



The New South Wales Bar Association

11/220

25 October 2011

Commissioner David Patten
Special Commission of Inquiry
New South Wales Crime Commission
Level 3
60-70 Elizabeth Street
SYDNEY NSW 2000

Dear Commissioner

Special Commission of Inquiry into the New South Wales Crime Commission

The New South Wales Bar Association welcomes your invitation to make a submission to the above Inquiry.

Background

Members of the Association have harboured concerns about the operation of the New South Wales Crime Commission for some time. Revelations stemming from the trial and conviction of Mark Standen highlight the need for important structural reform of the Crime Commission.

It is important, though, that the Association state at the outset that the need for a body such as the Crime Commission is well documented. The Association acknowledges that the Crime Commission has played an important role in accordance with its statutory duty investigating serious organised criminal activity for many years. The Association also acknowledges that the Crime Commission has been particularly effective in taking action under the *Criminal Assets Recovery Act 1990 (NSW)*.

Publicly available sources of information and the personal experience of a number of Association members has led to a widespread view amongst members of the legal profession that the Crime Commission has suffered from an incomplete adherence to internal protocols concerning contact with informers, questionable judgment on occasions concerning operational decision making and an undesirable lack of external accountability for the Commission's operations. The Standen case and the Commission's initial reaction to it demonstrated these problems.

In the immediate wake of Mr Standen's arrest and in light of public criticisms of the Commission, the former government implemented limited reform. The Police Integrity Commission was given statutory oversight of the Crime Commission. It is too early to properly assess the effectiveness of the Police Integrity Commission's oversight of the Crime Commission. The Special Commission of Inquiry is taking place at a time when the Police Integrity Commission itself is conducting an important inquiry into an aspect of the Crime Commission's operations and amidst widespread public criticisms of the Police Integrity Commission itself from the Inspector General of the Police Integrity Commission, the New South Wales Police Association, senior police officers and, recently, members of government.

The Inquiry's consideration of the Crime Commission's accountability mechanisms must necessarily proceed on the assumption that the Police Integrity Commission will continue as a viable, well-resourced organisation.

Against this background the Association strongly favours additional oversight mechanisms for the Crime Commission. There is a need to restore public confidence in the Commission. That can be done most effectively by greater external oversight mechanisms and by stricter compliance with internal protocols and rules.

Is the Crime Commission complying with the New South Wales Crime Commission Act 1988 and the Criminal Assets Recovery Act 1990 in the exercise of its functions?

The Association is aware of evidence that the Crime Commission maintains a practice of failing to obtain the approval of a Supreme Court judge before payment of legal expenses is made from restrained property.

Section 16A of the *Criminal Assets Recovery Act 1990* makes it necessary to file in court a sworn Statement of Affairs disclosing all of the person's interest in the property and liabilities and restricts payments for legal expenses to circumstances where the Supreme Court is satisfied, inter alia, that the person whose assets have been restrained has taken all reasonable steps to bring their interests in property within the jurisdiction of the Court.

The Association is aware that two respectable bodies of opinion exist about whether the Crime Commission has been complying with the *Criminal Assets Recovery Act 1990* in this regard and does not wish to express a view about whether the Commission has acted illegally in this respect. Nevertheless, the potential for abuse of the currently relatively informal process of settlement negotiations at the Commission cannot be ignored. The Association supports the establishment of a clear statutory regime (if the current one is unclear in this regard) requiring judicial consideration of Crime Commission settlements, including the payment of legal fees out of seized assets.

Are the terms of the New South Wales Crime Commission Act 1988 and the Criminal Assets Recovery Act 1990 appropriate for securing the objectives of the Acts?

Because of time constraints, the Association is not in a position to make submissions about the general effectiveness of the *Criminal Assets Recovery Act 1990*. The Association's concerns centre upon the accountability mechanisms of the Crime Commission. There are, though, concerns that the assets recovery function of the Crime Commission does not always sit comfortably with its criminal investigation functions. Operational objectives may be compromised if financial objectives are taken into account.

For this reason, the Association submits that the Inquiry carefully consider the establishment of structural boundaries between the assets recovery function and the criminal investigation function of the Commission. Whether this can be achieved by means of 'Chinese Walls' or separate departments within the Commission, or whether there should be an entirely separate body tasked with the assets recovery function is a matter of fine judgment.

The Association supports the Law Council of Australia's position in the analogous debate about which body should commence and conduct proceedings under the *Proceeds of Crime Act 2002* (Cth). The Commonwealth Government is currently considering amendments to the *Proceeds of Crime Act 2002* to remove the Commonwealth DPP's exclusive responsibility for litigation under the Act, enabling the AFP Commissioner to commence and conduct proceedings under the Act. The Law Council opposes this change.

The Association is of the view that an authority which is independent of an investigating agency involved in criminal assets recovery is more likely to make an objective assessment about the appropriateness of any assets recovery litigation rather than the investigators involved in the criminal investigation. The involvement of independent lawyers in the process provides a valuable safeguard against the misuse or overuse of the powers available under the Act.

The adequacy of accountability mechanisms for the Crime Commission

The Association favours a comprehensive regime of extra accountability mechanisms for the Crime Commission. This is particularly so if the government is contemplating changes to or the abolition of the Police Integrity Commission.

The office of Inspector General should be created. The Association has confidence that this model works effectively in other similar settings, including the Police Integrity Commission. The Association rejects the current criticisms of the Police Integrity Commission's Inspector General. Robust criticism of an organisation, where necessary, is much to be preferred over the suppression of damaging information. It allows constructive review of procedures and increases public confidence in the administration of what is, necessarily, an otherwise opaque organisation.

A parliamentary oversight committee should be established. This model also works well in similar statutory contexts.

The Commissioner or Commissioners should have fixed term contracts. The New South Wales DPP and the New South Wales Police Commissioner are both on fixed term contracts. There is a perception that many of the problems at the Crime Commission stem from the lack of critical internal assessment of personnel as a result of comfortable familiarity built over many years. The regular turnover of Commissioners would guard against this phenomenon and bring about periodic reviews of processes from new Commissioners.

For similar reasons, senior investigative staff should also be placed on fixed term contracts. Investigators' relationships with criminal informers are a crucial area for concern. Potential abuse of relationships with informers would be minimised with the turnover of staff.

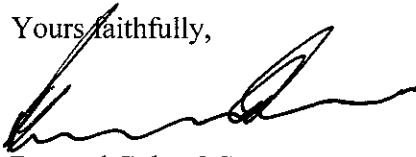
The Association supports the continuation of the Police Integrity Commission's oversight of the Crime Commission despite concerns that the Police Integrity Commission itself lacks adequate resources and support from the government.

Conclusion

The Crime Commission has suffered considerable damage as a result of its failure to adequately supervise a senior investigator. Public confidence in the Commission is at an all-time low and can only be restored if a number of measures are put in place to ensure that the Commission and its staff complies with the law and its own protocols.

If there is anything that you or your officers would like to discuss, please do not hesitate to contact me.

Yours faithfully,



Bernard Coles QC
President