CRIMES COMMISSION?

John Hatton, M.P.

INTRODUCTION

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

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

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

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

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

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

"Organised crime relies for its existence on the technology and the affluence of our society".

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

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

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

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

I perceive now that the Federal government has a very real problem following upon the statements made by the previous Liberal government emphasising the menace of organised crime and the need for action. There is a large body of opinion which has rejected the necessity for a national crimes commission and nationally divided opinion on what form any crime commission, if established, should take. It is in this climate that this discussion is taking place, and I put forward the concept of a National Crime Commission which, hopefully, will use and strengthen existing structures to safeguard in large measure civil liberties and ensure accountability and yet provide a meaningful and effective response to the problems organised crimes poses.

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

Organised crime cannot exist without the corruption of Government and Public Officials. It is institutional corruption that provides the necessary insulation between the criminal act and the figures of organised crime. If an attack on the Criminal Hierarchy left institutional corruption intact many

more criminals would soon appear to take the place of those deposed.

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

The national crimes commission then should consist of a Parliamentary Standing Committee on crime control established by the Federal government with parliamentary crime committees established in each State parliament. (See Annexure I. An approach arrived at jointly by Arthur King and myself. For most of the ideas regarding the possible administrative arrangements I am indebted to Dr Geoffrey Hawker of Canberra.)

The major areas of profit for organised crime are illegal gambling, drugs and vice. These are all areas where there are few complaining victims and a good deal of ambivalence in society about the need for prospective laws to control these activities.

Because of this ambivalence officials do not feel they are doing anything very wrong when they tolerate the existence of such activities in their area. This attitude and the very high cash flow generated makes the corruption of Public officials inevitable.

This corruption is not restricted to policy. It is generally recognised that for organised crime to succeed its corruption extends to include public servants, members of the judiciary,members of Parliament, and not infrequently, executive government itself. Thus any approach to the problem of organised crime that ignores or plays down the importance and extent of this corruption is one-eyed and misdirected.

The National Crimes Commission Act 1982 was criticised by Mr Justice Stewart for not expressly providing that "the Crimes Commission may investigate any corrupt omission or exercise of discretion by a public servant."

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

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

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

1. Create some new structures.

2. Reform the existing structures.

3. Attempt to remove the basis of the problem by Law Reform and more open Government.

LAW REFORM

Let us take these points in reverse order. Most of the areas of making a profit for organised crime are areas of victimless - or at least non-complaining victims of crime. These areas are, of course, illegal gambling drug abuse and vice. In all of these areas there is no complaint, generally speaking, from the victim of these crimes.

Where there are crimes that generate high cash flow and yet no complaining victims there is clearly a tremendous potential for the corruption of public officials. Police, politicians, officials in Immigration, Telecom, and

the various Attorney-General's partments are all in a position to be le to provide some immunity or rvice to organised crime.

early, if the drug, licensing, vice d gaming laws were reformed, most of e areas of profit for organised crime uld disappear overnight. However, to ggest that law reform is a practical lution to the problem of organised ime in Australia is misguided for two asons.

w reform is not a permanent solution. ganised crime makes its profits from ploiting the gap between what people - at least some of them - want, and at the law allows them to obtain. As ng as we have proscriptive laws this p will exist, if not in the areas of legal gambling and drugs, then in me other area as yet unforeseen. As ng as the opportunity to make large ofits by illegal means exists we will ve the same, or a similar, problem.

e law, it seems, always lags behind e desires of the population and ganised crime exploits this gap.

condly, Law Reform is a very very slow ocess. The prospects for significant w reform in the areas of vice and age of illegal drugs are slight deed. While the long term solution y well be law reform, it is not a medy that is available in the mediate future.

FORM OF EXISTING STRUCTURES

e next general approach which we uld take to this problem is to reform e structures that already exist. rtainly there is a great deal that uld be done to restructure some of the w enforcement and judicial systems we w have. However, none of these forms are available as an immediate lution because the basic reform cessary is a move towards more open vernment. Organised crime, along th its concomitant official corruption, n best thrive with closed bureaucratic ructures. If the bureaucracy and dicial system were more open to rutiny then it would be much more fficult for officials to indulge in rrupt practices.

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

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

1. Lateral recruitment. What is suggested is that all positions above, perhaps, the rank of Inspector be advertised nationally and any officer serving in any police force in Australia may apply for a job in any other force. This would ensure the rotation of the top levels of management of police thus providing some guarantee against entrenched corrupt practices.

2. Such a reform would require, amongst other things, portability of pensions between States and between State and Federal governments.

3. Police forces should be open to inspection by the office of the Ombudsman or some other similar method of external scrutiny instituted.

4. Officers in high risk corruption squads, such as drugs, should be rotated at regular intervals, and no officer should serve for more than, say, three years in these squads.

5. Uniform police should also be used for short periods in these high risk corruption squads, these police being seconded for periods of, about, three months.

6. Special duty squads should be introduced. These squads should have across the board jurisdiction thus ensuring that no one officer, or no one squad, can provide an immunity to arrest.

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

CREATION OF NEW STRUCTURES

Because the prospects for law reform and more open government in the immediate future seem dim, many people have called for a new approach to the problem of organised crime. One of the most popular of these new approaches is the call for the establishment of a National Crimes Commission. Much lip service has been paid to this concept of a National Crimes Commission. However, very little analysis of what a Crime Commission would be, and do, has been evident.

What has been evident is a belief amongst the proponents of a Crimes Commission that some modification of our democratic institutions is necessary in order to effectively combat organised crime.

Recent comments by the Attorney-General, papers given to the ANZUS Conference by Justice Moffitt, and Douglas Meagher of the Costigan Commission, and the Crimes Commission Bill 1982, all propose some modification to a few basic rights. The emphasis varies from the Attorney-General on the civil libertarian side to Mr Meagher on the inquisitorial side, but all suggest some rights and liberties be foregone for the greater good.

The rights most under attack are - the right to remain silent; guarantees against self-incrimination; the presumption of innocence; and the right to privacy.

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

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

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

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

Another element that is common to almo all proposals for a Crimes Commission is the inclusion of an extensive facility for the collection of crimina intelligence.

The basic function of intelligence gathering and the keeping of dossiers on individuals is anti-democratic. Normally law enforcement is reactive. A crime is committed, a complaint is made to the police, the police investigate and collect the evidence which is then presented to a court to determine guilt or innocence.

A crime intelligence unit operates in quite a different way. Individuals or groups are declared 'targets' and all available information is collated. Should this pooled information confirm the already held suspicion that the 'target' is involved in illegal activities then a surveillance operation is mounted. This kind of

eration takes the initiative away om the criminal and involves the lice in actively seeking out crime fore it occurs.

is argued that this operation is eventative rather than reactive and erefore its results are not always sible to anyone other than the ential criminal who aborts the crime cause of the surveillance.

is approach to law enforcement is mmon to security organisations. IO used it in a recent annual report, aiming that they had considerable ccess in foiling terrorist plots in eir early stages. But the unmasking the conspirators early, before the ent occurred, precluded any court tion, or one might add, any public amination of ASIO's claims.

e dangers in such an approach to crime ntrol are apparent:

Intelligence gathering tends to become an end in itself.

The temptation is to get that little bit more information to complete the picture before acting frequently means no prosecutions result.

Most of the evidence so gathered is inadmissible in court.

The compilation and ordering of information brings into existence a commodity that can be sold back to the criminal community by corrupt officials.

Intelligence information is not shared, but jealously guarded by the agency that collects it. (We need only look at the history of the Australian Bureau of Criminal Intelligence if confirmation of this last point is felt necessary).

e South Australian Police Commissioner s sacked and a Royal Commission held er this very issue in 1978, yet now ere seems little controversy over e keeping of dossiers on 'suspects'.

e same ends can be achieved by more en and less coercive means. Rather than forcing individuals to answer questions and covertly spying on them why not offer some reward or encouragement to come forward and give testimony? I speak here of immunity statutes and the use of a witness protection plan.

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

Immunity statutes *de facto* exist. All that is suggested is that the procedures become formalised and open to scrutiny. Every police force offers rewards and immunities to its informers as they must if they expect to receive any worthwhile information. Objection is not taken to the process itself, but rather to the clandestine way in which it is now carried out.

Information so gathered would have the advantage of being admissible in court in a way that covertly gathered intelligence is not. It is one thing to collect intelligence. It is quite another to collect evidence that may be used to sustain prosecutions.

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

There already exists in our system of government a body that has the power to summon witnesses and compel answers. It is also a body that is accountable for its actions in a way that few other organs of government are. I speak here of a Parliamentary Committee.

STRENGTHS AND WEAKNESSES

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

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

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

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

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

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

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

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

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

Committees are a low-cost initiative.

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

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

Can provide witnesses with legislativ protection against recrimination.

WEAKNESSES

Executive governments are reluctant t pass work to Parliamentary Committees

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

SUPPORT AND OPPOSITION

Support can be expected from:

* staff associations and unions
* members of parliament
* civil libertarians
* academics, critics
* some parts of the legal profess

and opposition from:

* executive governments
* some judges, Royal Commissioner lawyers.

EXAMPLE OF ATTACK

As an example merely, a Committee mig

follow the clues of the Connor Board

of Inquiry into casinos:

> "every SP Bookmaker has to have some people within Telecom on his payroll ... substantial bribes are paid to Telecom employees up to a high rank."
>
> (Report 14.11 - 12)

Note that the ABCI Inquiry of Telecom (Project Lion) has been terminated after noting that:

> **"the task force did not have th resources to inquire into Telecom ... Telecom records are not structured in such a way as to make (relevant) information available."**
>
> **(Internal report 44**

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ANNEXURE I

)POSAL TO ESTABLISH A PARLIAMENTARY MITTEE ON CRIME CONTROL - A COMMITTEE BE ESTABLISHED INITIALLY IN THE MMONWEALTH AND IN ONE OTHER STATE RLIAMENT (PREFERABLY NEW SOUTH WALES)) LATER IN ALL AUSTRALIAN PARLIAMENTS

e idea of a Crimes Commission as a werful body distinct to some degree om the executive government is a ndamentally mistaken one. To give to agency which cannot be controlled the vers of summoning witnesses and mpelling answers, collecting intelligence d subpoening documents, is to make a ngerous decision which cannot easily revoked.

think of a Crimes Commission as an ency of the executive government, or ce removed as a statutory authority, then a step in the wrong direction. preferable direction would be at ce more modest and yet also more dical.

at would be a proposal to establish a stem of Parliamentary Committees on ime control. To do this would involve me redefinition of what we understand ganised crime to be and its control to quire. It would also require a different proach entirely to the organisational rm and personal practices of the re-nstituted body to control crime.

r parliament, through its committees, take an effective role in the control crime (as outlined below) is clearly kely to raise some acute political oblems. The resistance of the ecutive to extensions of parliamentary tivity of a scrutinising type through mmittees is one factor to be considered; other would be the often cited incapacity parliament to do anything much at all.

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

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

CONSTITUTION

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

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

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

MEMBERSHIP

The membership of the committee could be six or eight, drawn equally from both

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

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

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

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

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

Some supposed weaknesses in the parliamentary committee scheme should noted. Since the task of the committe is considerable in the short term the question of staff and support 'resourc will arise. But these will be in the nature of clerical and executive suppo The publishing of the committee's work and expedition of the hearings will be important, as will careful attention t the rights of public servants who appe before the committee. For this reason early consultation with trade unions a staff associations would be required in support of this general proposal and i terms of its subsequent implementation

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

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