MANAGERIALISM AND MAJOR CRIME IN AUSTRALIA

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I. INTRODUCTION

It has been said that the "New Public Management", better known as "managerialism" in Australia, is one of five "megatrends" in public sector reform around the world in the 1990's.[1] As responsibility for dealing with law and order issues falls almost entirely to the public sector, major trends in public sector reform such as managerialism are therefore likely to be highly relevant to many aspects of law and order discourse.

Already much has been done in attempt to modernise police management in Australia. Also, there is a growing literature in this area.[2]

Far less interest has been taken in the implications of managerialism in the field of other public sector agencies/initiatives fighting major crime. In this paper, an attempt will be made to consider some of these implications. At the

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1 C. Hood "Public Administration and Public Policy: Intellectual Challenges for the 1990s (1989) 48 *Australian Journal of Public Administration* 346, 346, 349.

2 See generally J. Vernon & D. Bracey (eds), *Police Resources and Effectiveness* (1989) Australian Institute of Criminology Seminar Proceedings No. 27; D. Chappell & P. Wilson (eds), *Australian Policing: Contemporary Issues* (1989); I. Freckleton & H. Selby (eds), *Police In Our Society* (1988).

outset managerialism is described. As managerialism is result orientated, the next step is to stipulate the results to be expected of agencies/initiatives against major crime. The groundwork is thus laid out for developing a general corporate plan for Australian agencies/initiatives against major crime. This forms the basis for a discussion of these agencies/initiatives as grouped in five programs, corporate crime, government illegality, organised crime, public corruption and white collar crime. Critical issues discussed are problems of definition, effectiveness criteria, management information systems and evaluation. Attention is given to the limitations and future directions of managerialism in dealing with major crime in Australia. By way of conclusion, the problematic relationship in managerialism between effectiveness and accountability is considered in the context of major crime.

II. WHAT IS MANAGERIALISM?

Managerialism is often regarded as a swear word, denoted by the "ism" which to some indicates that it is a sinister ideology or dogma. It is, therefore, a word for critics and not proponents of a particular approach to public sector administration.

That approach is simply summed as "management for results".[3] It signals a shift in emphasis in public sector accountability from compliance and due process to performance.[4]

The reform program developed from this approach is broad and to some extent has been introduced in most areas of the Australian public sector, especially in the federal public sector under the title of the Financial Management Improvement Program or FMIP.[5] Important elements of the managerialist program are management for results, revised budgeting arrangements, risk management, deregulation, staff performance appraisal and incentives, user charging and revised financial reporting arrangements. Some aspects of this program are controversial and not of relevance to this paper.

Of relevance is the focus upon results in terms of effectiveness and accountability.

Particular tools borrowed from the private sector are of core relevance, namely the devices by which the required results are identified and responsibility for their achievement is allocated within an organisation or portfolio of organisations. The principal device is the corporate plan, supported

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3 M. Keating "Quo Vadis? Challenges of Public Administration" (1989) 48 *Australian Journal of Public Administration* 123, 124.

4 House of Representatives Standing Committee on Finance and Public Administration, *Not Dollars Alone: Review of the Financial Management Improvement Program* (1990) paragraph 8.2.

5 *Id., xi.*

by program budgeting, planning and monitoring designed to aid the judgements of senior management as to the extent to which stipulated aims are being met.

Whilst, of course, a concern with the meeting of objectives can hardly be regarded as innovative, the formal arrangements contemplated by managerialism, such as corporate plans, are novel as they provide a formal structure in which "management for results" can be established as a fundamental and ordinary part of the public sector.

The extent to which managerialism should involve itself in policy making is well indicated by Dr. Keating, Secretary of the Federal Department of Finance, speaking in the context of social justice, but with equal application to law and order:

> For my part, I have never thought that econocrats working in government had any particular capacity to advise on the desirable degree of equity, income distribution, or social justice. We can assist judgments about the implications for incentives, but for the most part social justice issues involve value judgments which are properly handled through the political process.[6]

Managerialism has its critics but for the purposes of this paper it is not necessary to generally to canvass the considerable debate in this area.[7] Nor is it necessary for this paper to formulate a final position on the desirability of managerialism in principle or of elements of its reform program.

III. IS MANAGERIALISM APPLICABLE TO LAW ENFORCEMENT AGENCIES?

A threshold question is whether law enforcement agencies should be immune from the requirements of managerialism, especially evaluation in terms of effectiveness and accountability. I respectfully concur with the following remarks of the Federal Minister for Justice, Senator Michael Tate, made in relation to the police but of equal application to other investigative and law enforcement agencies:

> One particular article of faith among some police is that police forces are fundamentally different from other organisations. This is used both to argue that police forces should have a special set of standards applied to them in a whole range of areas and also that the views of people outside the force carry less weight because by definition they do not understand the nature of the policing task.
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> In my view, this is a complete fallacy. While I appreciate the arduousness of the tasks police are called upon to perform, the police organisation itself, in management terms, is like any other corporate entity. It has objectives and goals, professional and human hierarchies, a variety of human and technological

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6 *Id.*, 129.

7 *E.g.* see notes 1 & 3 *supra*; J. Nethercote, "The Rhetorical Tactics of Managerialism: Reflections on Michael Keating's Apologia, Quo Vadis?" (1989) 48 *Australian Journal of Public Administration* 363; A. Sinclair "Public Sector: Managerialism or Multiculturalism?" (1989) 48 *Australian Journal of Public Administration* 382.

> resources at its disposal and, one trust, rational strategies to apply its resources in such a way as to achieve those objectives in the most effective and efficient manner.[8]

I would note also that under the FMIP service delivery program elements, which includes agencies/initiatives in the major crime field, are expected to be evaluated with respect to their objectives.[9]

IV. MANAGING FOR RESULTS AGAINST MAJOR CRIME

In examining the implications of managerialism for major crime, the first step is to stipulate the results that should be expected of relevant agencies/initiatives.

As noted earlier, managerialism does not however claim a role in stipulating what those results should be - that is to be determined by the political process, i.e. the parliament or the government, as appropriate.

What then should be the results which the parliament or the government should stipulate, for management purposes, are the results to be achieved by agencies/initiatives directed to dealing with major crime? The threshold issue is to define the object or point of reference the results relate to, namely major crime.

V. DISAGGREGATING CRIME AND THE CRIMINAL JUSTICE SYSTEM

From the perspective of managerialism, crime in general has no existence. The reason for this is found in an understanding of the criminal justice system[10] or, acerbically, the criminal injustice system.[11] Understood as names for the Australian public sector apparatus which deals with crime, both are imperfect as there is no system in the sense of one machine or co-ordinated set of operations with integrated aims, functions and organisational structures. Not only is there no system, there is no single authority responsible for the management of the various elements of the supposed system. Further it may be almost impossible to identify all the elements of the system with any certainty.

Of course it is possible for some purposes to generally map out relationships between agencies, such as the linear map of a person passing through the various stages of the criminal process such as arrest, charge, bail, decision to

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8 M. Tate, *Opening Address*, in J. Vernon & D. Bracey, note 2 *supra*, 6.

9 Department of Finance and Australian Public Service Board, *Evaluating Government Programs Canberra* (1987) 5.

10 D. Chappell and P. Wilson (eds), *The Australian Criminal Justice System* (2nd ed., 1977).

11 J. Basten, M. Richardson, C. Ronalds & G. Zdenkowski (eds), *The Criminal Injustice System* (1982); G. Zdenkowski, C. Ronalds & M. Richardson (eds), *The Criminal Injustice System Volume Two* (1987).

prosecute, committal proceedings, trial, sentencing and punishment. This kind of mapping does not however identify a system in any organisational sense; to attribute such a meaning is misconceived as many of the agencies in the process are in important respects regarded as independent e.g. police, courts, prosecutors. Such an approach has other deficiencies. It only describes a historically constituted process. It is incomplete, ignoring certain elements such as public sector crime policy makers, the resource structure underpinning the process, the role of civil process and the plethora of non-police investigative agencies.

It can therefore be no surprise that in the absence of a single criminal justice system in Australia there is no single or unified structure to meet the requirements of managerialism. That is, there is no corporate plan, formally or informally, which specifies the results the supposed system is designed to achieve.

Instead there is a disaggregation bureaucratically of the field of public sector anti-crime activity. Some agencies have their own corporate plans, some do not. Co-ordination arrangements between agencies and between governments do exist at ministerial and senior officer level[12] but tend to have as there program mutual assistance by information exchange, joint efforts, regularising dealings between members and promotion of uniformity. These co-ordination arrangements do not generally seek to pursue plans which challenge the autonomy of member agencies or governments.

From the perspective of managerialism, the work of public sector anti-crime agencies is not therefore organised around achieving results in relation to crime in general or in terms of a single Australian anti-crime system.

Instead, particular agencies/initiatives have their own aims which reflect Australian historical and political conditions. A federal distribution of legislative powers under the Australian Constitution has resulted in the dominance of the states in dealing with law and order. The Federal Parliament has no general power to legislate with respect to crime. Accordingly, its legislative initiatives have been generally tied to the limits of what is incidental to specific heads of legislative power under the Constitution.[13] Acceptance of political traditions of independence of the police, the courts and prosecutors has prevented their integration. Historical rivalry between agencies together with reluctance to lose organisational identity has also prevented organising public sector anti-crime agencies into a single system.

This bureaucratic disaggregation entails that in terms of the public sector managerialism, at least, the concept of crime in general does not have a place.

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12 *E.g.* the Standing Committee of Attorneys-General, the Australian Police Ministers Council with corresponding committees at the level of department head and police commissioner.

13 M. Bersten, *From Customs to Computers: The Development and Reform of Federal Criminal Law*, paper presented at the Fifth Annual Conference of the Australian and New Zealand Society of Criminology, University of Sydney, 11 July 1989.

Only those types of behaviour proscribed by law and within the jurisdiction of an agency or within the compass of a particular anti-crime initiative have any management significance. The unity of these types provided by the criterion of "proscription by law" is of bureaucratic significance only. It does not indicate why particular behaviours are proscribed or legalised. Nor does it indicate, as is the case especially with public sector regulators, the connections between legal and illegal transactions.

VI. DISAGGREGATION OF CRIME - SPECIFIC TYPES OF CRIME

Remembering that consideration of definitional issues is for the purpose of stipulating results to be expected of agencies/initiatives the matter cannot rest simply with disaggregation.

Major crime has to be disaggregated into the terms generally employed by parliaments and governments in Australia when considering major crime at the major policy level. These types, however, almost never appear expressly in legislation defining the subject-matter jurisdiction of anti-crime agencies.

In that context, crime should be disaggregated into certain familiar types, namely organised, corporate and white-collar crime, public corruption and government illegality. It should be noted that these types do not purport to cover all examples of major crime. Nor is it claimed that the types are discrete, that is it is conceded that the types may overlap conceptually in some respects and that some examples of major crime may fit two or more the types.

VII. MINIMISING MAJOR CRIME

At a general level, it can be safely asserted that in Australia minimisation of major crime is the basic result to be expected of agencies/initiatives against major crime.[14] Total elimination of major crime is regarded as an unrealistic aim, if not unachievable without unjustified social cost.[15]

How does one measure minimisation of major crime? Numeric quantification is not the total answer. For example, quantification by the law

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14 *E.g.* I. Temby, *The Setting Up of an Anti-Corruption Agency in New South Wales, Australia*, in Attorney-General's Department (ed.), *The Fourth International Anti-Corruption Conference* (1990), 35, 39.

15 F. Costigan "Organised Crime and a Free Society" (1984) 17 *ANZ J Crim* 7; I. Temby, *Stewart, Costigan ... Temby?: DPP v. Organised Crime*, outline of address at the National Conference Australian Society of Labor Lawyers, Adelaide 13 October 1984; Special Minister of State, *Review of Systems of Dealing with Fraud on the Commonwealth* (1987), paragraph 3.1.1.

enforcement outcomes, such as conviction rates or drug hauls, begs the question as to what significance can be attached to an instance without an agreed scale of measuring significance.

Scales are therefore required which address the relevant features of major crime. An important clue as to what those scales might be is inherent in the concept of minimisation itself. It involves at least two elements - what makes a thing exist (or not) and what makes it proliferate (or not). This might be rephrased into what makes a thing possible and likely.

In a field, such as major crime, where specific instances are numerous, complex and often only incompletely known to outside observers, it would set the standard for minimisation scales unrealistically high to look at the causes for major crime and its proliferation. Also, full causal analysis may be unnecessary and hence a burden for what is only a managerial project.

Less demanding than a thorough-going aetiology would be an approach purporting to specify the conditions of possibility and likelihood of major crime.

VIII. A CORPORATE PLAN

For the purpose of a discussion in terms of the effectiveness and accountability of public sector agencies/initiatives against major crime,[16] a corporate plan based on the foregoing would at the higher levels of the plan look something like the following:[17]

Aim
To minimise major crime.

Principal strategy to achieve aim
To address the conditions that make major crime possible and likely.

Program one (Corporate crime)

Components

1. Australian Securities Commission (hereafter ASC)
2. Trade Practices Commission (hereafter TPC)
3. State consumer affairs agencies
4. Specific sector regulators e.g.environment, industrial safety

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16 In terms of lines of responsibility for particular agencies, the corporate plan is obviously unrealistic. Just as the so-called criminal justice system is bureaucratically disaggregated, so too is legislative, Ministerial and budgetary responsibility for these agencies.

17 This plan only attempts to list the major components. Many parts of the public sector are also connected to these agencies but are not mentioned as major crime is not their main concern *e.g.* agencies which refer matters to listed agencies, prosecutorial agencies, courts, prison system.

5. Revenue collectors e.g. Australian Tax Office (hereafter ATO), Australian Customs Service (hereafter ACS)
6. Royal Commissions and other special inquiries
7. Police
8. Cash Transactions Reports Agency (hereafter CTRA)

Program two (Government illegality)

Components

1. Ombudsmen or equivalent
2. Parliamentary committees e.g. public accounts
3. Audit agencies
4. Royal Commissions and other special inquiries
5. Police

Program three (Organised crime)

Components

1. National Crime Authority (hereafter NCA)
2. Revenue collectors e.g. ATO, ACS
3. CTRA
4. NSW Crime Commission (NSW) (hereafter NCC)
5. Independent Commission Against Corruption (NSW) (hereafter ICAC)
6. Criminal Justice Commission (Qld) (CJC)
7. Police
8. Royal Commissions and other specialinquiries

Program four (Public Corruption)

Components

1. ICAC
2. Ombudsman or equivalent
3. Parliamentary committees e.g. public accounts
4. Audit agencies
5. Royal Commissions and other special inquiries
6. Police

Program five (White collar crime)

Components

1. NCA
2. ASC
3. Revenue collectors e.g. ATP. ACS
4. Royal Commissions and other special inquiries
5. Police
6. CTRA

The lower levels of the plan would set out aims corresponding to each components of each component would have corresponding aims. Taken to its logical conclusion, each individual in a program might be listed showing aims or results expected from that person. For practical reasons, sub-components and lower levels in the plan will not be examined in this paper.

References, below to a program or components are to those referred to in the above corporate plan.

IX. EFFECTIVENESS AND ACCOUNTABILITY

It will be recalled that the aspects of managerialism of specific interest in this paper is effectiveness and ultimately accountability.

Effectiveness is taken to mean the extent to which stipulated results are met. Criteria must be established for determining the degree to which stipulated results are met. Management information systems are required so as to produce appropriate data to evaluate in terms of the criteria. This indicates the effectiveness of the agency/initiative under evaluation.

Accountability, following the definition employed by the federal House of Representatives Standing Committee on Finance and Public Administration, means

> [t]he obligations of persons/authoritites entrusted with public resources to report on the management of such resources and be answerable for the fiscal, managerial and program responsibilities that are conferred.[18]

In Australia, accountability is ultimately to the parliament although it may be mediated by ministerial or other authorities.

X. CRITICAL ISSUES

From the perspective of managerialism, four conditions seem crucial to the validity and utility of any evaluation of the above programs in the Corporate Plan namely,

1. The definition[19], if any, of the type of crime of concern to the program.
2. The criteria, if any, to determine whether stipulated results have been achieved.
3. The Management Information Systems (hereafter MIS), if any, available to the program.

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18 Note 4 *supra*, paragraph 8.7; see also R. Sarre, *Towards the Notion of Policing "By Consent" and its Implications for Police Accountability* in D. Chappell & P. Wilson (1989), note 2 *supra*, 102-119.

19 The definitions used in this paper have been selected as they are relatively uncontroversial, with the exception of the definition of organised crime.

4. The evaluation processes, if any, available to the program and their control.

Several general comments about each conditions are in order.

In relation to the need for adequate definitions of the type of crime which is the subject of a program, the ambiguity of not adequately defining that subject matter will necessarily flow through to any evaluation of the performance of that program. As the principal strategy to minimise major crime, namely to address the conditions that make it possible and likely, focuses on the contexts in which major crime occurs, so must the definitions be contextual in order to mesh in with this strategy.

In relation to criteria, criteria to determine the effectiveness of agencies/initiatives in a program must be framed in terms of the principal strategy to minimise major crime. To determine what these conditions are requires a solid basis of experience and analysis. The conditions would include legal, administrative, political, cultural, social, historical and other material conditions. As each type of major crime in a program is contextually heterogeneous, it is necessary to make criteria context sensitive.

Although there is already a significant body of statistical material documenting the incidence of major crime within particular contexts, this body of material is by itself necessarily uninformative as to the effectiveness of agencies/initiatives in this program. First, it documents the activity of agencies/initiatives, not all incidents of major crime, reported or otherwise. Second, there is no frame of reference by which to rationally determine the significance of these statistics in terms of effectiveness.

To address these concerns it is suggested that different types of criteria need to be considered. At least three are apparent. The first type is, where possible, in terms of targets whereby statistical incidence of a particular type of major crime in a given context is measured against a scale of measurement (e.g. illegal drug seizures measured against the total quantity of illegal drugs entering into a market in a given period). These are called "target criteria" and should be especially reliable where the agency/initiative has a complete knowledge of not only offences but also actual incidents. Were MIS operating so as to provide the relevant data, target criteria would be an especially informative guide as effectiveness. That the MIS precondition is often absent requires other types of criteria, such as those following, to be developed. The second type will be in terms of some outcome not in the nature of a target but a qualitative outcome. These criteria involve stipulation of outcomes which are measured by acts of informed judgment (e.g. a judgment as to the prevailing ethical standards to fraud amongst a given professional group such as accountants). These are called "qualitative criteria". The third type do not involve outcomes at all. Instead they measure the activity of a given agency/initiative (e.g. the number of complaints of corrupt conduct received). These are called "activity criteria". Provided they can be strategically related to the conditions making major crime possible and likely, activity criteria may be quite useful. Where that strategic

link cannot be established, such criteria are quite useless as measures of effectiveness.

Criteria must of course be consistent with legal requirements and the intention of the parliament or other authority which created the agency/initiative in question.

Failure in the present exercise might occur if the criteria are overly complex or because in practice the data collection such criteria require is practically unachievable. Equally, a failure would also result from stipulation of criteria which, although simple and quantifiable enough to permit an effective MIS in its own terms, are unconvincing tests of whether the program is effective or not.

It should be mentioned, as especially the case in evaluations of organised crime and public corruption programs, that effectiveness is often judged by whether a certain result could not have been achieved without a certain agency (e.g. the NCA achieving what the police could not against organised crime).[20] Such relativist criteria only apply once the individual effectiveness of each agency/initiative in question is determined. Whilst it is accepted that such relative evaluations are important, they are consequential rather than central to the evaluations of effectiveness presently under consideration. Therefore they will not be considered in detail in this paper.

In relation to MIS, the whole managerialist project must fail if the MIS cannot itself effectively deliver the data required to apply the criteria in the process of program evaluation. This may occur because no MIS could reasonably be established to provide the required data.

As a general proposition, there is clearly the possibility of integrating statistical material from individual agencies/initiatives as to the incidence of major crime and the type and amount of certain enforcement activities so as to develop something of a quantitative national profile of major crime in Australia. Probably the best MIS would be an independent, national agency tasked with integrating this statistical material as well as providing strategic intelligence about major crime. This would be especially valuable in providing data relevant to target criteria.

Such a process would however involve many complex and difficult problems such as legal arrangements, funding, control, data secrecy and privacy requirements, data classification and collection methodology and co-operation amongst data contributors. To the extent that some major crime is unreported, such a process would not give a complete profile of major crime. Also, such a project would be of limited value unless it was organised the criteria which it was required to document and was able to isolate the individual impact of program components.

Accordingly, numerous difficulties stand in the way of large-scale quantitative databases as MIS in the present exercise. The corollary however is

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20 The Parliament of the Commonwealth of Australia, *Parliamentary Joint Committee on the NCA: Third Report* (1989) 5.

that target and activity criteria may prove to be equally difficult to document. As qualitative criteria are not usually dependent upon quantitative data, they would not, at least for this reason, be in difficulty. MIS for qualitative criteria appear to pose less problems, at least in terms of establishment. Most common MIS in this area are expert assessments and public opinion surveys. These MIS not however without difficulty, most notably well known methodological problems and the question as to how much weight should be given to perceptions and subjective judgments rather than empirical evidence.

For the above reasons, Australia is a long way from an integrated MIS capable of providing the information required for a national evaluation of agencies/initiatives in the above corporate plan.

The next best thing would be for program components to at least develop their own MIS which in turn might report to a joint co-ordination body at program level. That body could attempt to piece together the reports and work towards a national program database along the lines noted above.

In the end, MIS limitations therefore appear to be significant constraints upon the utility and validity of an evaluation of the effectiveness of the programs under consideration.

In relation to evaluation, there is little cause for confidence in an evaluation which is not open and independent from the agencies/initiatives in the program itself or at least subject to some external review. Practically, this requires consideration being given to evaluation by at least those bodies with an established role in external evaluation of the public sector such as parliamentary committees and the audit agencies.

A fundamental problem in evaluation in Australia is to devise a system for national evaluation which is acceptable to the various agencies/initiatives at all levels of government. Such an evaluation would almost certainly cut across the legal and political lines of public accountability that these agencies/initiatives are ordinarily subject to.

Evaluation, whereby several different types of criteria are used, is to be preferred to single criterion evaluation. By using multiple criteria, the overall reliability of the evaluation should be improved. Another useful consequence of such an approach is the increased likelihood that a more diverse range of insights into program effectiveness will result.

As to the scope of evaluation in practice, the FMIP counsels:

> Whether a given program evaluation examines an entire program, a sub-program, component or lower element in the program hierarchy will depend on what is being sought from the evaluation
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> Evaluating an entire program in the one exercise runs the risk of being too generalised; objectives statements at this level of the program hierarchy are often too broad to permit meaningful measures of performance.
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> Evaluating at a low level of the hierarchy runs the risk of being too narrowly focussed, either ignoring the implications of other program elements which are directed to common objectives or ignoring other approaches to achieving the same objectives.

> In general, however, program evaluation would be focussed at the component level or lower.[21]

The FMIP regards an evaluation as being of high quality only if it is useful, feasible, ethical and accurate.[22]

Several initiatives should be noted which may be of significance in relation to a managerialist approach to major crime in Australia, especially in relation to MIS and to a lesser extent evaluation. Other than identifying them it is difficult to ascertain their specific relevance or importance due to either a lack of publicly available information about them or that they are only in the early stages of their development.

The Law Enforcement Policy and Resource Committee was established in December 1988 by the Federal Attorney-General. Its permanent members are the Federal Attorney-General, the Minister for Justice, the Secretary of the Federal Attorney-General's Department, the Chairman of the NCA, the Federal Director of Public Prosecutions and the Commissioner of the Australian Federal Police. Its purpose is to:

> ... discuss the formulation of law enforcement policy and the effective and co-ordinated allocation of resources to law enforcement. Major projects commissioned by the Committee include the development of an assessment of the nature and extent of criminal activity (the criminal environment) and preliminary work on the development of a Commonwealth criminal law enforcement policy. The former is intended to assist in measuring the effectiveness of law enforcement policies and programs. The latter is intended to ensure the optimal effectiveness of co-operative law enforcement arrangements at Commonwealth level.[23]

The National Police Research Unit is undertaking inquiries into developing a national strategic crime trend forecasting facility.[24]

Increasingly criminal activity is being documented on a national basis. Since 1981, the Australian Bureau of Criminal Intelligence has been collecting and disseminating criminal intelligence of interest to principally the police. The Australian Institute of Criminology and the Australian Bureau of Statistics have collected certain criminological statistics on a national scale. Federal and state governments are co-operating to establish a system of national uniform crime statistics.[25]

Each program will now be discussed by reference to the four conditions and general comments, noted above. It must be emphasised that this discussion is conducted a from perspective external rather than internal to the programs in question. In practical terms this perspective includes that of the parliament and the public rather than, for example, senior management or action officers in

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21 Note 9 *supra*, 5.

22 *Id.*, 34.

23 Attorney-General's Department, *Annual Report 1988-1989* (1990), 102.

24 Australian Police Minister's Council, *National Common Police Services Annual Report 1988-1989* (1990), 7.

25 Note 23 *supra*, 104.

individual agencies. It must also be noted that this discussion only considers directly relevant aspects of some agencies/initiatives in the programs in the above corporate plan and does not attempt to provide actual evaluations of programs.

A. PROGRAM 1 (CORPORATE CRIME)

(i) Definition

The following definition of corporate crime is considered appropriate for present purposes:

> Corporate crime is defined to mean criminal acts committed by corporations or by officers acting on behalf of corporations to further the legitimate purpose of the organization.[26]

Significantly, this definition excludes criminal acts not committed for a legitimate purpose of the organization such as criminal acts performed for the private gain of an individual such as fraud. Often such acts are instances of white collar crime.

Generally, the contexts in which corporate crime occurs are framed as acts in particular sectors subject to a public sector regulatory authority or authorities. The principal sectors are the environment, industrial health and safety, trade practices and consumer protection, the financial sector and the regulation of corporations.

(ii) Criteria

As a starting point it must be recognised that no agency/initiative in the public sector regards itself as having as it prime function the task of directly dealing with corporate crime. It follows that one finds few, if any, corporate plans or statements of objectives dealing expressly with corporate crime.

Regulation of corporations in general falls to the ASC. Corporate crime in this context primarily relates to corporations and their officers failing to observe accountability requirements at law.

The ASC response has been to focus on enforcement mechanisms although it is expected that it will also develop preventative and educative strategies. It is noteworthy in that regard that the ASC Chairman, Mr Hartnell, regards the ASC's regulatory strategy as being primarily one of law enforcement.[27] As at the time of writing the ASC has not formally commenced operations, it is, however, too early to expect from the ASC a corporate plan or statement of objectives which spells out how law enforcement fits into the totality of ASC functions.

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26 Based on P. Grabosky, "Corporate Crime in Australia: An Agenda for Research" (1984) 17 *ANZ J Crim* 95.

27 T. Kaye, "ASC Primary Role Law Enforcement: Hartnell" *Australian Financial Review*, 13 June 1990, 7.

Indicative however of the general approach of the ASC to corporate crime are the views of Mr Hartnell, put in February 1990. He said that

> ... the ASC's enforcement policy must be to ensure that the Australian markets have integrity and that people who lend to, or invest in, Australian companies can place faith in their loans or investments, within of course the normal vicissitudes of business life.
>
> This aim, which I believe the ASC has no alternative but to adopt, suggests a three-pronged approach to corporate regulation - which I will refer to as preservation, recovery and prosecution respectively.[28]

Mr Hartnell went on to say that by "preservation, I mean the use of remedies which are designed to prevent damage, or to prevent further damage to a company's assets or business".[29] By recovery actions, he was referring to "those remedies which exist under the (Corporations) Act which enable a person to recover either from the wrongdoer, or a third party, property of the company or damages in lieu thereof, following a breach of the Act."[30] By prosecution, he was referring to prosecution of two main classes of offences under the Corporations Act 1989 (Cth), "minor" offences such as those relating to information and document requirements under the Act and "major" offences such as those involving an intention to defraud under the Act.[31] Also, Mr Hartnell has announced areas of special interest for the ASC in its enforcement role, including accountants,[32] directors[33] and particular large corporations or corporate groups.[34]

The general goal of the ASC policy is a qualitative criterion. The "three-pronged" approach lends itself to evaluation also by target and activity criterial. Target criteria relating to minor offences should be an especially reliable guide as to the reduction in actual incidents of this type of crime as the offence can only be established if first coming to the attention of the ASC.

Indicative of a less enforcement based agency with an interest in corporate crime is the TPC. It has stated that it

> ... administers the [Trade Practices Act 1974 (Cth)] in line its four objectives:
> to secure compliance with the Act...
> to foster competition, fair trading and protection for consumers by taking initiatives to overcome market problems;
> to inform the community at large about the Act and its specific implications for business and consumers;

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28 A Hartnell "The National Companies Scheme: The ASC's Approach to Enforcement" [1990] *Australian Corporate Law Bulletin* (No. 6) 82

29 *Ibid.*

30 *Id.*, 85.

31 *Id.*, 86.

32 J. Shanahan, "ASC Set to Make Life Tough for Accountants", *Australian Business*, 12 September 1990, 86

33 S. Fisher, "ASC Chief to Crack Down on Directors", *Australian*, 12 September 1990, 27.

34 M. Westfield, "Hitman" Hartnell Pulls on the Gloves", *Sydney Morning Herald*, 12 September 1990, 37.

> to maintain high levels of management efficiency and cost effective resource utilisation at both central and regional office levels.[35]

The contexts in which the TPC deals with corporate crime are particular legal markets. It is therefore difficult to distinguish between the conditions which make those markets and the conditions making for corporate crime occurring in them. In an illuminating comment in its 1987-1988 Annual Report, the TPC emphasised market deregulation as a further condition contributing to non-compliance with the Trade Practices Act. The TPC stated:

> Governments at all levels are now deregulating private and public sector business and the Commission is acquiring the additional responsibilities of ensuring the "level playing field" in deregulated markets and of educating members of deregulated industries about competition law and consumer issues. The list of industries being deregulated at either Federal or State level is considerable and includes: financial services, telecommunications, primary production, transport (airlines, shipping and road) and occupational licensing.[36]

The impact of deregulation on corporate crime has been further emphasised by former Royal Commissioner, Mr Frank Costigan Q.C., who has suggested that deregulation of the Australian financial system has created new opportunities for corporate and organised crime.[37]

Conversely, some regulatory practices result in a displacement of criminal activity such as encouraging those keen to avoid regulation by changes in criminal operations rather than an abandonment of criminality.

Regulation, deregulation and regulatory practices must therefore also be included as important conditions determining whether corporate crime is possible and likely. As has been well documented in Australia, different business regulators have different approaches to enforcement.[38] Attention in establishing criteria in the present exercise therefore needs to be given to the specific terms of particular regulatory or deregulatory regimes. A fundamental criteria to be considered is the extent to which the regulatory environment has reduced or displaced the incidence of corporate crime.

Other relevant conditions are the environment of public knowledge about crime and the role of the media[39] and organisational structures and management

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35 Trade Practices Commission, *Annual Report 1988-1989* (1989), *xi*.

36 Trade Practices Commission, *Annual Report 1987-1988* (1988), 54.

37 F. Costigan, *Anti-corruption Authorities in Australia*, paper presented at Labor Lawyers Conference, Brisbane, 22 September 1990.

38 *E.g.* P. Grabosky & J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986); J. Braithwaite, P. Grabosky & D. Rickwood, "Research note: Corruption Allegations and Australian Business Regulation" (1986) 19 *ANZ J Crim* 179

39 B. Fisse & J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (1983).

practices.[40] These also are matters appropriate for consideration in developing criteria as to the effectiveness of agencies/initiatives against corporate crime.

(iii) Management Information System

The amount of information required to document the incidence and nature of corporate crime in Australia must be considerable and therefore poses an equally large challenge to any MIS in this program. Some indication of scale is given by the fact that there are over 800,000 companies[41] and numerous agencies at all levels of Australian government dealing to some extent with corporate crime.

This would tend to suggest the general problems facing the MIS, noted earlier, are not only applicable but compounded by the massive quantity of material to be considered.

(iv) Evaluation

Given the existence of a national corporate regulator, the ASC, it is suggested that the ASC would be the most obvious agency to administer a national system of evaluating components of this program. Philosophically, at least, national evaluation of the effectiveness of components of the corporate crime program would be consistent with the role of the ASC as the national watch-dog on Australian business.

Such a task would probably require enabling legislation and co-operation from all levels of government. To provide some degree of independent, external evaluation, a federal parliamentary committee might appropriately take an interest in this aspect of the ASC's work.

B. PROGRAM 2 (GOVERNMENT ILLEGALITY)

(i) Definition

The following definition of government illegality is considered appropriate for present purposes:

> Government illegality is defined to mean criminal or otherwise unlawful conduct by agencies in the public sector or by officers of these organizations acting in the course of their employment to further the legitimate purpose of the organization.[42]

Like the definition of corporate crime, this definition excludes criminal acts not committed for a legitimate purpose of the organization such as criminal acts performed for the private gain of an individual such as fraud.

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40 B. Fisse & J. Braithwaite, *Accountability and the Control of Corporate Crime: Making the Buck Stop*, in M. Findlay & R. Hogg (eds), *Understanding Crime and Criminal Justice* (1988) 93.

41 Note 27 *supra*.

42 Based on P. Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector* (1989), 3.

It should be noted that the definition distinguishes between criminal and unlawful conduct. This is because is some government illegality is only unlawful in the sense of being unauthorised by law but is not criminal. Also, unlike private legal personalities, some areas of the public sector are not subject to the ordinary criminal law.

(ii) Criteria

The formal contexts in which government illegality occurs may be categorised as follows:

- the parliament
- ministers
- government departments
- statutory authorities which are required to operate by commercial standards in a commercial environment
- statutory authorities with a regulatory function
- other statutory authorities
- law enforcement agencies
- the Australian Defence Forces
- security agencies
- the courts.

Each of these contexts is structurally distinct in terms of legal and political basis and forms of accountability.

Criteria as to effectiveness in this program should reflect these different structures. As lack of accountability seems to be an especially significant condition making for government illegality, accountability should also figure in criteria design. For that purpose accountability can usefully be divided into two areas - organisational and transactional.

As to the organisational accountability, this concerns the relationship between an organisation in the public sector and the effectiveness of accountability mechanisms to the external, superior authorities responsible for it such as a minister, board or the parliament. The routine forms of accountability in this area are requirements as to reporting and financial compliance audits. Accountability is also facilitated by special investigations conducted by royal commissions and other boards of inquiry, parliamentary committees, the ombudsman and audit agencies.

As to transactional accountability, this concerns decision-making and the extent to which individual decisions are subject to challenge or review either internally such as by superiors or internal audit/investigation units within an organisation or externally such as by courts and tribunals. This necessarily involves a close examination of organisational structures, management and work practices and the legal arrangements as to the making of decisions and penal, disciplinary or review mechanisms available in the event of government illegality.

Of increasing importance as a condition making for government illegality are the managerialist imperatives for public sector deregulation, commercialisation, a preference for flatter organisational structures, as opposed to hierarchical structures, devolution of managerial responsibility and risk-management.

An analysis of the conditions making for government illegality would also examine the influences which encourage public sector organisations or officers to take up opportunities to perform acts constituting this type of major crime. These influences would vary according to the context under examination but may include influences from party political, sectional or commercial interests.

Developing specific target, qualitative and activity criteria to determine the effectiveness of agencies/initiatives dealing with government illegality is beyond the scope of this paper. The general nature of such criteria, are, it is submitted, reasonably well indicated by the preceding discussion.

Although many agencies have an interest in the prevention and investigation of government illegality, even those with the greatest interest, such as the ombudsman and audit agencies, do not appear to have framed their own corporate objectives in terms of government illegality. Instead the corporate objectives of the ombudsman and audit agencies, expressly or implicitly as the case may be, are focussed on the overall quality and propriety of public sector activity within their jurisdiction. Government illegality is only implicitly part of this focus. For example, the *Mission Statement and Corporate Plan 1989-1990 to 1991-92* of the Australian Audit Office states:[43]

> *Corporate Mission Statement*
>
> To improve the economy, efficiency, effectiveness and accountability of the Commonwealth Public Sector by comprehensive auditing and reporting to:
> . The Parliament and the community
> . the Executive
> . Public Sector entities.
>
> *Corporate Goals Performance Auditing*
>
> To provide an independent evaluation to the Parliament, to the Executive, to Boards, to management and to the public of the economy, efficiency and effectiveness of the administration of Commonwealth Public Sector entities.
>
> *Regularity Auditing*
>
> To provide independent assurance to the Parliament, to the Executive, to Boards, to management and to the public on the financial statements, the proper maintenance of accounts and records, and the management of financial affairs by Commonwealth Public Sector entities.
>
> *Audit Support*
>
> To provide audit and management support services which facilitate the achievement of the corporate mission of the AAO.

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43 The Auditor-General, *Annual Report of the Australian Audit Office 1988-89* (1989), 125.

(iii) Management Information Systems and Evaluation

Only those agencies/initiatives with a regular interest in government illegality can be expected to maintain MIS in this area. It must however be recognised that as such MIS as would be presently maintained are orientated, in general, to quality and propriety of public sector activity, they would probably require adaptation to produce material relevant to determining the effectiveness of these agencies in dealing with government illegality.

A further difficulty is that, unlike programs dealing with corporate and organised crime, no agency has a national interest in government illegality. Instead agencies/initiatives are tied to their own particular level or area of government. There is therefore no organisation that is presently well placed to develop or be responsible for a national, central MIS relating to government illegality.

MIS in this area will tend therefore only to provide information on government illegality disaggregated along the lines of individual agencies/initiatives, collected for their own peculiar purposes which may not always coincide with the needs of a national evaluation of the effectiveness of agencies/initiatives with an interest in government illegality. Arguably the best MIS that can be achieved on a national basis will be through a joint effort of relevant agencies/initiatives.

The same problems applicable to MIS in this program apply to evaluation.

A further problem that would be acute in this program is that national evaluation can reasonably be expected to clash with existing legal and political arrangements for government accountability.

C. PROGRAM 3 (ORGANISED CRIME)

(i) Definition

The following definition of organised crime is considered appropriate for present purposes:

> Organised crime is defined to mean the field of transactions materially connected to markets in illegal goods and services.[44]

Significantly, this does not focus on particular types of organisations. In that respect it departs from what appeared to be the approach of the Parliamentary Joint Committee in the NCA which, although stating that "organised crime" in the Australian context is ...difficult analytically to define", [45] seemed to regard the problem of definition as being one of characterising the structure or organised crime groups.

Consistent with the principal strategy against major crime, the definition preferred in this paper emphasises a context, namely illegal markets.

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44 M. Bertsten, "Defining Organised Crime in Australia and the USA" (1990) 23 *ANZ J Crim* 39, 53.

45 The Parliament of the Commonwealth of Australia, *The National Crime Authority - An Initial Evaluation (Report by the Parliamentary Joint Committee on the NCA* (1988), 20.

Significantly, the NCA, the agency principally tasked with dealing with organised crime on a national scale, appears to have now adopted an illegal markets approach along the same lines as earlier set out[46] after previously being publicly uncommitted to a particular definition of organised crime.[47]

(ii) Criteria

Organised crime in Australia, as defined earlier, consist of numbers of well known illegal markets such as those involving drugs, sex, gambling, stolen property, and weapons.

These markets are the contexts which criteria for program effectiveness should be addressed as different conditions have made each market possible. Nonetheless, the interaction between illegal markets and between legal and illegal markets must also be considered.

A common feature of all illegal markets is the proscription by law of a good or service. Whilst there are often strong objections to legalisation or decriminalisation, a managerialist evaluation of program effectiveness should be able to provide an evaluation of the relative effectiveness of legalisation or decriminalisation against prohibition in dealing with the problems with the activities occurring in illegal markets. This would at least provide more information for parliaments in deciding whether to maintain the prohibitions upon which the existence of illegal markets depend.[48]

An important advantage of the illegal markets approach to organised crime is that it more readily permit the development of quantitative, economic criteria by which to evaluate program effectiveness than most other definitions. Especially informative target criteria may be devised relating to demand and supply reduction targets.

Using market modelling techniques to identify the conditions which constitute particular markets, activity criteria can also be developed which would be informative to the extent that they addressed identified conditions.

To date, however, agencies with a major brief to tackle organised crime, such as the NCA and NCC, have yet to make a credible contribution to the development of criteria to evaluate the effectiveness of their work.

In its 1985-86 Annual Report the NCA stated

> The term "success" is a very difficult one to define and even more difficult to assess. One yardstick which may be used to determine the success of the [NCA] is the number of persons arrested as a result of [NCA] investigations. The number of arrests is an easily quantifiable measurement and one that is readily understood. The [NCA] considers, however, that such a statistic would not of itself provide a satisfactory measurement of the [NCA's] overall performance.

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46 P. Faris, *Corruption as a Fundamental Element of Organised Crime*, in Attorney-General's Department (ed.) (1990), note 14 *supra*, 29-32, 30.

47 NCA, *Annual Report 1985-1986* (1987), 2.

48 *E.g.* Parliamentary Joint Committee on the NCA, *Drugs, Crime and Society* (1989).

> Performance measurement in law enforcement agencies is generally exceedingly difficult. The principal aim of the authority is to take effective action to combat organised crime in Australia. The inherent difficulty in attempting to arrive at a set of performance measurements or indicators against which to assess this aim is that it is impossible to quantify the size of the task faced by the [NCA]. In addition, it is not easy to assess performance against what is a rather nebulous and qualitative objective.[49]

In its 1988-89 Annual Report, the NCA advised that it was a working on a corporate plan which was to replace its present statement of aims.[50] That statement relevantly provides:

> The [NCA] has adopted the following formal statement of aims, based primarily on its statutory functions:
> 1. To take effective action to combat organised crime in Australia.
> 2. To perform effectively its functions under the National Crime Authority Act...[51]

One is forced to agree with the NCA that these aims are "nebulous" as they beg questions as to what is meant by organised crime and what counts as effective in the context. As its five year sunset clause has been repealed, the NCA purports to have turned its corporate mind to developing an approach to management appropriate to a permanent body as it has now become.[52]

It has since been reported that the NCA have obtained reports from Arthur Andersen & Co, a large firm of accountants and management consultants, on improving NCA management and devising a corporate plan for them. At the time of writing, the Andersen report written over a year ago has not been publicly released, even to the Parliamentary Committee on the NCA,[53] and the corporate plan has not been finished or publicly released.[54]

In contrast to the caution of the NCA, the NCC (then the State Drug Crime Commission or SDCC) 1985-86 Annual report stated:

> The principal function of the [SDCC] is to prepare briefs of admissible evidence of drug trafficking and furnish them to a Special Prosecutor.
>
> The [SDCC] has given early consideration to indicators which would be considered relevant in assessing its performance. At this stage it is believed that ultimately performance of the [SDCC] will be measured by reference to the following criteria:
> 1. the number of persons arrested and subsequently prosecuted;
> 2. the quantity of illegal drugs seized;
> 3. pecuniary penalty orders sought and applications for confiscation of assets made;
> 4. legislative or administrative changes achieved as a result of recommendations of the [SDCC];

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49 Note 47 *supra*, 2.

50 NCA, *Annual Report 1988-89* (1990), 65.

51 *Ibid.*

52 S. Warnock, "Duffy Guides NCA to New Era", *Sun Herald*, 1 July 1990, 33; note 20 *supra*, 5; note 50 *supra*, 2.

53 Warnock, *ibid.*

54 M. Bruer, "NCA Corporate Plan Not Finished", *The Age*, 20 September 1990, 10.

5. development of law enforcement strategies;
6. deterrent effect of [SDCC's] activities to present or potential drug traffickers;
7. extent of information furnished to other law enforcement bodies and prosecuting authorities. [numbers added][55]

These indicators have several difficulties. Criteria 1, 2, 3, 7 are activity rather than target criteria and, to that extent, can provide no information on the impact of these activities on organised crime. Criteria 2-6 seem to be irrelevant to the stated principal function of the SCC. Criterion 5 requires fuller explanation to be informative. Criterion 6 would involve guess-work unless supported by a comprehensive MIS.

In its 1986-87 Annual Report, the SDCC published a corporate plan.[56] The SDCC corporate objective was to "take effective action to combat drug trafficking and related crime in New South Wales...". This was supported by nine "strategic objectives" under which specific programs to achieve the objectives were described. The Corporate Plan nowhere stipulates criteria by which the success of the SDCC in achieving its Corporate Objective might be determined. The first seven strategic objectives only seem capable of measurement by activity criterion. Strategic objective eight ("to establish and maintain public awareness and recognition of the [SDCC] as a responsible and effective organisation") and strategic objective nine ("to manage resources of the [SDCC] efficiently and economically") beg much the same questions as the SDCC Corporate Objectives. In the words of the NCA, they are "nebulous".

The Parliamentary Joint Committee on the NCA reported to the Federal Parliament in 1988 on its initial evaluation of the performance of the NCA. In that exercise the Committee identified two objective against which to measure the performance of the NCA. The primary objective was the extent to which the NCA had put "important or significant criminals behind bars". The secondary objective was the extent to which the NCA had changed "the environment in which organised crime operates in this country".[57] As the report explains, these objectives reflect a combination of the National Crime Authority Act 1984 and the intention of the Federal Parliament in enacting that legislation.[58] The primary objective is a target criteria which would be informative if in the context of a given illegal market one could establish with certainty the significance or importance of a given criminal and the effect on the market of prosecuting that person. The second objective, although extremely general, seems consistent with the aim and principal strategy to achieve that aim in the corporate plan for major crime, set out earlier.

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55 SDCC, *Annual Report 1985-86* (1986), 8.

56 SDCC *Annual Report 1986-87* (1987), 28-32.

57 Note 45 *supra*, 57, 65.

58 *Id.*, ch. 2 and 4.

(iii) Management Information Systems

Other than establishing systems to record data relevant to activity criteria of a program component, developing useful MIS in the organised crime program is a difficult task. The Parliamentary Joint Committee on the NCA in its Interim Evaluation of the NCA in 1988 relevantly no:ted that

> [t]he essence of organised crime... is that there is no complaint and therefore no readily ascertainable index of its nature or extent.
>
> Estimates of the turnover or the profits to be obtained in illegal markets in Australia and of the extent of revenue and corporate crime are at present little better than guesses. The basic research has not been done which would enable the development of reliable measures of illegal activity in these areas and hence some evaluation of the impact of different law enforcement strategies on such activity. Australia is not unique in this regard ... Nevertheless there is an urgent need for more basic research on illegal activity in this country so that public policy decision can be taken on a more informed basis ... The lack of a statistical base makes it impossible to say whether the work of the [NCA] has led to "a discernible diminution in the extent of criminal activity". Moreover, even if there were such a diminution measurable in quantitative terms, it would still be difficult to isolate the impact of the [NCA] from the impact of the other changes that have taken place in Australian law enforcement over the past decade.[59]

The option of creating an independent agency tasked with providing an MIS and strategic intelligence for the organised crime program would seem the most desirable but may not be easily achieved for reasons noted earlier. Whereas in the corporate crime program it was suggested that an existing national agency, the ASC, would be the appropriate site for an MIS, the same arguments do not apply to the NCA. It is believed that the NCA does not have as comprehensive an information base on organised crime as the ASC would have on corporate crime. The ASC has much of the information for an MIS readily to hand through its general regulatory functions where as the NCA probably does not have such an extensive monitoring capacity. As the Parliamentary Joint Committee on the NCA pointed out in 1988, the NCA does not have a strategic overview of organised crime in Australia.[60] Also, the political sensitivities surrounding organised crime law enforcement suggests that the NCA may not be supported by those whose co-operation is necessary for the success of such an initiative, especially the police, as the site for an organised crime MIS.

(iv) Evaluation

Many evaluations have been made of law enforcement agencies/initiatives in the field of organised crime, especially the NCA, but most can be given little credence as they are mere assertions not based on identified criteria for effectiveness or the data upon which to apply such criteria. For example, commentator Bob Bottom has stated that "the NCA has been more successful than publicly acknowledged", supporting this conclusion by reference to the

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59 *Id., 55-56.*

60 *Id.*, 66.

NCA conviction rate, the imprisonment of significant criminals, the size of drug seizures and the amount recovered under proceeds of crime legislation. There is no explanation given by Bottom as to why these statistics are any guide to the effectiveness of the NCA.[61]

There is also a trend for evaluations to commence with extensive qualifications as to the capacity to make an evaluation yet making an evaluation anyway.

One academic commentator has stated:

> Assessing the "performance" or "efficiency" of the [NCA] is difficult for a number of reasons.
> First, the notion of "organised crime" is problematic...
> Second, there are difficulties in deciding upon the criteria to measure the efficiency of the [NCA], and indeed the efficiency of any law enforcement agency...
> Third, external review of the [NCA] is limited simply to information available...
> Subject to the methodological difficulties outlined above, the [NCA] appears to have compiled an impressive track record to date.[62]

Given the "methodological difficulties" there is no rational reason to be impressed or unimpressed with the "track record" of the NCA. The correct conclusion is that no rational evaluation can be made.

Of the same type, the Parliamentary Joint Committee on the NCA made evaluative remarks about the performance of the NCA despite the caution showed in their Initial Evaluation Report of May 1988, quoted earlier, and the fact that they did not then feel able to make any conclusive evaluation of the NCA at that stage.[63] The Committee stated in November 1989 that

> The Measure of the [NCA's] success lies not only in the number of convictions of significant criminals arising from its investigations but also in the fact that it is unlikely that many of the convictions would have occurred without the [NCA].[64]

In July 1990, the NCA advertised seeking public submissions for its continued evaluation of the NCA. The advertisement stated that although it had not intended to further evaluate the NCA until seven years after the NCA's commencement (that is until July 1991) "concerns about the continuing operations of the [NCA]" resulted in the Committee deciding to start the evaluation sooner. The advertisement relevantly went on to say that the Committee will examine the efficiency, effectiveness and accountability for the NCA. That inquiry is scheduled to report to the Federal Parliament in August 1991.[65]

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61 B. Bottom ,"Despite what the Critics Say, the NCA is a Success Story", *The Age*, 28 February 1990, 15.

62 C. Corns "The National Crime Authority: An Evaluation" (1989) 13 *Crim LJ* 233.

63 Note 45 *supra*, 2.

64 Note 20 *supra*, 5.

65 *Sydney Morning Herald*, 11 July 1990, 10.

Much is to be said for the use of parliamentary committees in performing such evaluations, provided they have access to sufficient resources, expertise and the MIS operative in the program under evaluation.

An encouraging example of evaluation in the field of not only organised but other areas of major crime was the report from the Federal Director of Public Prosecutions on civil remedies in 1987. It documented the initiative of giving the DPP the ability to pursue certain civil remedies to recover the proceeds of crime. The DPP was however required by statute to report on its performance. Using criteria based on the effects of the loss of the proceeds of crime on the viability of committing major crime, the DPP was able to provide a reasonably convincing and thorough case for showing that the initiative was reasonably effective.[66] This example contradicts any suggestion that initiatives relating to organised crime cannot or should not be subject to close evaluation in terms of effectiveness.

D. PROGRAM 4 (PUBLIC CORRUPTION)

(i) Definition

The following definition of public corruption is considered appropriate for present purposes:

> Public corruption means the intentional misperformance or neglect of a recognised public duty, or the unwarranted exercise of public power, with the motive of gaining some advantage more or less directly personal.[67]

(ii) Criteria

There has been far less interest in evaluating the effectiveness of components of the public corruption program than has been the case for the organised crime program.

Such discussion as has occurred recently has focussed on ICAC in NSW. ICAC states that its aim is to minimise public corruption in NSW through its investigations, corruption prevention and public education.[68] ICAC Commissioner Ian Temby QC has noted that

> It is no easy thing to measure how well a body such as ICAC is doing because the product is not of uniform size or quality.[69]

He has suggested a number of indicators to measure ICAC's performance, which seem similar to those used by the Hong Kong ICAC:[70]

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66 DPP, *Civil Remedies Report 1985-1987* (1987).

67 Based on J. Douglas & J. Johnson, *Official Deviance: Readings in Malfeasance, Misfeasance and Other Forms of Corruption* (1977), 15-16.

68 ICAC, *Annual Report 1988-1989*, 6-7.

69 Note 23 *supra*, 38.

70 D. Jeaffreson, *The Importance of a Three-Prong Attack on Corruption and an Assessment of its Effectiveness*, in note 14 *supra*, 21-23, 22.

- statistics as to ICAC activities which, over time may suggest trends which can be used to improve efficiency and effectiveness;
- public support as determined by public opinion surveys;
- relativist criteria - ICAC doing what the police cannot or will not;
- the necessity of ICAC's continued existence.[71]

The advantages of the first three are that they are measurable with little cost or difficulty. The last criteria begs the question as to how necessity would be determined. Overall it is suggested that these criteria are unsatisfactory as they do not address the conditions which make corruption possible and likely.

Save for ICAC's own views and the very general positions taken during parliamentary debate of the ICAC Bill[72] no effectiveness criteria have, however, been generally agreed.[73] I have elsewhere suggested that the appropriate criteria for measuring ICAC's effectiveness:

> ... should be based upon a qualitative analysis of the evidence as to:
> 1. the impact of the ICAC on the level of corrupt conduct;
> 2. the impact of the ICAC on the conditions which make corruption likely and possible; ...
>
> This in turn can be broken down into specific elements, such as the impact upon:
> - particular parts of the public sector (for example, law enforcement agencies, local government);
> - systems for corruption detection within the public sector;
> - systems for accountability as to key decisions in the public sector where a benefit of some sort can be corruptly conferred.[74]

The contexts for public corruption contemplated by this approach to effectiveness criteria are virtually identical to those for government illegality, noted earlier. Likewise, organisational and transactional accountability are fundamental considerations. Criteria for effectiveness should relate to these contexts.

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71 *Id.*, 38-39.

72 M. Bersten, "Making ICAC Work: Effectiveness, Efficiency and Accountability", *Current Issues in Criminal Justice* No. 2 March 1990, 67-113, 79-81.

73 M. Bersten, *Organised Crime: Strategies and Future Directions*, paper presented at the 1988 Congress of the Australian and New Zealand Association for the Advancement of Science, Sydney University, 18 May 1988; M. Bersten, *Democracy and Strategy: Policy Development in the Field of Organised Crime and Corruption*, paper presented at the Fourth Annual Conference of the Australian and New Zealand Society of Criminology, University of Sydney, 24 August 1988; M. Bersten, "Crimefighters: Time For A Rethink", *Australian Society* July 1988, 39-41; M. Bersten & R. Hogg, "NSW Anti-corruption Commission: Has it been worth the wait?", (1988) 13 *Legal Services Bulletin* 146; M. Bersten & R. Hogg, "The Temby Chainsaw Massacre meets the Days of Our Lives? ICAC and NSW Inc 18 Months On" (1990) *Legal Services Bulletin* (forthcoming); M. Bersten, "The Anti-ICAC Campaign Gathers Pace in NSW" *Australian Society* September 1990, 24.

74 Note 72, *supra*, 81.

(iii) Management Information Systems and Evaluation

The comments made earlier with respect to MIS and evaluation of effectiveness program components dealing government illegality apply equally to program components apply equally to the public corruption program.

Of special importance in the public corruption program are difficulties arising out of the secretive and sometimes politicised nature of public corruption. This may make it practically impossible to collect comprehensive data on public corruption. Also, there may be political pressures which may work to circumscribe a national MIS or national evaluation. For example there may be concerns that these processes might be used to suggest that government is more corrupt than another or to interfere with the government processes due to political embarrassment.

E. PROGRAM 5 (WHITE COLLAR CRIME)

(i) Definition

The classic definition of white collar crime is that it is violation of criminal law by a person of the upper socio-economic class in the course of his occupational activities[75] and the classic white collar crime is fraud. White collar crime is more popularly understood to also include any non-violent offences involving money such as fraud and revenue evasion performed with some sophistication or system, regardless of the socio-economic class of the offender or whether the offence occurred in the course of occupational activities. This popular understanding does not however count simple revenue evasion or welfare offences as white collar crime.

As "white collar crime" is so entrenched in discussions of major crime it will, as a term, have to be persisted with. It is suggested that once the classic and popular understandings of the term are combined, white collar crime becomes a residual category in the sense that it covers most instances of major crime which do not seem to fit the other four types of major crime, defined above. Contextually however it can be usefully divided into two types, criminal abuse of the public and private sectors.

(ii) Criteria

In relation to abuse of the public sector, the comments on effectiveness criteria made relating to government illegality and public corruption apply equally to white collar crime. Special emphasis must therefore be given to two systemic conditions making for white collar crime, lack of public sector accountability and system vulnerability to external criminal abuse.

In that regard it should be noted that whilst no agency/initiative in Australia perceives itself has white collar crime as its principal subject-matter, many do have some role in dealing with a specific context in which white collar crime occurs. Many of these agencies would see this role as one of law enforcement

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75 Based on E. Sutherland, "Crime and Business", *The Annals* No 217, 112-118.

ancillary to either more general law enforcement functions (e.g. the NCA, the police), revenue collection (e.g. ACS, ATO), benefit program delivery (e.g. Department of Social Security) or regulatory functions (e.g. licensing). Therefore activities directed against white-collar crime tend to be subsumed in these more general roles.

A good example is that of the ACS whose "mission statement" relevantly provides:

> The Australian Customs Service aspires to make the most efficient and effective contribution to the delivery of Government policy through a Customs program which covers:
>
> - collection of Customs and Excise duties and protection of that revenue against erosion and fraud;
> - provision, within an overall framework of facilitation, of an effective means to administer a range of Government controls over the movement of people, goods, aircraft and ships into and out of Australia...[76]
>
> ACS corporate goals have been derived from this mission statement, include:
>
> 1. To improve interception of prohibited goods, including narcotics.
> 2. To ensure border and underbond controls do not unduly hinder commerce or overseas travellers.
> 3. To administer controls on behalf of other agencies within agreed standards and limits.
> 4. To collect the correct amount of Customs duty, Excise and other revenue and maintain a strong enforcement effort to detect and deter fraud in the revenue area.[77]

In relation to white collar crime in the private sector the heterogeneity of the category of white collar crime is probably greater than for any other type of major crime in terms of context and crime victim. To assess effectiveness in these circumstances probably requires modelling of the more common types of this crime. Once modelled it would be possible to identify the conditions making such crime possible and likely. This would then provide a basis for developing relevant effectiveness criteria.

(iii) Management Information Systems and Evaluation

The comments made earlier with respect to MIS and evaluation of effectiveness program components dealing government illegality and public corruption apply equally to program components of the white collar crime program.

It should be noted that the prospects for developing significant, national MIS and evaluation in relation to fraud on the public sector seem good. At the Federal level, public sector fraud control systems are under ongoing review, run largely by the Federal Attorney-General's Department and the Australian Audit Office, a process initiated by a report of the Committee undertaking a review of systems for dealing with fraud on the Commonwealth of Australia in 1987.[78]

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76 ACS, *Annual Report 1988-1989* (1989), 5.

77 *Id.*, 18.

78 Special Minister of State, note 15 *supra*; note 23 *supra*, 104-105.

This may provide a platform upon which to build a national system of public sector fraud MIS and evaluation.

XI. THE LIMITATIONS AND PROSPECTS OF MANAGERIALISM

From the preceding discussion of the five types of major crime and managerialism there are numbers of factors which tend to obstruct a comprehensive approach to "managing for results" in the major crime field in Australia. In particular these are:

1. Difficulties in specifically identifying the conditions which make major crime possible and likely.
2. Difficulties in establishing definitions of the various types of major crime.
3. Difficulties in developing workable effectiveness criteria.
4. Serious problems in developing adequate MIS.
5. Serious problems in developing practical evaluation systems and determining where responsibility for evaluation should lie.

Not surprisingly, relevant agencies/initiatives have a poor record for developing valid and useful indicators of their own performance. The practical prospects for a national approach to evaluating the effectiveness of major crime programs is seem therefore poor.

The prospects however for applying the "management for results" imperative on a national level seem reasonable at least in the fields of corporate crime and public sector fraud. The prospects seem poor in the field of government illegality, public corruption and private sector white collar crime. It may be however that some headway can be made through co-operative efforts amongst relevant agencies/initiatives in the fields of government illegality, organised crime and public corruption provided that political problems can be overcome.

It must be emphasises that until national evaluations and comprehensive audits of law enforcement in Australia occur, there is no strong foundation for determining what national impact particular agencies/initiatives are having.[79] This lack of knowledge practically results in reduced accountability of these law enforcement efforts.

XII. MANAGERIALISM AND ACCOUNTABILITY

In this paper it has been argued that the imperative for "management for results" should be applied to programs for dealing with major crime in Australia. The principal political basis for arguing in favour of this imperative

79 M. Bersten, (24 August 1988), note 73 *supra.*

is that it provides a mechanism to make those programs more accountable to the parliament and the people for their effectiveness. This paper has also highlighted that lack of accountability as one of the fundamental conditions making major crime possible and likely in Australia. As a practical matter imperatives of managerialism other than "management of results" such as deregulation, risk management and reducing some areas of accountability for the propriety of some areas of public sector ("letting the managers manage") reduce accountability in relevant respects. Therefore there is an apparent conflict between some of the elements of managerialism when considering it in the context of major crime in that managerialism enhances accountability in parts of its program whilst removing it in others.

Whilst managerialism continues to be a public sector mega-trend into the 1990s, accountability should be the focus for discussions of major crime in Australia.

XIII. POSTCRIPT

An emerging trend for Australian agencies dealing with major crime is to include statements of functions or corporate plans in their Annual Reports. It has not been possible to deal with all of them in this article. Two important examples worth noting, which have been published since this article was submitted for publication, are the NCA *Annual Report 1989-1990*[80] and the Criminal Justice Commission (Qld) Annual Report 1990.[81]

80 See the new Corporate Plan, 66-67.

81 See paragraphs 1.4 and 1.5 on purposes and functions of the Commission.