable interpretation of Denning's motives and history (Brook 1991).

To give another example the NSW Court of Criminal Appeal has been in the rather embarrassing position of giving a four year sentence discount to notorious offender and informer Fred Many on the ground that his 'assistance was significant, substantial and true' when the same court differently constituted had nine months earlier allowed an appeal in the exact same case referred to, on the basis that Many's evidence was unreliable in that he gave four versions of a key event (*Domican and Drummond (No 2)* (1990) at 418–419; see Brown and Duffy 1991:185–190). Needless to say, it was not a police prosecutor who conducted the Crown case at the CCA.

There is one advantage of the focus on police prosecutors and that is that the arguments in favour of phasing out police prosecutors in favour of the DPP can be rehearsed once again in Volume II (16 years on from the Lusher (1981) inquiry). Correctly the Commission notes that:

> The desirability of having the prosecution process separate from the investigating process does not depend on evidence of misconduct or corrupt behaviour on the part of the police prosecutors. It rests essentially on the principles of independence and impartiality which are relevantly affected in the present context by
> - the fact that police prosecutors are answerable to their supervisors in the chain of command,
> - they do not owe a legal duty to the court in the same way that solicitors and barristers do; and
> - they are not subject to the code of behaviour and professional discipline as members of the legal profession (at 316).

These arguments have theoretical appeal but some elaboration on the likely practical effect of positive obligations attaching to legal ethical duties and professional discipline, in the light of some of the case studies presented to the Commission, would have been most interesting. Unfortunately they are not forthcoming.

### *Duped again: 'hear no evil, see no evil ...'*

Without expecting self flagellation we might expect just a sprinkle of judicial reflexivity in the context of a discussion organised around notions of honesty and integrity in a process involving a range of parties, some with supervisory roles. But once again malpractice is strictly confined to particular agents, certain police or 'some officers', as in the following acknowledgment that:

> informants ... are spared prosecution for offences which they are known to have committed, or are given favourable treatment in relation to custodial arrangements or sentencing in return for giving evidence against others, without sufficient disclosure of their true position to senior officers, the DPP and the courts (at 113).

The 'some officers' solely responsible for this state of affairs are undoubtedly devilishly clever at concealing their corrupt arrangements from 'senior officers, the DPP and the courts' who apparently bear no responsibility for the cases they are supervising, managing, arguing and hearing. It is as if the cases proceed without agency, save for that of the original investigator. A rather different inflection arises later in a discussion of the 'necessity' to legislate to overturn the effect of the *Ridgeway* (1995) decision in which the High Court refused to sanction illegal covert operations, what I elsewhere describe as the Commission's familiar 'legalise the illegalities' strategy (Brown 1997a:223–224). Here the Commission shifts from the 'we was duped' to the 'blind eye to the telescope' metaphor in quite a revealing fashion:

> it is undesirable for the courts to be placed in a position where an *expectation* arises that they will similarly turn a blind eye to this form of conduct or *de facto* be given a *delegated responsibility to 'excuse' criminal conduct* (at 446, emphasis added).

### *Legal practitioners obtain absolution*

If prosecutors and judges are absolved of any responsibility (save of course for police prosecutors) the legal profession similarly receive brief mention and then disappear from sight. While evidence suggested that some lawyers had colluded in the production of 'less than honest' expert reports and character references:

> the proof of unethical or improper practices on the part of lawyers is very difficult, because of the difficulties in penetrating legal professional privilege and in maintaining the kind of electronic surveillance required for affirmative proof (at 111).

This is undoubtedly correct, there are technical impediments to such investigations. But there are no impediments to a discussion in a Royal Commission Report of the reluctance of legal disciplinary bodies to pursue complaints against lawyers, nor of the development of mechanisms through which lawyers might take greater ethical responsibility for material presented in court. The Commission does note that the DPP are introducing a procedure requiring copies of all documents lodged by the defence to be lodged at least two working days prior to the hearing (at 112). But as we have seen, dubious references and reports are not restricted to the defence. My basic point here is the simple one that police do not operate in a vacuum, and they are not the sole agents responsible for the ethical operation of the criminal justice system. Some rather fuller treatment of the roles and responsibilities of others and the extent to which these might be enhanced in the interests of integrity, might have been expected.

### *At last: some recognition*

The vast bulk of Volume II *Reform*, has little or no reference that I could find to the role of the judiciary, prosecutors or the legal profession. But finally in a one page section towards the end of Volume II under the heading 'Review of Prosecutions' there is a belated recognition that other agents might be responsible for initiating an internal review mechanism. This would be by way of the establishment of a prosecution review committee comprised of senior officers to:

> conduct a post mortem on:
> - any major prosecution, which has failed in circumstances suggestive of serious police incompetence or malpractice; and
> - all cases in which judicial criticism is made of the integrity and conduct of the police concerned, or where the DDP delivers an adverse report on the quality of the police investigation (at 491).
>
> The Commission views commitment of the Service to such a procedure as a valuable means of enlisting the support of the profession, the DPP and the Judiciary in improving the overall efficiency, professionalism and integrity of the Service. For too long, the attitude on the part of the Crown prosecutors and the judiciary has been that problems seen in prosecutions have not been their concern, and that if anything is to be done, it should be left to the Service. Such an attitude excludes a valuable and independent sentinel and weakens police accountability (at 491).

The chief concern here once again appears to be prosecutions compromised in favour of the accused as against those fixed through various forms of process corruption, against them. A fair response might be 'better late than never', but I find this paragraph somewhat hypocritical given the way the Report has largely airbrushed 'the profession, the DPP and the judiciary' out of the picture. With respect, 'such an attitude' of 'not our concern' has

been amply replicated in the Commission Reports, as I have shown. It is re-inforced in the final chapter.

### *Final chapter: disappeared again*

There are a range of mechanisms and institutions through which process corruption in particular might be revealed and curbed. In the final chapter of the Report headed 'An End To The Cycle Of Corruption' those agencies are identified as the Police Integrity Commission, Ombudsman, ICAC, NSW Crime Commission, Auditor General, The State Coroner, Ministry of Police, and Council on the Cost of Government. Various useful recommendations are made about how these 'external oversight' agencies might improve their game. This is in addition to a large number of recommendations about the inculcation of integrity measures within the Police Service itself.

But as I have belaboured throughout this paper, rather closer to home, in the sense of potentially providing daily scrutiny of police activities through the prosecution process, there are a range of other agents and institutions who seem to be missing in action in the Report. Those agencies are the office of the Director of Public Prosecutions, the organised bodies representing lawyers, the Law Society and Bar Association, particularly their disciplinary committees, and Magistrates and Judges. The police are only, to adopt a sporting analogy, some of the players in the game of criminal justice. If they have, as the Commission through thorough investigation decisively proved (finally laying to rest the oft interred 'rotten apples' thesis), been involved in 'entrenched and systemic corruption', it is difficult to believe that other players in the game can have been totally ignorant of this.

### *Reflexivity starts at home*

What is missing in a sustained way is any sense of reflexivity in the Royal Commission Report. As is clear from some of the individual case studies, prosecutors having ethical duties of 'fairness and impartiality' have colluded in the presentation of clearly suspect evidence. When very occasional complaints about such behaviour have been made, the disciplinary bodies of the Law Society and Bar have been reluctant in the extreme to pursue them. Magistrates and Judges have often been at best gullible in their acceptance of police testimony and hostile to challenges to it. Appeal courts have lacked the necessary scepticism and nose for miscarriages of justice, or been tardy in identifying practices productive of injustice such as police verbals or the use of informers. While there is no doubt much in the Report which hopefully will assist in 'ending the cycle of corruption' this aim is only possible if all the players are involved and take responsibility for the ethical and effective conduct of their roles.

Reflexivity starts at home. It is easy to blame everyone else. I do not wish this paper to be interpreted as an attempt to let the police off the hook. The Royal Commission was a commission into the Police Service and not, like its British counterpart, into Criminal Justice. Police clearly do a lot more than investigate criminal offences and initiate prosecutions. But this is an important dimension of police work and one which brings the Service into contact with and to some extent under the scrutiny of, a range of other agencies with responsibilities for vetting the integrity of police conduct and evidence and ensuring a fair trial. I do think the police are entitled to feel aggrieved when so much attention is devoted to the pernicious aspects of police culture(s) and at the same time other aspects of the network of legal cultures which connect and overlap with police cultures and practices are ignored or glossed over, the agency and responsibility of powerful players such as the judiciary, prosecutors and the legal profession minimised or denied.

In a national political context where courts and judges are increasingly coming under fire from politicians who voice disagreement with judicial findings in unrestrained and ignorant terms in an attempt to bully and influence tribunals in particular cases, one is cautious about criticising the judiciary. Without wanting to personalise the point it is worth noting that the Royal Commissioner, Justice James Wood, who recommended the abolition of NSW Special Branch in the Royal Commission, sat on an inquiry into the convictions of Alister, Dunn and Anderson in 1984–85 (Wood 1985). This inquiry resulted in a pardon for the three on the basis that their convictions were unsafe. But the inquiry also revealed some of the dubious practices of Special Branch at that time, practices similar to those which horrified the same Justice Wood some 12 years later. A more sceptical, less 'idealised' (Findlay 1991), more rigorous and searching analysis of the material revealed in 1985 may have resulted in Special Branch being exposed and dealt with 12 years earlier.

As mentioned earlier, Justice Wood also sat on the Denning sentence re-determination, so the dangers of compromised Crown cases should scarcely be novel. He also presided over the Leigh Leigh rape/murder case at Stockton in 1990 (*R v Webster*) and in the process commended the police in the case:

> The police involved, working under the direction of Detective Sergeant Chaffey, should in my view, be highly commended for the care, dedication and professionalism with which they went about the task and for bringing the offender to book (at 11).

The Webster investigation was subsequently referred to the Royal Commission as an example of a partial investigation that operated to protect a large number of boys present at the events from prosecution on assault charges, and the possible complicity of two of the boys in the murder itself (Carrington 1994). The Commission declined to pursue the complaint further after some preliminary investigations. The matter is currently being investigated by the NSW Crimes Commission.

I do not raise these examples, which spring readily enough to mind and could no doubt be multiplied with research, in order to embarrass Justice Wood who is generally regarded as a good and fair judge. The point is that when issues such as corruption are found to be reasonably commonplace in complex institutions like the criminal justice system, we cannot lay the blame for this state of affairs solely at the feet of one particular agency, and within this, to an identifiable coterie of rogues and rascals. Rogues and rascals might have considerable power and influence but they do not preside over the criminal justice system. That task is carried out in the main by well intentioned people of integrity such as judges, prosecutors and lawyers, professionals who tend to inhabit the upper reaches of society. It ill behoves such people to minimise their agency and responsibility for their own role, performance and outcomes. It seems to me that this is exactly one of the chief accomplishments of the Royal Commission Report.

## List of Cases

*Chamberlain v R* (1984) 153 CLR 521.

*Chidiac v R* (1991) 171 CLR 432.

*Domican v R* (1992) 173 CLR 555.

*Doney v R* (1990) 171 CLR 27.

*Foster v R* (1993) 113 ALR 1.

*Lawless v R* (1979) 142 CLR 659.

*McDermott v R* (1948) 76 CLR 501.

*R v Alister* (1984) 154 CLR 404.

*R v Black* (1993) 118 ALR 209.

*R v Clough* (1992) 28 NSWLR 396.

*R v Domican and Drummond (No 2)* (1990) 46 A Crim R 408.

*R v McKinney and Judge* (1991) 171 CLR 468.

*R v Pollitt* (1992) 174 CLR 558.

*R v Varley* (1987) 8 NSWLR 30.

*R v Webster* unreported 24 October 1990, Supreme Court of NSW No 70112/90.

*Ridgeway v R* (1995) 69 ALJR 484.

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