

THE GOVERNANCE OF COVERT INVESTIGATION

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[This paper considers covert investigation and how such conduct might be governed and regulated within operational criminal law enforcement. It reflects upon the purpose of governance and how it is currently structured and functions. It proposes principles of governance that could inform future debate and development.]

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I COVERT INVESTIGATION IN CONTEXT

The covert investigation of crime is an arena in which a number of principles and interests find themselves juxtaposed in dynamic, and occasionally fraught, interaction. Traditional approaches to policing and conventional methods of crime investigation are now part of a wider enforcement portfolio that exists alongside increased investigative potential arising from technological developments and the widely held perception that the new century faces new threats which must be addressed in new ways.¹ Long-recognised theoretical tensions

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¹ For a summary and critique of the thinking on the asserted ‘new’ threats, see Amy E Eckert and Laura Sjoberg (eds), *Rethinking the 21st Century: ‘New’ Problems, ‘Old’ Solutions* (Zed Books, 2009). Amy E Eckert and Laura Sjoberg, ‘Introduction: “New” Problems and “Old” Solutions’ in Amy E Eckert and Laura Sjoberg (eds), *Rethinking the 21st Century: ‘New’ Problems, ‘Old’ Solutions* (Zed Books, 2009) 1 provides a particularly helpful overview.

between crime control and due process are now manifest in the debate about how best, if possible, simultaneously to achieve both community safety (taken here to include safety secured through individual and community rights protection) and the security of the state (to which individual rights are argued by some to take second place).² It is a debate given additional contextual hue in light of the ongoing search for improved cost-effectiveness and better value for money arising from the New Public Managerialism of the 1980s and 1990s and pressures on public spending arising from the recent global financial crisis.³ The blurring of the historical distinction between the role of policing and the role of the intelligence and security communities, for instance, through the re-identification of organised crime as a national security threat,⁴ adds further complexity. In terms of both technological potential and political justifiability, the parameters of the possible are expanding, with a consequential diminution of what is considered exceptional.

Ashworth warns of the need 'to be on guard against the covert expansion of the categories of case to which' exceptional and intrusive investigation methods apply.⁵ Just because some method can be used does not mean it should be used.

² See generally Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1. In both the United Kingdom and Australia, government Ministers have argued that an individual citizen's rights are now trumped by a greater right, that of the state to defend itself against terrorism (and so, arguably, to save lives): see David Blunkett, 'Freedom from Terrorist Attack Is Also a Human Right', *The Independent* (online), 12 August 2004 <<http://www.independent.co.uk/opinion/commentators/david-blunkett-freedom-from-terrorist-attack-is-also-a-human-right-556280.html>>; ABC Local Radio, 'Ruddock Denies Anti-Terrorism Law Breaches Human Rights', *The World Today*, 4 November 2005 (Philip Ruddock) <<http://www.abc.net.au/worldtoday/content/2005/s1497863.htm>>. Philip Ruddock was the federal Attorney-General in the Howard government at the time of the interview. For a case law-based critique of the 'public interest' versus individual rights debate, see Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 123 *South African Law Journal* 63, 83–6. Concerning theoretical approaches to criminal justice, Michael King, *The Framework of Criminal Justice* (Croom Helm, 1981) outlines four additional models — medical, bureaucratic, status passage and power — in his consideration of social functions of the criminal justice system and the role of the criminal court in delivering those functions. At first sight, the model labelled 'bureaucratic' is closely associated with due process values; however, whereas the due process approach is concerned to avoid arbitrary use of state power against the individual, the bureaucratic approach is primarily concerned with speedy processing of defendants utilising standard procedures. In the construction applied in this paper, the role of governance is to protect citizens from abuse of covert investigation powers by state agents, particularly where the political agenda is inclined to the crime control model with its social function of punishment.

³ Covert investigation generally produces strong evidence of criminal conduct and is therefore popular with investigators seeking convictions but it is extremely resource intensive and investigating agencies have to prioritise conflicting requests for such resources. On the emergence of New Public Managerialism within English policing and for an introduction to the relevant policy documents, see generally Stephen P Savage, *Police Reform: Forces for Change* (Oxford University Press, 2007) 106.

⁴ See *Presidential Decision Directive No 42: International Organized Crime*, PDD/NSC 42, October 1995; Exec Order No 12 978, 60 Fed Reg 54 577 (21 October 1995); Home Office (UK), *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, Cm 6167 (2004) 1 ('*One Step Ahead White Paper*'). See also Cabinet Office (UK), *The National Security Strategy of the United Kingdom: Security in an Interdependent World*, Cm 7291 (2008) 12–13 [3.14]–[3.17]. Australia, for the time being, preserves the distinction between security and law enforcement: see Philip Flood, *Report of the Inquiry into Australian Intelligence Agencies* (2004) 2–3, 5.

⁵ Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, 2002) 107.

The expansion of possibilities creates a need for a more purposeful dialogue about the direction and governance of covert investigation. It is an issue too important to be left to the political discourse of 'emergency response' in which recourse to emotive labels and the language of battle are used to conflate the issues of terrorism and serious crime and so heighten public concern about 'the need' to employ ever more intrusive investigation methods.⁶

The need for considered reflection is emphasised further by the political attractiveness of recent theoretical developments in relation to criminal justice and the policing function. O'Malley's technocratic justice model, in which technical control and administrative rationalisation drive approaches to controlling crime and achieving compliance,⁷ can be used to justify the translation of low-level policing functions from the application of powers through individual officer discretion into 'demoralised' policing through covert or semi-covert use of surveillance technologies such as, for example, speed cameras and automatic numberplate recognition for policing traffic regulations.⁸ The police power model of the criminal process, in which policing serves public interests rather than individual citizen/victim interests, is consistent with the new political rhetoric of security and with the consequential response of high-level policing.⁹

Although covert investigation is historically antithetical to English approaches to policing¹⁰ (which, in turn, have influenced approaches to policing in Australia¹¹), it is now argued to be the only effective means of countering criminal conduct that is difficult to evidence through conventional witness testimony at trial.¹² It is a tool of particular utility now that the concept of pre-emptive policing has been added to the strategic portfolio alongside traditional approaches of prevention through the deterrence of physical presence, target-hardening and ex post facto prosecution. Such policing finds expression in the

⁶ See generally *ibid* 96–108.

⁷ See generally Pat O'Malley, 'Technocratic Justice in Australia' (1984) 2 *Law in Context* 31.

⁸ See *ibid* 45–7.

⁹ See generally Markus Dirk Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process' in R A Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005) 91. On high- and low-level policing, see Jean-Paul Brodeur, 'High and Low Policing in Post-9/11 Times' (2007) 1 *Policing: A Journal of Policy and Practice* 25.

¹⁰ See generally Clive Emsley, *The English Police: A Political and Social History* (Longman, 2nd ed, 1996) ch 3. On English resistance to the police as a mechanism for surveilling the population (a practice in continental Europe in the early 19th century when public police forces were first established in England), see Philip Rawlings, *Policing: A Short History* (Willan Publishing, 2002) 72, which quotes a contemporary newspaper article. See also Clive Emsley, 'The Birth and Development of the Police' in Tim Newburn (ed), *Handbook of Policing* (Willan Publishing, 2003) 66.

¹¹ At the time Australia was colonised, the idea of policing was contested and debated in the imperial centre of London, resulting in the varying models and concepts of policing that influenced the shape, structure and practice of policing in Australia: Dean Wilson, 'Histories of Policing' in Roderic Broadhurst and Sara Davies (eds), *Policing in Context: An Introduction to Police Work in Australia* (Oxford University Press, 2009) 18, 19.

¹² See *One Step Ahead White Paper*, above n 4, 41; New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1997, 2323 (Richard Amery).

increasing resort to the criminalisation of preparatory conduct (for which there is frequently no victim to trigger a conventional investigation).¹³

With power comes responsibility in the use of that power. Governance frameworks are fundamental to protection against abuse or misuse of power and to accountable policing, which, in relation to the investigation and prosecution of crime, is also inextricably linked to models of prosecution: in the United Kingdom and in Australia, models structured around the adversarial trial system. This paper considers the different approaches to the governance of covert investigation that have emerged in the common law jurisdictions of England¹⁴ and New South Wales. Superficially similar, at the core of these two approaches are fundamental philosophical differences in attitude towards the regulation of covert investigation.

The purpose of this paper is to consider and identify possible general principles of governance (drawing upon investigation management practice and the law) of covert investigation, recognising that such principles must operate within the context of different jurisdictional traditions.¹⁵ One size may not fit all. This paper argues that an effective governance framework can be achieved in three complementary, but not unproblematic, ways: through internal management, external scrutiny, and ultimately through the laws of evidence. Whether it is appropriate to rely upon the last mechanism as a means of indirectly regulating investigators is debatable. Two questions provide a leitmotif throughout this consideration: what outcome is the measure of success in covert investigation; and what outcome is the measure of success in governance?¹⁶

¹³ See, eg, *Terrorism Act 2000* (UK) c 11, ss 56–8; *Criminal Code Act 1995* (Cth) s 101.6. But see also Ashworth, *Human Rights*, above n 5, 5, who observes that the *Terrorism Act 2000* (UK) c 11 is but one example of a tendency in such laws to minimise suspects' rights in parallel to the developments in criminalisation.

¹⁴ The United Kingdom of Great Britain and Northern Ireland comprises three criminal jurisdictions: England and Wales; Scotland; and Northern Ireland. This paper considers England and Wales, which will be referred to as 'England'. Both England and New South Wales apply the common law and operate an adversarial trial system.

¹⁵ Covert investigation governance must be viewed from two related but distinct perspectives. First, resort by investigators to statutory triggers for the use of covert investigation powers must be understood and regulated to eliminate erroneous or deviant manipulation of applications to use such powers. Secondly, once authorised, the management of operations utilising such powers must be understood and regulated.

¹⁶ Performance measurement in governance, as in many management functions of the criminal justice system, is problematic. Where such measurement has been considered at all, it has focused on the outputs of the governance bodies (for example, numbers of audits or reports) and, unpersuasively, on vaguely defined indirect outcomes over which governance bodies have little or no control (for example, reduced numbers of public complaints about the organisations subject to governance): see Tim Prenzler and Colleen Lewis, 'Performance Indicators for Police Oversight Agencies' (2005) 64 *Australian Journal of Public Administration* 77. Prenzler and Lewis, concentrating on governance of local policing generally rather than on governance of covert investigation, highlight the need to develop more sophisticated measures of governance success: at 82.

II THE PURPOSE OF COVERT INVESTIGATION AND ITS GOVERNANCE

A *The Necessity of Governance in Covert Investigation*

Outcome is derived from and defined by purpose. Within the context of this paper, the purpose of covert investigation in a criminal law enforcement context may be simply stated: primarily, it is to acquire evidence lawfully that is relevant and admissible and that cannot be obtained by conventional investigation, so that it may be adduced at trial. A consequential secondary purpose can also be argued: namely, the acquisition of information (commonly termed ‘intelligence’ by practitioners) that can be used to identify opportunities to secure and gather evidence either by covert or more conventional means.¹⁷

Governance serves to inhibit and discover deviance. Governance frameworks are defined by the way in which specific deviance is characterised as a problem in need of control, and by whose interests are served by such deviance.¹⁸ Deviance in policing may be characterised in a number of ways: conduct that is criminal per se, conduct that breaches criminal procedural law, and conduct other than the aforementioned categories that falls short of expected and required

¹⁷ The discussion here is deliberately functional. The statutory purposes of covert investigation are variously constructed around the design of the authority regime. Under the *Regulation of Investigatory Powers Act 2000* (UK) c 23 (*‘RIPA’*), in language which calls to mind the police power model of criminal justice, ‘directed surveillance’ must be authorised if it is for the purposes of preventing or detecting crime or preventing disorder, protecting public health, assessing tax liability, or is being conducted in the interests of national security, the economic well-being of the United Kingdom, or public safety: ss 28(2)–(3). ‘Intrusive surveillance’ must be authorised if it is necessary in the interests of national security or the economic well-being of the United Kingdom, or for the purpose of preventing or detecting serious crime: ss 32(2)–(3). For both directed and intrusive surveillance, once the necessary purpose test has been met, there is a further qualification that must be satisfied before the surveillance can be lawfully authorised. The proposed surveillance must be proportionate to what is sought to be achieved: ss 28(2)(b), 32(2)(b). On proportionality in covert investigation generally, see Clive Harfield and Karen Harfield, *Covert Investigation* (Oxford University Press, 2nd ed, 2008) 17–20. Under ss 28 and 32, surveillance may be used for preventing crime, for detecting that a crime has been committed, for preventing disorder, or for preventing serious crime or detecting that a serious crime has been committed. Surveillance may also be conducted to apprehend a suspected offender: see s 81(5). In *C v Police* [2006] 1 Pol LR 151, 159–60 [80]–[89] (Mummery LJ, Burton J, Sir Richard Gaskell, Sheriff Principal John McInnes and Robert Seabrook), the Investigatory Powers Tribunal concluded that covert surveillance for purposes other than those specified in the statute fell outside the statutory authorisation regime. See also Mark Aldred, ‘Does *RIPA* Apply to Disciplinary Investigations by Public Bodies?: “Core Functions” and “Ordinary Functions”’ [2007] *Covert Policing Review* 25. In New South Wales, with authorisation focused on specific operations rather than investigative method, a ‘controlled operation’ is an operation conducted for the purpose of: obtaining evidence of criminal activity or corrupt conduct; arresting any person involved in criminal activity or corrupt conduct; frustrating criminal activity or corrupt conduct; or carrying out any activity that is reasonably necessary to facilitate the achievement of the aforementioned purposes: *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 3(1) (definition of ‘controlled operation’).

¹⁸ This proposition about characterisation is corroborated from a slightly different perspective by Garland’s observation that ‘[t]he governmentality literature offers a powerful framework for analysing how crime is problematized and controlled’: David Garland, ‘“Governmentality” and the Problem of Crime’ in Russell Smandych (ed), *Governable Places: Readings on Governmentality and Crime Control* (Ashgate, 1999) 15, 15. See also Trevor Jones, ‘The Governance and Accountability of Policing’ in Tim Newburn (ed) *Handbook of Policing* (Willan Publishing, 2003) 603, 604–5.

professional standards. The first category is governed by the criminal law; the last category by organisational professional standards, codes and disciplinary regulations. With respect to breaches of criminal procedural law — relevantly, the laws that empower policing and other enforcement agencies to do what they do — a historical reliance upon case law that has remedied such breaches (where the accused has been in a position to challenge police practice) has in recent years been reinforced by the creation of independent oversight structures to inhibit such breaches.¹⁹ These structures range from ad hoc commissions (in Australia) to new statutory frameworks (in England and Wales).²⁰ Statutory governance frameworks reduce the need for the courts to mop up the consequences of official deviance — which may or may not emerge as an issue at trial or on appeal — without infringing judicial discretion as to what evidence to admit or exclude. Investigators may legitimately be expected to assume responsibility for their own professionalism: an expectation not inconsistent with the idea proposed here that practitioners should also be contributing to a theoretical and policy discourse about the future management and deployment of covert investigation. ‘Criminal investigations are a high-risk area for corruption’:²¹ not only criminal corruption, but corruption of procedure. Agencies in which the organisational culture (itself a product of the prevailing socio-political environment)²² tolerates a ‘means justified by the ends’ mentality may be considered particularly vulnerable to procedural corruption.²³ The arena of covert investigation is potentially more vulnerable, since such investigation, by definition, cannot be challenged by the subject of the investigation in ways that overt investigation powers can be. As the European Court of Human Rights observed in *Huvig v France*:

there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of art 8 of the *Convention for the Protection of Human Rights and Fundamen-*

¹⁹ For example, the creation in England and Wales of a Surveillance Commissioner under s 91 of the *Police Act 1997* (UK) c 50, an Interception of Communications Commissioner under s 57 of the *RIPA*, and an Intelligence Services Commissioner under s 59 of the *RIPA*.

²⁰ See, eg, *Police and Criminal Evidence Act 1984* (UK) c 60 (*‘PACE’*). In New South Wales, a Royal Commission into the New South Wales Police Service investigated issues of corruption and malpractice: New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) (*‘NSW Royal Commission Report’*). Statutory regulatory frameworks will be discussed more fully below.

²¹ *NSW Royal Commission Report*, above n 20, vol II, 392 [7.3].

²² The totality and multi-perspective complexity of police organisational culture from canteen to command suite must be viewed in the context of the ‘conditions of policing’: see Janet Chan and David Dixon, ‘The Politics of Police Reform: Ten Years after the Royal Commission into the New South Wales Police Service’ (2007) 7 *Criminology & Criminal Justice* 443, 447–8, which draws upon Janet B L Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press, 1997).

²³ See, eg, Carl B Klockars, ‘The Dirty Harry Problem’ (1980) 452 *Annals of the American Academy of Political and Social Science* 33.

*tal Freedoms*²⁴] ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...²⁵

If covert investigation is to be the social good that politicians in legislatures claim it to be,²⁶ then it must be conducted in a fashion that is as amenable as feasible to scrutiny. Whilst statute prescribes what investigators can and cannot do covertly (which might be the subject of a challenge at trial if the defence is able to secure sufficient information to suggest police wrongdoing), mechanisms for external inspection are relied upon as a means of regular and consistent governance. Necessarily, this latter form of governance is indirect: it is not the actual conduct of investigators that is subject to governance, but the investigator-generated records of that conduct that are audited in lieu of direct governance. In the neo-liberal society in which governments foster the concept of the 'responsible individual',²⁷ the responsible law enforcement organisation is required daily to demonstrate its professionalism and integrity through its record-keeping.²⁸ In what might be seen as an almost ironic variant of the much espoused paradigm of policing by consent,²⁹ policing of the police only works if the investigators contribute to and collaborate with those undertaking the function of governance.

B *Rules of Evidence as an Alternative to Governance*

The alternative to a statutory governance framework as a mechanism for addressing investigative deviancy is reliance upon the laws of evidence with their discretionary principle that evidence improperly obtained may be excluded if inclusion would adversely affect the fairness of any proceedings.³⁰ This

²⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

²⁵ (1990) 176-B Eur Court HR (ser A) 54 [29], quoting *Malone v United Kingdom* (1984) 82 Eur Court HR (ser A) 32 [67].

²⁶ See United Kingdom, *Parliamentary Debates*, House of Commons, 6 March 2000, vol 345, col 767 (Jack Straw), in which Jack Straw, in opening the Second Reading debate on the Regulation of Investigatory Powers Bill 2000 (UK), asserted that covert investigation powers are 'vital' to 'the protection of society as a whole'. In New South Wales, Members of Parliament were invited to fight fire with fire:

Criminals will use any method to commit crimes and protect themselves and their ill-gotten gains. The purpose of this bill is to allow law enforcement agencies to use similar methods to fight crime while at the same time providing a strict system of accountability for the use of otherwise unlawful activities.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 November 1997, 2322 (Richard Amery).

²⁷ See Garland, above n 18, 16.

²⁸ Accountability through documentary records is required of law enforcement agencies by a number of statutes and in relation to a variety of law enforcement functions. In the context of covert investigation, see, eg, *Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 5(2), (2B)(d), 8(6); *RIPA* ss 23, 229(5)(d).

²⁹ The notion of policing by consent can be traced to the Nine Principles of Policing articulated by Sir Robert Peel when creating the Metropolitan Police Service in London in 1829; these principles are set out in John Grieve, Clive Harfield and Allyson MacVean, *Policing* (Sage, 2007) 36–7. Peel strongly envisaged constables as members of the community they served. They policed with the community and by the consent of the community, recognising that successful policing could only be achieved with the 'willing co-operation' of the community (Principle 3).

³⁰ Privileging the fairness of the proceedings, *PACE* s 78(1) states that:

approach has its problems. It depends upon the defence (whose role is to represent the accused, not to regulate investigation) raising an appropriate challenge, which is itself dependent upon the defence having sufficient information to realise that a challenge is there to be raised. It also depends on judges exercising their discretion to exclude. Both s 78(1) of the *Police and Criminal Evidence Act 1984* (UK) c 60 ('PACE') and s 138(1) of the *Evidence Act 1995* (NSW) allow judges to admit evidence improperly obtained, so there is no guarantee, as there is in New Zealand for example,³¹ that evidence improperly obtained will be excluded. In *R v Stubbs*, Higgins CJ made clear that even if he had agreed with the defence suggestion that investigators had acted improperly (which he did not³²), he would still have admitted the contested evidence because it was the role of the jury to find facts about that evidence,³³ the probative value of the disputed evidence was high,³⁴ and because '[t]he evil [of paedophiles grooming victims via the internet] to be confronted by this kind of

the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Taking a rather different perspective which privileges the value of the evidence, s 138(1) of the *Evidence Act 1995* (Cth) states that evidence obtained:

- (a) improperly or in contravention of an Australian law; or
 - (b) in consequence of an impropriety or of a contravention of an Australian law;
- is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

This is mirrored in s 138(1) of the *Evidence Act 1995* (NSW).

³¹ See *Evidence Act 2006* (NZ) s 8(1) (emphasis added):

In any proceeding, the Judge *must* exclude evidence if its probative value is outweighed by the risk that the evidence will—

- (a) have an unfairly prejudicial effect on the proceeding; or
- (b) needlessly prolong the proceeding.

See also s 24(2) of *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') (emphasis added):

Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence *shall* be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The rights protected by the *Canadian Charter of Rights and Freedoms* are briefly and broadly expressed. There is no equivalent of *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8, for instance, but the rights defined in art 8 would not necessarily be excluded from protection under the *Canadian Charter of Rights and Freedoms*. In *Bunning v Cross* (1978) 141 CLR 54, 74–5 (Stephen and Aickin JJ), the High Court of Australia, following its earlier decision in *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ), held that the discretion was a device used to weigh competing public policy considerations. The discretion was not simply a device used to discipline investigators, even though in admitting illegally obtained evidence the court was at risk of appearing to condone such conduct. See also Kerri Mellifont, *Fruit of the Poisonous Tree: Evidence Derived from Illegally or Improperly Obtained Evidence* (Federation Press, 2010) 135–7; Rosemary Pattenden, 'The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia' (1980) 29 *International and Comparative Law Quarterly* 664.

³² (2009) 3 ACTLR 144, 157 [66].

³³ *Ibid* 157 [67].

³⁴ *Ibid* 157 [68].

investigation is of high public importance.³⁵ Tapper has recently suggested that the application of judicial discretion inherently undermines the rule of law,³⁶ and thus becomes a value judgment subject to the variables of circumstance and judicial opinion, itself amenable to influence by public outrage. Such variability begets ambiguity, and offers little firm guidance to investigators, even if investigators were regularly and comprehensively apprised of new case law which, Bronitt asserts, they are not.³⁷

Regulation of investigation is not the primary purpose of the laws of evidence.³⁸ Nor can such laws effectively and consistently achieve regulation of investigation — even if they can certainly influence such regulation — because their strictures are applied at the discretion of the judge, many weeks (if not months or years) after the conduct that needed to be controlled.³⁹ Before the proceedings are concluded, the judge is required to make theoretical determinations about the effect of admitting the disputed evidence on the fairness of the proceedings, and that effect can only be inferred. The product of covert investigation is very often incontrovertible evidence which the defence would undoubtedly regard as ‘prejudicial’ to any protestations of innocence.⁴⁰ Exclusion is of

³⁵ Ibid 157 [69]. In *Schenk v Switzerland* (1988) 140 Eur Court HR (ser A) 29 [46], the European Court of Human Rights held that rules of evidence regarding admissibility were the preserve of domestic courts, the Court confining its role to determining the fairness of proceedings ‘as a whole’. The requirements of a fair trial do not automatically demand exclusion of evidence improperly or unlawfully obtained; but before such evidence may be admitted, the relevant court must consider the probative value of the evidence, defence opportunities to challenge the evidence and any other relevant factors pertaining to the fairness of the proceedings: see *Khan v United Kingdom* [2000] V Eur Court HR 279, 293 [34]; *PG v United Kingdom* [2001] IX Eur Court HR 195, 221–2 [68]–[69].

³⁶ See Colin Tapper, ‘The Law of Evidence and the Rule of Law’ (2009) 68 *Cambridge Law Journal* 67. See also William Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge University Press, 2nd ed, 2006).

³⁷ See Simon Bronitt, ‘Regulating the Admissibility of Evidence: From Reactive to Proactive Models’ (Paper presented at the ARC Centre of Excellence in Policing and Security Criminal Investigations Workshop, The Australian National University, Canberra, 11 December 2009). I am grateful to Professor Bronitt for providing me with a copy of his working draft. The Office of Surveillance Commissioners in England provides case law updates on its website: see Office of Surveillance Commissioners, *Judgements and Case Law* <http://surveillancecommissioners.independent.gov.uk/judgements_case_law.html>, but there is no obligation on investigators to avail themselves of this facility.

³⁸ Evidence rules are primarily concerned with relevance and admissibility: see John Anderson and Peter Bayne, *Uniform Evidence Law: Text and Essential Cases* (Federation Press, 2nd ed, 2009) 13; Peter Murphy, *Murphy on Evidence* (Blackstone Press, 5th ed, 1995) 4. Such rules provide a framework for the settlement of disputes between citizens and the enforcement of the law: Andrew Ligertwood, *Australian Evidence* (LexisNexis Butterworths, 4th ed, 2004) 1. Exclusion of evidence deemed inadmissible limits the information placed before trial fact-finders, leading to analysis of evidence rules as a form of jury control: see Lisa Dufrainmont, ‘Evidence Law and the Jury: A Reassessment’ (2008) 53 *McGill Law Journal* 199. However the laws of evidence are perceived in terms of jury control or protection of the accused, any regulatory influence that such rules have on pre-trial investigation is in the form of norm-setting rather than directly governing investigator conduct.

³⁹ For examples of case law interpreting and clarifying restrictions on investigative practice, see, eg, *R v Grant* [2006] QB 60; *R v Sutherland* (Unreported, Crown Court, Newman J, 29 January 2002); *R v Sentence* (Unreported, Crown Court, Judge Heath, 1 April 2004).

⁴⁰ Sybil Sharpe, ‘Covert Surveillance and the Use of Informants’ in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 59, 64.

enormous advantage to the defence, but is it fair in the context of the trial's parallel role in protecting the public?⁴¹

If the purpose of governance in the context of covert investigation is to promote and achieve consistent investigator compliance with investigation law (and so enhance investigation professionalism), then unambiguous statutory powers — consistently framed for the variety of covert investigative methods — are needed.⁴² Consistent investigator compliance can best be achieved by a governance framework that operates at the time of utilisation and is reinforced by systematic review rather than by episodic review dependent upon the individual circumstance of trial strategy.

III PRINCIPLES OF GOOD GOVERNANCE IN COVERT INVESTIGATION MANAGEMENT

A Principles of Good Governance

Preserving the integrity of the criminal justice system, its instruments, its actors and their methods underpins the rule of law as a mechanism for protecting citizens from both the malevolence of fellow citizens and the abuse of state power. Both in England and New South Wales, the overt use of police coercive powers is regulated through legislation such as the *PACE* and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). These are politically desirable legislative responses to enhance public confidence following periods of police corruption and serious miscarriages of justice. Such a rationale dictates that covert investigation similarly should be regulated.⁴³

Covert investigation can be of considerable benefit to investigators because it produces evidence that is often incontrovertible.⁴⁴ As such, it is a powerful tool against organised crime and corruption. The Royal Commission into the New South Wales Police Service found covert electronic surveillance to be the 'single most important factor in achieving a breakthrough in its investigations' into police corruption.⁴⁵ But the absence of full transparency in the use of such

⁴¹ False acquittals of the guilty are logically as unacceptable as false convictions of the innocent, although the presumption of innocence arguably sets aside objectivity in trial truth-finding. See Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006) 4 (emphasis in original): 'many of the rules and procedures regulating criminal trials in the United States — rules for the most part purportedly designed to aid the truth-finding process — are themselves the cause of many incorrect verdicts.' The 2007 Australian Survey of Social Attitudes discovered that 52 per cent of respondents were confident that Australian courts acted fairly and 70 per cent regarded that process as adequately protecting the rights of the accused: David Indermaur and Lynne Roberts, Australian Institute of Criminology, *Confidence in the Criminal Justice System*, Trends & Issues in Crime and Criminal Justice No 387 (2009) 3 ('*Confidence in the Criminal Justice System Paper*').

⁴² Accepting that case law can usefully interpret this very complex area of regulation.

⁴³ The United Kingdom Parliament has recently emphasised the critical importance of public confidence in the governance regimes overseeing use of covert investigation: 'it is essential that the regulators overseeing the use of *RIPA* powers should maintain public confidence in the regime': Select Committee on the Constitution, *Surveillance: Citizens and the State — Volume I: Report*, House of Lords Paper No 18-I, Session 2008–09 (2009) 62 [257]. See also at 80 [345].

⁴⁴ See Sharpe, above n 40.

⁴⁵ *NSW Royal Commission Report*, above n 20, vol II, 413 [7.82].

powers leaves the powers vulnerable to misuse by overzealous or corrupt investigators. The effectiveness of a police service and the wider criminal justice system is enhanced if the public has trust and confidence in that service and system.⁴⁶ The practical benefits include a greater willingness on the part of the public to engage with the police and to pass on information or testify as witnesses.⁴⁷ Abuse of covert investigation powers may quickly erode public confidence in policing and the rule of law, generating fears of a ‘police state’ and perhaps necessitating, ironically and counterproductively, greater reliance upon the very powers that gave rise to the erosion in the first place because of the withdrawal of public cooperation with and support for police investigations.⁴⁸

Sound governance establishes and fosters a culture of professionalism. In the covert investigation arena, professionalism may be aligned with four principles:⁴⁹

- Evidence to sustain a prosecution or intelligence to facilitate investigation management must be obtained in a manner that preserves the integrity of the criminal justice system and its actors.
- Statutory rights of the suspect should not be breached except when the following criteria are met in full: the rights are qualified, breach is necessary and there is statutory authority to do so.
- The rights and privacy of those citizens not suspected of criminal conduct must be protected: collateral harm as a consequence of covert investigation should be minimised through effective investigation management.
- The professional integrity of investigators must be demonstrated, or, if necessary, its absence exposed.

These over-arching principles influence the professional environment within which the investigation of crime is managed. Sound management is achieved through clear and precise procedures, any deviation from which constitutes corruption compromising the integrity of the criminal justice system.⁵⁰ The importance of a professional working environment was recognised by Justice

⁴⁶ See *Confidence in the Criminal Justice System Paper*, above n 41, 1.

⁴⁷ For a study of how public confidence promotes cooperation with the police, see Mike Hough et al, ‘Procedural Justice, Trust, and Institutional Legitimacy’ (2010) 4 *Policing: A Journal of Policy and Practice* 203.

⁴⁸ Exploring levels of public tolerance of impropriety in the obtaining of evidence would be a fruitful future research topic, as would English and Australian studies to complement a recent United States study of police attitudes to the role of impropriety in reinforcing a prosecution case: see Jona Goldschmidt and Anonymous, ‘The Necessity of Dishonesty: Police Deviance, “Making the Case”, and the Public Good’ (2008) 18 *Policing & Society* 113.

⁴⁹ These four principles are an elaboration of three criteria for the management of covert investigation first articulated in Harfield and Harfield, *Covert Investigation*, above n 17, 6.

⁵⁰ An argument can be made that in the wider criminal justice context, moral authority or integrity is maintained not by a rigid application of the rules but by the production of correct verdicts arrived at in a publicly acceptable manner. I am grateful to one of the peer reviewers for this observation. From this perspective, rules for rules’ sake can adversely affect the integrity of the criminal justice system. See also Laudan, above n 41, 4. There is also a pragmatic perspective — what to do in the event of circumstances unforeseen by governance designers — necessitating default to fundamental principles pending adaptation of the regulatory framework.

Wood, Commissioner of the Royal Commission into the New South Wales Police Service:

The environment in which a police service operates can have a significant effect on the nature and extent of the corruption that emerges. To a considerable degree this environment is set within the legislation by which the service is governed, but it is also, to a degree, capable of being set by the service itself ...⁵¹

In a single passage, Justice Wood captures the two strategic approaches to achieving good governance: sound management (internal governance) and an appropriate statutory framework (external governance). The latter will be considered in more detail below as individual jurisdictions operating within particular contexts have developed different procedural approaches. Sound management, in contrast, has principles and practice that can be applied commonly across different jurisdictions, regardless of procedural expression.

B *Good Practice in Covert Investigation Management*⁵²

Covert investigation methodology may often be desirable,⁵³ but whether it is essential is a rather different matter. Parsimony applies. As already noted, just because covert techniques are available as a tool does not dictate that they have to or should be used. There may be good arguments in any given scenario for not resorting to covert methods. Determination of the proper and appropriate use of covert investigation is founded upon three tranches of internal governance: investigation management, resource management and information management. Successful outcomes to the deployment of covert methodology — the lawful acquisition of relevant and admissible evidence — will be dependent upon organisational capacity and capability in each of these three areas.

For investigation management, different operational and strategic tests apply. At the operational level, can the information or evidence required be obtained by means other than recourse to covert investigation? Every use of covert methodology runs the risk of sensitive techniques and tactics being exposed either directly or indirectly through testimony at trial or through mismanagement or mischance during an operation. Thus compromised, the future utility of such tactics and techniques is consequently reduced as individuals subject to such methods develop counter-surveillance tactics in order to frustrate further or future investigation.⁵⁴ In the arena of the competing knowledge systems of

⁵¹ *NSW Royal Commission Report*, above n 20, vol I, 31 [2.43]. See Chan and Dixon, above n 22 for consideration of related developments in New South Wales policing following the *NSW Royal Commission Report*.

⁵² The following summary draws on more detailed discussion in Harfield and Harfield, *Covert Investigation*, above n 17, ch 12.

⁵³ The attractions of covert investigation to law enforcement are catalogued in David Ormerod, 'Recent Developments in Entrapment' [2006] *Covert Policing Review* 65, 65–7.

⁵⁴ A point wryly observed by Gleeson CJ in *Toflau v The Queen* (2007) 231 CLR 396, 403 [5]. Lack of case law does not help to develop an understanding of the regulatory framework. Formulaic application wording may be re-used routinely on a 'cut-and-paste' basis without proper consideration being given to individual circumstances, simply because it is known to have

organised crime and policing,⁵⁵ sound operational governance helps to promote and protect investigative professionalism, and to minimise compromise and exposure of techniques through adverse case law.

At the strategic level, the issue is the extent to which a proposed investigation or operation relates to organisational priorities. Policing interventions can be prioritised in a number of ways: in response to a specific crime type, threat or assessment; in response to community concerns; or in order to meet (politically-imposed) performance targets. The relative prioritisation will influence the frequency with which covert investigation methods are deployed, and that frequency itself will directly characterise the general style of policing and so indirectly inform public opinion of and confidence in policing and the wider criminal justice system.

Related to this strategic direction are the resource management implications. Covert investigation is resource-intensive. Preparation, in the form of equipment acquisition and staff training, is expensive in both staff time and money. So, too, is actual deployment of such methods. In parallel to these direct costs are the opportunity costs of covert investigation. Investigation managers and the strategic managers — to whom senior investigators report — face an operational resourcing test that can be articulated in the form of a series of key questions:⁵⁶

- What is the required objective of the whole investigation?
- What is the objective of the covert element within the context of the whole investigation?
- How might that objective be achieved? (Is it information that another agency might already have?)
- Can the solution be afforded?
- Even if it can be afforded, is the proposed solution cost-effective?
- What is the organisation going to have to sacrifice, abandon or postpone in terms of other work in order to resource and support a covert operation?

The first three questions provide the context within which the second three must be considered. This test, by which the use of covert investigation can be justified in terms of resource expenditure, is a significant contribution to the internal governance of such methods. In conjunction with the prioritisation test, it establishes specific operational legitimacy for each deployment.

been successful previously and it is thought that it must therefore be satisfactory from a regulatory perspective. For elaboration on this vulnerability, see Harfield and Harfield, *Covert Investigation*, above n 17, 21–2, 181–2. In criticising such usage, the Office of Surveillance Commissioners has used the term ‘template applications’: Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and Scottish Ministers for 2009–2010*, House of Commons Paper No 168, Scottish Government Paper No SG/2010/66 (2010) 13 [5.13].

⁵⁵ See Geoff Dean, Ivar Fahsing and Petter Gottschalk, *Organized Crime: Policing Illegal Business Entrepreneurialism* (Oxford University Press, 2010) 195–6.

⁵⁶ Harfield and Harfield, *Covert Investigation*, above n 17, 201.

The strategic resourcing considerations revolve around issues such as skills, technical capability and capacity, and how sustainable an operation is once commenced. Investigation managers may not have much control or even influence over such issues, and on occasion, different investigations may be competing for the same finite resources. As the front-line of governance, management systems and processes must ensure that the competition for scarce resources does not become manifest in exaggerated applications or alternative (deviant) solutions.

C *Managing the Product of Covert Investigation*

Management of information falls into pre- and post-deployment phases.⁵⁷ Pre-deployment information management feeds the application and authorisation processes. The justification for authorising covert investigation is dependent upon the evidence or intelligence supporting the application and the evidence or intelligence identifying a future evidential opportunity that will potentially fill an information gap if covert investigation were to be successfully deployed.⁵⁸ Three types of information may arise from deployment: the required evidence or intelligence relating directly to the operation in question; collateral intelligence relating to other matters; and operational and management lessons for organisations that have the willingness and capacity to engage in reflective learning. These are three different types of product and each has to be managed in a particular way. Managing the product of covert investigation is as important a function as managing operational deployment. There is little point in undertaking covert investigation unless the outputs and outcomes can be successfully managed. Given the sensitivity of some of the methodology involved, such information management can itself be resource-intensive, requiring its own specialist professional standards.⁵⁹

The hallmarks of good internal governance are: the recording of decisions and the basis for such decisions; auditing the chain of continuity between intelligence, covert technique deployment and outcome; and both operational and strategic accountability within organisations. These processes establish the reliability of the evidence. As will be seen below, these processes, which are out of public view, can be reinforced by providing for external auditing and accountability in statutory frameworks intended to ensure integrity through transparency. There is a danger that procedures associated with robust internal frameworks might come to be viewed by staff as needless bureaucracy and that ‘over-

⁵⁷ Harfield and Harfield, *Covert Investigation*, above n 17, 201–10. Using the acquisition and processing of intelligence as a particular example, see also Clive Harfield and Karen Harfield, *Intelligence: Investigation, Community, and Partnership* (Oxford University Press, 2008) chs 8–10.

⁵⁸ In *R v Kelly* (Unreported, District Court, Judge Woods, 30 July 2002), failure on the part of the applicants to provide full information to the authorising officer resulted in the covert investigation being held unlawful, and the resultant evidence inadmissible: see discussion in NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2002–2003* (2003) 11, 23.

⁵⁹ See Harfield and Harfield, *Intelligence*, above n 57, chs 7–10.

bureaucratisation' be confused with 'over-regulation'.⁶⁰ Regulation and bureaucracy have interrelated but different purposes; if the purposes are confused, then good governance arguably is vulnerable to becoming self-defeating as organisational culture becomes resistant to regulation.⁶¹ This possibly fosters procedural corruption (with escalation as a concurrent vulnerability) through the inclination to evade rather than comply with proper procedure.

Sound management procedures for decision-making and deployment in relation to covert investigation provide the machinery; the oil that lubricates this machinery is the recognition and acceptance amongst staff that governance protects them and their work by demonstrating their professional integrity and enhancing the *legitimacy* of what they do.

IV GOVERNANCE OF COVERT INVESTIGATION THROUGH A STATUTORY FRAMEWORK

The *legality* of what investigators do, by contrast, is governed by statute and the common law. The statutory frameworks adopted in England and New South Wales elaborate on the common law of each jurisdiction. Accordingly, these frameworks differ because they reflect different bodies of case law. Such divergence illustrates the influence of serendipitous case law at work on policing practice in the absence of statute.

A The English Statutory Framework

English common law and statute historically have been permissive: individuals may engage in any conduct that is not specifically criminal or otherwise unlawful. Covert investigation methods, not being criminalised, have thus historically been permissible.⁶² The last three decades, however, have witnessed a conceptual acceptance and policy shift towards the notion that authority for policing and investigation powers should be specifically provided for in law. Such a transition was long foreshadowed. The concept of state agents acting only as provided for in law is at the root of the *Convention for the Protection of Human Rights and*

⁶⁰ See, eg, complaints from front-line investigators and managers made in England and Wales to the 2008 Independent Review of Policing: Sir Ronnie Flanagan, *The Review of Policing: Final Report* (2008) 61–2 [5.55] ('*Review of Policing Report*'); and in New South Wales: Ministry for Police (NSW), *Law Enforcement (Controlled Operations) Act 1997 and Law Enforcement (Controlled Operations) Regulation 1998: Review Report* (2004) 27 ('*Review of the Law Enforcement (Controlled Operations) Act 1997*'). I am grateful to staff at the University of Wollongong Library and at the Parliament of New South Wales for their efforts in obtaining a copy of the latter reference.

⁶¹ See generally Clive Harfield, 'Paradigm Not Procedure: Current Challenges to Police Cultural Incorporation of Human Rights in England and Wales' (2009) 4 *Public Space: The Journal of Law and Social Justice* 91 <<http://epress.lib.uts.edu.au/ojs/index.php/publicspace/article/view/1149/1430>>.

⁶² In *R v Stubbs* (2009) 3 ACTLR 144, 156 [62] (Higgins CJ), an undercover operation using the internet was held not to require prior authorisation because investigators were not committing any crime. Of additional relevance in *R v Stubbs* was the influence of clear published operational guidelines for investigators that were also available to the judge: at 150–2 [37]–[39].

Fundamental Freedoms ('ECHR'),⁶³ and judgments from the European Court of Human Rights have had a significant influence on the law and procedure in England.⁶⁴ The non-statutory regime for the interception of communications in England was challenged before the European Court of Human Rights in *Malone v United Kingdom*, in which the Court held that Home Office and police guidelines concerning the investigative interception of communications failed to meet the obligation that there should be a basis in law for the breach of the qualified right to respect for family and private life in ECHR art 8.⁶⁵ In consequence, the United Kingdom Parliament enacted the *Interception of Communications Act 1985* (UK) c 56, and in 1997 it enacted the *Police Act 1997* (UK) c 50 ('*Police Act 1997*') when creation of the new National Crime Squad offered a suitable legislative opportunity to include a provision making police interference with property lawful in certain circumstances.⁶⁶ Part III of the *Police Act 1997* makes lawful, subject to appropriate authority under the statute, interference by police with private property that would otherwise constitute a tort. When in 1998 the United Kingdom gave further domestic effect to the ECHR which it had signed 48 years previously,⁶⁷ it was necessary to make statutory provision for the methods of covert investigation that the *Police Act 1997* was intended to facilitate. With the coming into force of the *Human Rights Act 1998* (UK) c 42 scheduled for October 2000, preparations to make the government compliant with this new statutory benchmark of governance included the *Regulation of Investigatory Powers Act 2000* (UK) c 23 ('*RIPA*') and its accompanying Codes of Practice.⁶⁸ Over 900 public authorities were originally given covert investigation powers under *RIPA*, although a number have now had the powers withdrawn (for want of use) as a result of ongoing inspection of the operation of the

⁶³ ECHR, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁶⁴ See also *Perry v United Kingdom* (2004) 39 EHRR 3. Whilst this case was not directly concerned with covert investigation tactics, Strasbourg's broad interpretation of what constitutes private information has implications for the covert surveillance of crime 'hotspots'. The implication is that when surveilling a locality vulnerable to high-volume crime (in order to identify suspects), collateral intrusion issues have to be managed in the same way as when identified suspects are being surveilled for intelligence or evidential purposes. For further discussion, see Harfield and Harfield, *Covert Investigation*, above n 17, 15.

⁶⁵ (1984) 82 Eur Court HR (ser A) 36 [79]–[80]. See also *Silver v United Kingdom* (1983) 61 Eur Court HR (ser A) 32–3 [83]–[86].

⁶⁶ The National Crime Squad, the first national operational policing agency in England and in which the author served from January 1999 to July 2003, was created by the amalgamation of six regional crime squads to provide a nationally coordinated response to serious and organised crime. It became operational on 1 April 1998 and was superseded on 1 April 2006 by the Serious Organised Crime Agency ('SOCA'): see *One Step Ahead White Paper*, above n 4, 3. The new United Kingdom coalition government elected in May 2010 has proposed the creation of a new agency, to be called the National Crime Authority, to take over the functions of SOCA and border control: see Home Office (UK), *Policing in the 21st Century: Reconnecting Police and the People*, Cm 7925 (2010) 29–31.

⁶⁷ See *Human Rights Act 1998* (UK) c 42.

⁶⁸ *RIPA* repealed and incorporated updated provisions from the *Interception of Communications Act 1985* (UK) c 56: see *RIPA* s 82(2), sch 5. The Codes of Practice supplementing the *RIPA* are published online: see Home Office (UK), *RIPA Codes of Practice* <<http://www.homeoffice.gov.uk/counter-terrorism/regulation-investigatory-powers/ripa-codes-of-practice/>>.

legislation by the Office of Surveillance Commissioners ('OSC').⁶⁹ Regarding the deployment of undercover operatives and informers — an arena in which enforcement action is particularly vulnerable to overzealousness amounting to incitement and entrapment — the English statutory touch on the tiller is light and one of general principle: the covert exploitation of a new or established personal relationship is an intrusion into privacy (and trust) and consequently requires prior authorisation under s 29 of the *RIPA*. Authorising officers must prescribe the conduct that is authorised, and any deviation from the authorisation will amount to conduct that is unauthorised and consequently unlawful.⁷⁰ However, the latitude afforded to authorising officers is not unfettered. Case law — some of which predates the *RIPA*, as courts sought to establish through the common law that which was not yet regulated by statute — defines the limit between investigators' conduct that is acceptable and that which is not.⁷¹

There is thus a two-pronged statutory framework for covert investigation in England. *Surveillance* (as a general intrusion into private life) is provided for conditionally by the *RIPA* with an authority regime tailored to methodological hierarchy,⁷² while *conduct necessary to facilitate surveillance in certain circumstances* is provided for by ss 92–7 of the *Police Act 1997*. In each case, investigators cannot act without prior authorisation, and their use of the legislation is subject to annual inspection by the independent OSC.⁷³ Authorisation processes are determined by the way the *RIPA* defines two tiers of surveillance ('directed'

⁶⁹ Harfield and Harfield, *Covert Investigation*, above n 17, viii.

⁷⁰ See *RIPA* s 27(1).

⁷¹ For general approval of the use of informers, subject to prohibitions on entrapment, see *R v Birtles* [1969] 1 WLR 1047, 1049–50 (Lord Parker CJ for Lord Parker CJ, Megaw LJ and Nield J) (also defining acceptable limits on the conduct of participating informers); *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; *R v J* [2001] 1 Cr App R (S) 79. For a definition of entrapment, see *R v Looseley* [2001] 4 All ER 897. For the principle that the fact of entrapment provides no defence, see *R v Sang* [1980] AC 402, 432 (Lord Diplock), 441 (Viscount Dilhorne), 443 (Lord Salmon), 445–6 (Lord Fraser of Tullybelton), 451 (Lord Scarman); *R v Smurthwaite* [1994] 1 All ER 898, 901 (Lord Taylor). For undercover officers overstepping acceptable parameters and becoming agents provocateurs, see *R v Moon* [2004] EWCA Crim 2872 (10 November 2004). For undercover agents getting it right, see *R v Chandler* [2002] EWCA Crim 3167 (20 December 2002); *R v Byrne* [2003] EWCA Crim 1073 (18 March 2003). For undercover officers asking questions essential to having their cover story approved, see *R v Bryce* [1992] 4 All ER 567. For the principle that no interviewing about offences is to take place except under the circumstances prescribed by *PACE* and its attendant Codes of Practice, see *R v Christou* [1992] 4 All ER 559. The Codes of Practice supplementing the *PACE* are published online: see Home Office (UK), *Police and Criminal Evidence Act 1984 (PACE) and Accompanying Codes of Practice* <<http://www.homeoffice.gov.uk/police/powers/pace-codes/>>. For the duty of care to be extended to informers, following the generic tests set out in *Caparo Industries plc v Dickman* [1990] 2 AC 605, see *Swinney v Chief Constable of the Northumbria Police* [1996] 3 All ER 449, 460 (Hirst LJ), 466 (Peter Gibson LJ), 467 (Ward LJ); *Donnelly v Chief Constable of Lincolnshire* [2001] 1 Pol LR 313, 322 [46]–[48] (Leveson J). The relevant case law (as at 2008) is discussed in Harfield and Harfield, *Covert Investigation*, above n 17, 146–54, including the influential Strasbourg case of *Teixeira de Castro v Portugal* [1998] IV Eur Court HR 1451.

⁷² The various authority regimes created by the *RIPA* are explained in Harfield and Harfield, *Covert Investigation*, above n 17, 36 (directed surveillance), 52–5 (intrusive surveillance), 89–92 (investigation of computers), 101–2 (investigating data held on mobile phones), 112–13 (accessing communications data), 123–7 (intercepting communications content), 142–5 (deployment of covert human intelligence sources), 168–9 (covert investigation outside England and Wales).

⁷³ See *Police Act 1997* s 107.

or ‘intrusive’). The two-tier statutory hierarchy theoretically provides that the more serious the intrusion and the more sensitive the methodology, the higher the rank of the prerequisite authorising officer. This reflects the need to define authority responsibilities, rather than the degree of intrusion into individual privacy viewed from a philosophical or ethical perspective.

A police superintendent (local police area commander) may authorise basic surveillance, which is called ‘directed surveillance’ in the statute.⁷⁴ Chief Constables and Commissioners must authorise surveillance that is statutorily defined as more intrusive than directed surveillance, but such operations cannot commence until written approval of the Chief Constable’s authorisation has been received from the OSC.⁷⁵ For the interception of communications, the authorising officer is the Secretary of State for the Home Department.⁷⁶ Whereas judges issue search warrants and arrest warrants in England (to secure the presence of evidence or persons at trial),⁷⁷ there is no judicial authorisation of covert investigation. To involve the judiciary in such pre-trial investigation would be inconsistent with the historical separation of judicial and criminal investigative functions in England and Wales.⁷⁸

B *The New South Wales Statutory Framework*

The role of judges in authorisation is one of the differences in detail between the regime established in England and that in New South Wales. A more fundamental distinction between the two jurisdictions is that where English legislation approaches statutory governance from the perspective of human rights protection, in New South Wales — absent enforceable statutory human rights protections — case law has prompted a focus on evidential integrity.⁷⁹ Surveillance per se in New South Wales is not provided for in statute and does not require prior authorisation: in the permissive tradition, surveillance, not being unlawful, is therefore conduct in which law enforcement agencies may engage. Rather, it is certain covert methodologies and certain facilitating conduct for which statutory provision has been made.

⁷⁴ Statutory instruments accompanying the *RIPA* provide the identified equivalent of superintendent level management in the various other organisations empowered: see Harfield and Harfield, *Covert Investigation*, above n 17, app C.

⁷⁵ *RIPA* s 35.

⁷⁶ *Ibid* s 5.

⁷⁷ See John Sprack, *A Practical Approach to Criminal Procedure* (Oxford University Press, 11th ed, 2006) 39–40, 54.

⁷⁸ Whether there should be judicial authorisation of covert investigation in England is an ongoing debate, relevant yet tangential to this paper, which focuses on issues arising from the regime that is currently in place. In evidence to the 1994 United Kingdom parliamentary inquiry into the policing of organised crime, police practitioners argued not only for statutory covert investigation powers, but also for judicial authorisation of such powers: see Home Affairs Committee, *Organised Crime: Minutes of Evidence and Memoranda*, House of Commons Paper No 18-II, Session 1994–95 (1994) 136 [3.8]. This issue does not arise in civil code jurisdictions because covert investigation is authorised by those branches of the judiciary (including prosecutors) that direct and oversee police investigations: see generally Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge University Press, 2002).

⁷⁹ See, eg, *Ridgeway v The Queen* (1995) 184 CLR 19.

Communication interception, authorised either by judicial warrant or by a warrant of the Administrative Appeals Tribunal, is confined to Commonwealth agencies; however, the product may be shared with state agencies, and agencies from the different jurisdictions may undertake joint operations.⁸⁰ Governance is divided in a way that reflects the tiered access to method and product. The Commonwealth Ombudsman monitors, through inspection of records, the use of the powers by Commonwealth agencies, whilst the NSW Ombudsman inspects the records of state agencies in relation to interception assistance requested and received.⁸¹

Deployments, maintenance and retrievals of audio, video or data surveillance devices and of asset-tracking devices in New South Wales require a judicial warrant,⁸² as does the undertaking of covert searches.⁸³ Investigation agencies may self-authorise⁸⁴ infiltration by undercover officers or informers where those infiltrating criminal conduct might themselves commit a crime, thus negating the possible vulnerability that any evidence would be unlawfully obtained and liable to exclusion at trial. They may also self-authorise the use of assumed identities to facilitate such infiltration.⁸⁵

The rationale underpinning this approach is derived from *Ridgeway v The Queen* ('*Ridgeway*'). In that case, Ridgeway was arrested by the Australian Federal Police ('AFP') for importing heroin, after the AFP had taken significant steps to facilitate the importation in order to further the investigation.⁸⁶ The High Court of Australia held that, having arranged and facilitated the importation (including applying for Australian visas on behalf of the participating informers), AFP officers connected with this operation had aided and abetted the importation of heroin into Australia, contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth).⁸⁷ There being no substantive defence of entrapment, the issue at appeal was whether the court should have excluded evidence unlawfully obtained,⁸⁸ or

⁸⁰ See *Telecommunications (Interception and Access) Act 1979* (Cth) ss 31, 34; *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW) s 8. The Administrative Appeals Tribunal is able to issue telephone interception warrants under *Telecommunications (Interception and Access) Act 1979* (Cth) s 6DA and also to authorise controlled operations under *Crimes Act 1914* (Cth) ss 15GG, 15GU, 15GV: see Justice Garry Downes, 'Future Directions for the Administrative Appeals Tribunal' (Paper presented at the 17th Australian Army Legal Corps Conference 2005, Canungra, Qld, 6 December 2005) <<http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/ArmyLegalCorpsDecember2005.htm>>.

⁸¹ *Telecommunications (Interception and Access) Act 1979* (Cth) s 83; *Telecommunications (Interception and Access) (New South Wales) Act 1987* (NSW) s 9.

⁸² See *Surveillance Devices Act 2007* (NSW) ss 4–5, 16–17.

⁸³ See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 46, 46B–46C, 47. The power to execute covert searches is the result of a 2009 amendment to the 2002 Act: *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (NSW) sch 1 item 5.

⁸⁴ See *Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 5, 16.

⁸⁵ See *ibid* ss 5, 17.

⁸⁶ (1995) 184 CLR 19.

⁸⁷ *Ibid* 27 (Mason CJ, Deane and Dawson JJ), 55 (Toohey J).

⁸⁸ A principle founded in *Bunning v Cross* (1978) 141 CLR 54 distinguished evidence improperly or unlawfully obtained from evidence improperly or unlawfully obtained as a direct consequence of serious and culpable misconduct on the part of investigators. On entrapment generally, see

stayed the proceedings as an abuse of process. The High Court held, by majority, that proceedings should have been stayed and quashed Ridgeway's conviction.⁸⁹

Australian jurisdictions responded to the *Ridgeway* case with a number of counterbalancing legislative measures. On the one hand, s 138 of the *Evidence Act 1995* (Cth), enacted in the wake of issues arising in *Ridgeway*,⁹⁰ provides specific *discretion* to exclude evidence obtained improperly or contrary to an Australian law, unless 'the desirability of admitting the evidence outweighs the undesirability of admitting [the] evidence'.⁹¹ Seeking deliberately to achieve consistency, *Evidence Act 1995* (NSW) s 138 mirrors its Commonwealth counterpart. On the other hand, the *Law Enforcement (Controlled Operations) Act 1997* (NSW) (together with similar legislation in other Australian jurisdictions⁹²) exempts investigators or civilian participants (that is, informers) from criminal or civil liability for acts done pursuant or ancillary to an authority to conduct a 'controlled operation'.⁹³ This exemption ensures that any evidence arising from such acts is not automatically characterised as unlawfully obtained, and so does not inevitably engage s 138 of the *Evidence Act 1995* (Cth) or s 138 of the *Evidence Act 1995* (NSW). However, each s 138 can still operate independently, and even where a controlled operation has been authorised, evidence improperly obtained therefrom may still be excluded.⁹⁴ In effect, investigators are authorised to commit such criminal acts (short of causing physical harm) as are necessary to achieve the investigative object. Such conduct must be pre-

Andrew Ashworth, 'Re-Drawing the Boundaries of Entrapment' [2002] *Criminal Law Review* 161; Simon Bronitt, 'Sang is Dead, Loosely Speaking' [2002] *Singapore Journal of Legal Studies* 374; Simon McKay, 'Entrapment: Competing Views on the Effect of the *Human Rights Act* on English Criminal Law' [2002] *European Human Rights Law Review* 764; Ormerod, above n 53.

⁸⁹ *Ridgeway* (1995) 184 CLR 19, 44 (Mason CJ, Deane and Dawson JJ), 54 (Brennan J), 64–5 (Toohey J), 78 (Gaudron J).

⁹⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 24 May 1995, 115 (J W Shaw). Also enacted as a consequence of issues arising in *Ridgeway*, for example, was the *Law Enforcement (Controlled Operations) Act 1997* (NSW): *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 128 [1] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

⁹¹ *Evidence Act 1995* (Cth) s 138(1). In England, s 78(1) of the *Police and Criminal Evidence Act 1984* (UK) c 60 provides a discretionary judicial power to exclude evidence where, taking into account all the circumstances including those in which any given evidence was obtained, 'the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

⁹² See *Crimes (Controlled Operations) Act 2008* (ACT) ss 18–19; *Surveillance Devices Act 2007* (NT) s 76; *Police Powers and Responsibilities Act 2000* (Qld) ss 258–9; *Criminal Investigation (Covert Operations) Act 2009* (SA) s 5; *Crimes (Controlled Operations) Act 2004* (Vic) ss 28–9; *Crimes (Assumed Identities) Act 2004* (Vic) s 20; *Corruption and Crime Commission Act 2003* (WA) ss 128–9.

⁹³ See *Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 16, 18–19.

⁹⁴ The notion of exemption from criminal liability for persons engaged in law enforcement has a long-established precedent. Section 299 of the *Navigation Act 1912* (Cth) allows the receiver to use or order the use of deadly force to suppress plundering and general disorder in relation to ships that are wrecked or in distress. Deadly force may also be used against those whose actions hinder the preservation of the ship or its passengers and crew. Those using deadly force are exempt from any criminal or civil liability in respect of persons they kill, maim, or hurt. Although anachronistic, this Act is still in force. Of the over 100 amendments to the Act since 1912, none has included any amendment of s 299. I am grateful to my colleague Professor Warwick Gullett for the *Navigation Act 1912* (Cth) reference.

planned for it to be amenable to be considered for authorisation, but a 2006 amendment made limited provision for retrospective authorisation.⁹⁵

C *Comparing the Two Approaches to Statutory Governance*

The English model of statutory governance for covert investigation seeks primarily to direct and lead compliance within a regulatory framework of rights and norms provided for by the *ECHR*, the greater good being that state agents should not unjustifiably intrude into the lives of citizens. The New South Wales model seeks to resolve irregularity in an excusatory fashion by authorising it in advance, the greater good being to preserve evidence for use at trial, regardless of the circumstances in which it was obtained. The former regime governs the inevitable intrusion arising from covert investigation; the latter regime, in which intrusion is not an issue, seeks to govern conduct that might otherwise render inadmissible the evidence obtained. Where a judicial warrant is required to authorise an aspect of covert investigation, that independent oversight precedes deployment, and so there is arguably enhanced confidence in the issuing of the relevant authority. The effectiveness of independent oversight is tested most robustly in the ex post facto inspections of the OSC and Ombudsmen.

V INSIGHT FROM OVERSIGHT

Different though their points of origin may be, the two regimes have in common the use of independent oversight as a vehicle for public reassurance that covert investigation powers are not being misused. The roles of this facet of governance differ in that the Chief Surveillance Commissioner in England has a prior approval function in relation to certain types of covert investigation authority, as well as the annual inspection function remitted to the New South Wales Ombudsman.⁹⁶ It is in their annual reports to Parliament that these appointed representatives of the public interest shed some light on the otherwise obscure world of covert investigation, through their own observations during auditing and the recorded responses of investigation practitioners.

Reading each series of annual reports as a whole produces an overall picture of the relationship between the overseers and those subject to governance, from which is beginning to emerge insight into the extent to which such governance can be effective in securing and sustaining proper standards in covert investigation. In the early years of the OSC's work, the annual inspections reported on specific identified instances of good and poor practice.⁹⁷ As practitioner familiarity with the *RIPA* has increased over time, so in more recent reports the Chief

⁹⁵ See *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 14, as inserted by *Law Enforcement (Controlled Operations) Amendment Act 2006* (NSW) sch 1 item 8.

⁹⁶ Prior approval application to the OSC is for approval of an authority granted by a Chief Constable. It provides a non-judicial check on the efficacy of the self-authorisation process for intrusive surveillance. Prior approval is not required for directed surveillance authorisations: *RIPA* s 36(2); *Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 21–2.

⁹⁷ See, eg, Chief Surveillance Commissioner, *Report of the Chief Surveillance Commissioner for 2000–2001*, Cm 5360 (2002).

Surveillance Commissioner has contented himself with general observations.⁹⁸ There remain, however, some perennial deficiencies,⁹⁹ and although police recourse to covert investigation is now reducing in frequency in England,¹⁰⁰ the level of errors remains static due to the increasing use of covert investigation by non-police administrative and regulatory public bodies, which is creating similar concerns to those that accompanied early police deployments.¹⁰¹ Recurring errors noted in the annual reports include:

- confusion about the statutory definitions of *directed* and *intrusive* surveillance;
- confusion about the definition of a covert human intelligence source (undercover officers and informers) and numerous attempts to avoid the regulatory regime by creating functional labels (such as ‘tasked witness’) that imply such persons are conducting themselves in a manner that should be pre-authorised if it is to be lawful;¹⁰²
- errors in detail such as car registration numbers and incorrect addresses;
- lateness in the statutory notification, renewal, and cancellation of authorities;
- commencement of operations requiring a Commissioner’s prior approval before such had been granted;
- failure to explain urgency in oral authorisations;
- authorisations given by staff without power to do so;

⁹⁸ See, eg, Chief Surveillance Commissioner, *Annual Report 2009–2010*, above n 54. The first Chief Surveillance Commissioner (1999–2006) was the Rt Hon Sir Andrew Leggatt. The second from 2006 to present is the Rt Hon Sir Christopher Rose.

⁹⁹ See, eg, Chief Surveillance Commissioner, *Annual Report 2009–2010*, above n 54, 11–13; NSW Ombudsman, *Law Enforcement (Controlled Operations) Act 1997: Annual Report 2008–2009* (2009) 15, 19–20.

¹⁰⁰ The total number of law enforcement authorities for intrusive surveillance, directed surveillance and Covert Human Intelligence Sources (‘CHIS’) deployments numbered 24 374 in 2006–07, 23 620 in 2007–08, 20 780 in 2008–09 and 20 989 in 2009–10: Chief Surveillance Commissioner, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2006–2007*, House of Commons Paper No 713, Scottish Executive Paper No SE/2007/126 (2007) 9–10; Chief Surveillance Commissioner, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2007–2008*, House of Commons Paper No 659, Scottish Government Paper No SG/2008/86 (2008) 8–9; Chief Surveillance Commissioner, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2008–2009*, House of Commons Paper No HC 704, Scottish Government Paper No SG/2009/94 (2009) 11; Chief Surveillance Commissioner, *Annual Report 2009–2010*, above n 54, 10.

¹⁰¹ In 2007, non-police *RIPA* authorities rose from 6924 to 12 494: see Chief Surveillance Commissioner, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2005–2006*, House of Commons Paper No 1298 (2006) 10 [7.3]; Chief Surveillance Commissioner, *Annual Report 2006–2007*, above n 100, 10 [7.3]. The empowerment under the *RIPA* of non-law enforcement bodies to use covert investigation is a marked difference from Australian jurisdictions, in none of which are non-law enforcement entities allowed to use covert investigation powers.

¹⁰² See Chief Surveillance Commissioner, *Annual Report 2006–2007*, above n 100, 12 [8.9].

- authorising more than was sought on an application (there may, of course, be very good reasons for officers to authorise less than what an applicant has applied for once proportionality and necessity has been considered);
- delegation of reviews by authorising officers; and
- codes of practice not readily available to practitioners.¹⁰³

All of the above procedural issues potentially provide grounds upon which a judge might be invited to apply discretion to exclude evidence. Equally, all are errors amenable to prevention through proper supervision and management. Annually from 2001 until 2009, the OSC has identified inadequate training (at all levels) as a significant contributing factor in the errors that lead to covert investigation being undertaken unlawfully.¹⁰⁴

Regulatory recidivism and inadequate training are issues that have been identified, with particular reference to NSW Police, by the NSW Ombudsman. The 2001–02 and 2002–03 annual reports showed signs of the tensions between the police and the Ombudsman as each explored the new relationship.¹⁰⁵ In 2003–04, the Ombudsman reported a ‘greatly improved’ standard of record-keeping in NSW Police,¹⁰⁶ but in the 2005–06 annual report the Ombudsman used a less placatory construction to observe that:

The major issue of non-compliance with the requirements of the Act is the same as reported in previous years — the failure of Principal Law Enforcement officers [senior investigating officers] to provide a report on the results of the operation to the chief executive officer within the two month statutory time frame, despite the failure to do so being a breach of the Code of Conduct.¹⁰⁷

Such a breach would also therefore be a disciplinary offence.¹⁰⁸ The same observation has been made in every subsequent report until 2008–09.¹⁰⁹ In

¹⁰³ For a further summary and discussion of the annual reports as a series of findings, see Harfield and Harfield, *Covert Investigation*, above n 17, 21–3.

¹⁰⁴ See, eg. Chief Surveillance Commissioner, *Annual Report 2008–2009*, above n 100, 18 [5.27]–[5.28]. Chief Surveillance Commissioner, *Annual Report 2009–2010*, above n 100 makes no substantive comment on the need for training, but it does catalogue continuing operational errors in relation to applying for and executing covert investigation: at 12–13. This demonstrates that improved training is probably still a significant issue even if the OSC has chosen not to comment on it.

¹⁰⁵ See, eg. NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2001–2002* (2002) 14–15, 20–1; NSW Ombudsman, *Annual Report 2002–2003*, above n 58, 13–24.

¹⁰⁶ NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2003–2004* (2004) 13.

¹⁰⁷ NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2005–2006* (2006) 12.

¹⁰⁸ *Police Act 1990* (NSW) s 201.

¹⁰⁹ See NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2006–2007* (2007) 11; NSW Ombudsman, *Law Enforcement (Controlled Operations) Act 1997: Annual Report 2007–2008* (2008) 11. But see NSW Ombudsman, *Annual Report 2008–2009*, above n 99, 15. In the 2008–09 report, the Ombudsman did observe that the situation had improved greatly during the reporting year. In the 2009–10 reporting year, records were found to be generally in compliance, with some exceptions. It was also observed that new procedures were being implemented to achieve greater compliance. See NSW Ombudsman, *Law Enforcement (Controlled Operations) Act 1997: Annual Report 2009–2010* (2010) 14–15.

2005–06, the solution — from the perspective of the Ombudsman — lay in the fact that ‘more attention needs to be given by NSW Police to addressing these continuing problems through education and training of principal law enforcement officers.’¹¹⁰ Annual repetition over a number of years points to the possibilities that training either did not take place, was not prioritised as a strategic response to identified failings, or had only limited success in addressing the issues (calling into question the effectiveness of the training). Although neither the OSC nor the NSW Ombudsman make specific reference to training issues in their 2009–10 reports, both reports continue to catalogue errors, thus indirectly demonstrating the need for continuous training and vigilance.

That both the OSC and the Ombudsman find it necessary to repeat key observations begs questions about the effectiveness of this model of governance in ensuring standards and achieving improvements. Is any notice taken of the inspection reports once the statutory performance indicator — the laying of the report before Parliament — is achieved? The concern arises that however envisaged and presented, this may really be governance to achieve output (an annual report to Parliament) rather than governance to achieve outcome (covert investigation that consistently complies with statutory regulation).

In the case of English agencies, the common deficiencies occur across several hundreds of organisations¹¹¹ and recidivism within any given agency is impossible to discern from only the publicly available reports. In the case of NSW Police, the perennial criticisms are directed at just one organisation. Both scenarios raise their own particular issues regarding remedy. In both cases, governance serves to achieve consistency of standards, but that is rather harder to achieve across several hundreds of different organisations with different infrastructures and different remits, than within a single organisation headed by a single Chief Executive Officer where, common sense suggests, a remedy should be easier to achieve because of the unified command structure. On the one hand, the issue is whether there should be some centralised facilitation of training and capacity-building in order to better coordinate consistency in a manner similar to the way in which the OSC can achieve consistency of inspection across such a number and variety of organisations.¹¹² On the other hand, if the Commissioner of Police cannot police his or her own organisation in respect of regulatory compliance, what might properly be inferred about wider issues of management within the organisation and its culture of professionalism?

¹¹⁰ NSW Ombudsman, *Annual Report 2005–2006*, above n 107, 12.

¹¹¹ The schedule to the *RIPA* lists the different types of government, law enforcement and military agencies empowered to use various overt investigation powers. These agencies are therefore subject to OSC governance.

¹¹² Resourcing the OSC to include a training function would taint its independence as an oversight body, as it would then be inspecting the results of its own work. The variety of organisations can be demonstrated with just a few examples drawn from *RIPA* sch 1: these include all police forces established under the *Police Act 1996* (UK) c 16; military forces; the Department for Transport; the Department for Work and Pensions; MI5; the Charity Commission, the Royal Pharmaceutical Society of Great Britain; and the Foyle, Carlingford and Irish Lights Commission (Northern Ireland).

An early response of NSW Police to the problem of late reporting by the Principal Law Enforcement Officers ('PLEO') was to transfer 'the responsibility for the administration of controlled operations'¹¹³ to the Special Advice Section of the Court and Legal Services department to ensure timely submission of the post-operation reports that were required by law to be made to the NSW Police Commissioner.¹¹⁴ Not only does this not appear to have achieved the desired outcome — reports are still being submitted late (or indeed very late)¹¹⁵ — but such a structure could be seen to be absolving the PLEOs from their role and responsibility to cooperate with and to facilitate statutory governance.¹¹⁶ It undermines the purpose of governance by reassigning it (which investigators might perceive as reducing it) to the level of an administrative function rather than a command responsibility. By implication, this diminishes the significance, relevance and importance of the external independent inspection process.¹¹⁷ It is a structure in which senior investigation managers are effectively relieved of their front-line governance responsibilities.

The creation of records amenable to external inspection is a bone of contention with investigators both in England and in New South Wales. In England, Sir Ronnie Flanagan, former Chief Inspector of Her Majesty's Inspectorate of Constabulary, in conducting a review on possible police reform noted:

The processes which surround the use by the police of [covert] investigatory powers have ... been raised with me by a large number of individual officers and forces throughout my review. Whilst I am clear that the use of surveillance techniques is an area where this is a clear need for regulation and authorisation processes, I am concerned that in some instances excessive bureaucracy is created by a combination of misunderstanding and sometimes over-interpretation of the relevant rules. Often to the service's credit, this is driven by the best motives. I have had a number of conversations with the Chief Surveillance Commissioner, Sir Christopher Rose, as to how best greater clarity and understanding can be brought about in this important area. I believe that the best way ahead for the service is for the Codes of Practice which cover the implementation of *RIPA* to be reviewed with a view to delivering greater clarity and pro-

¹¹³ NSW Ombudsman, *Annual Report 2002–2003*, above n 58, 13.

¹¹⁴ See *ibid.* *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 15.

¹¹⁵ See NSW Ombudsman, *Annual Report 2008–2009*, above n 99, 15, 19–20.

¹¹⁶ *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 21 requires the law enforcement agency chief executive officer on whose behalf the investigation is being undertaken to report certain matters to the Ombudsman within 21 days. Police accountability for use of their powers is also stressed generally in a number of codes of conduct: see NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) <http://www.police.nsw.gov.au/_data/assets/pdf_file/0007/108808/Code_CRIME.pdf>; New South Wales Police, *Code of Conduct and Ethics* <http://www.police.nsw.gov.au/_data/assets/file/0015/4326/Code_of_Conduct_and_Ethics.pdf>; NSW Police Force, *Standards of Professional Conduct* <http://www.police.nsw.gov.au/_data/assets/pdf_file/0009/87993/SPC_Conduct_2008_INTRANET_230608.pdf>.

¹¹⁷ Once again the context and circumstances of organisational culture and operational environment are at play here. Chan and Dixon, above n 22, 449–51 discuss the dissipation of political will to follow through with the recommendations and reforms of the Royal Commission into the New South Wales Police Service.

portionality around the recording of investigative powers, whilst still maintaining critically important public safeguards.¹¹⁸

Meanwhile in New South Wales, the 2004 Review of the *Law Enforcement (Controlled Operations) Act 1997* (NSW) recorded that practitioners found ‘the approval process for controlled operations under the Act [to be] cumbersome and unnecessarily formal.’¹¹⁹ The Review concluded, however, that ‘in order to satisfy the necessary probity and planning issues involved in serious and unlawful activities ... it is appropriate for stringent authorisation and management to remain.’¹²⁰ Nevertheless, the first recommendation of the Review proposed ways in which to streamline authorisation procedures.¹²¹ Such a process should not be taken too far. Acquiescence to the protests against governance by those being governed also contributes to the corrosion of the governance function.

The regulatory recidivism evident in the annual inspections in both regimes illustrates that this element of the governance framework is at least capable of identifying breaches, even if there seems to be relatively little success at addressing the recidivism (which is not the role of the inspection process within the governance framework). In each regime, the inspection element is dependent upon investigator cooperation in the form of accurate record-keeping, which is both a vulnerability (investigators do not always comply) and a strength (it can encourage recognition that such a system protects the investigators as well as the public interest).

As a form of governance then, written application for written authorisation to proceed remains a policy preference. Is it feasible?

VI IMPLICATIONS

In either regime, the authorising officer is dependent upon the operational plan as a basis for determining the appropriateness of covert investigation in any given instance. In England, the application and plan must be measured against the statutory tests of legitimacy, proportionality and necessity, which arise from Strasbourg case law in relation to art 8(1) of the *ECHR*.¹²² Consideration of the appropriateness of the intrusion against these tests informs the authorising officer’s decision about what to authorise in terms of surveillance and, if applicable, whether to authorise limited trespass in order to facilitate lawful surveillance. In relation to surveillance requiring greater degrees of intrusion, it is increasingly common for authorising officers in England to require verbal presentations from the applicant to accompany the written application so that clarification can be sought to assist in decision-making.¹²³ The authorisation

¹¹⁸ *Review of Policing Report*, above n 60, 61–2 [5.55].

¹¹⁹ *Review of the Law Enforcement (Controlled Operations) Act 1997*, above n 60, 27.

¹²⁰ *Ibid* 28.

¹²¹ See *ibid* 23–4.

¹²² See Harfield and Harfield, *Covert Investigation*, above n 17, 14–20, where the relevant cases and associated legal commentary are discussed.

¹²³ This observation is based on the author’s personal experience as a practitioner.

process, following Strasbourg case law, focuses on whether the proposed investigation method is proportionate to the information/evidence being sought in the operation (and not, as investigators often mistake, whether the proposed method is 'proportionate' to the crime being investigated).¹²⁴ Having considered this and recorded the decision rationale (thus completing their contribution to the external governance obligations), the authorising officer can then consider the appropriateness of the investigation management plan, including risk assessment and management (thus fulfilling internal governance functions).

In New South Wales, the issues regarding controlled operations are problematic. A documented operational plan is required by law to be attached to both 'formal' (written) applications and 'urgent' (non-written) applications for authority.¹²⁵ It is a necessary piece of information upon which authorisation must be based, and if the intelligence or plan is insufficient, any authority resting upon it may be invalidated and evidence acquired rendered inadmissible.¹²⁶ In the 2004 Review of the legislation, practitioners observed that 'on occasions even the general nature of the criminal activity or corrupt conduct cannot be anticipated in advance',¹²⁷ thus presenting significant difficulties in meeting the statutory requirements because 'a "plan" of a controlled operation cannot be created until the operation begins and particular offenders and particular criminal

¹²⁴ See Nick Taylor, 'Covert Policing and Proportionality' [2006] *Covert Policing Review* 22, 26; Ormerod, above n 53, 77–8. In England, the initial test of whether *directed* or *intrusive* surveillance may be conducted is essentially a 'list test' rather than a test of proportionality. *Intrusive* surveillance may only be deployed in relation to 'serious crime' as defined in *RIPA* ss 81(2)(b), (3). The definition is very broad, incorporating offences for which an adult on first conviction may reasonably be expected to be sentenced to three or more years imprisonment or which involves violence, substantial financial gain or the involvement of a large number of persons for a common purpose. *Directed* surveillance may be used for crimes that do not meet the criteria for being labelled as serious. The distinction and initial choice of method is not a matter of proportionality but a matter of the label under which a crime for investigation is to be listed.

¹²⁵ *Law Enforcement (Controlled Operations) Act 1997* (NSW) ss 5(2), (2A)(a).

¹²⁶ For an English example of such consequences, see Ed Rees, '*R v Grant*: The Lincolnshire Listeners — A Sad Chapter in Unlawful Surveillance' [2009] *Covert Policing Review* 17. New South Wales has recently witnessed an alternative outcome in circumstances of unlawful covert investigation. In *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, at issue was whether the New South Wales Crime Commissioner had lawfully authorised a controlled operation. The Court found in favour of the appellants, holding that the Commissioner, by too narrowly interpreting the *Law Enforcement (Controlled Operations) Act 1997* (NSW), had failed to consider matters that should properly have been considered in determining the authority: at 141–2 [57]–[58] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ). The authorities granted were therefore unlawful. This judgment gave rise to a further appeal on the basis that evidence obtained pursuant to an unlawfully authorised operation should be excluded. That appeal was heard by the New South Wales Court of Appeal. Tobias JA observed that even if the evidence obtained under the invalid authority could be impugned, the discretion under s 138 of the *Evidence Act 1995* (NSW) would be exercised to admit the evidence (and '[t]o suggest otherwise would be an exercise in futility'): *Dowe v The Queen* (2009) 193 A Crim R 220, 246 [104]. Tobias JA concluded that 'there has been no miscarriage, let alone a substantial miscarriage, of justice due to the fact that the trial of the appellant proceeded on the basis that the authority pursuant to which he was supplied with 1kg of cocaine was subsequently determined by the High Court to be invalid': at 246 [105].

¹²⁷ *Review of the Law Enforcement (Controlled Operations) Act 1997*, above n 60, 27.

activities can be identified.¹²⁸ On its face, it is possible to empathise with this view because of the way in which the statutory governance regime has been constructed. Investigators are being authorised to commit criminal acts as they interact with suspects. Spontaneous and unpredictable events are difficult to anticipate or plan for with much degree of accuracy, but this begs a fundamental question reaching to the core of the concept: in these circumstances, how can so-called controlled operations ever be appropriately (or lawfully) authorised?

The immediate solution to this was provision for retrospective authorisation of a controlled operation in limited circumstances,¹²⁹ which practitioners subsequently sought to have extended.¹³⁰ But retrospective 'authorisation' (ex post facto rubber-stamping by another name) arguably undermines the role of authorisation (informed decisions made on the basis of planned activity, which are then amenable to subsequent inspection) in the governance framework. Would investigators bother to seek retrospective authorisation where no evidential product had been obtained that required statutory protection to be used at trial?¹³¹ And if so, what control do senior managers retain over the actions of their staff in such circumstances? Indeed, it might be argued that there is no statutory obligation to seek retrospective authorisation where no evidence has arisen to be protected. This potentially is a systemic flaw in this construction of governance.

Indeed, the seemingly unquestioned policy presumption that it is necessary for police to commit criminal conduct in certain circumstances itself undermines the efficacy of governance. An approach that focuses on minimising the chances of evidence being excluded is excusatory, and it would seem, in a qualified fashion, to condone deviance. Such an approach is quite different in character from an approach that seeks to regulate investigator intrusion in order to prevent deviance. But is either approach founded upon a clear understanding of what covert investigation is and what it should be used for? Is the development of covert policing both in England and in New South Wales, far from being the proactive strategy for 21st century policing as asserted in rhetoric, a reaction to circumstance rather than a fully considered policy and policing agenda? And if so, what are the implications for the use of the evidential product at trial and for the procedures and principles of trial and criminal justice?

VII CONCLUSION

This paper has sought to illustrate the need for a wider discourse about the role of covert investigation and appropriate forms of governance, drawing upon practitioner, policy-maker and academic perspectives. The approach adopted has

¹²⁸ Ibid. An alternative perspective might give rise to the argument that if the general nature of the anticipated criminality cannot be foreseen, then there may be no justification for covert investigation.

¹²⁹ See *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 14.

¹³⁰ See *Review of the Law Enforcement (Controlled Operations) Act 1997*, above n 60, 25.

¹³¹ Indeed, might it be argued that there is no statutory obligation to seek retrospective authorisation where no evidence has arisen to be protected?

been to consider two different jurisdictions with a common heritage and to observe their different development trajectories, noting how each has highlighted different issues and different perspectives relating to the governance of covert investigation that should frame future discussion. In England, the trajectory has been steered by the over-arching norms articulated in the *ECHR*: an important and defining influence which has informed the four principles of covert investigation governance proposed above. In Australia, the individual states and territories pursue their own criminal justice trajectories, with occasional course correction provided by High Court judgments.

In functional terms, governance is currently structured at three levels:

- Statute and case law — mechanisms defining what investigators can and cannot do with the case law remedy providing a form of indirect governance through adverse consequences, such as the (discretionary) exclusion of evidence,¹³² and establishing external scrutiny mechanisms.
- External inspection — auditable governance in which proper records demonstrate lawful and appropriate deployment.
- Internal management — procedures to prioritise appropriate operations in which covert investigation may be necessary to guard against overuse and unnecessary deployment.

These three functional levels can — and in England and New South Wales do — apply generically, regardless of the statutory empowerment and authorisation framework in any given jurisdiction. But the way in which they function varies significantly, as different jurisdictional traditions have given rise to markedly different paradigms of covert investigation governance, as shown by the comparison of England and New South Wales. In England, following adverse human rights case law, the conduct of investigators is regulated; in New South Wales, following adverse evidence case law, the integrity of the evidence is preserved by exempting investigators from criminal or civil liability, so as not to taint evidence obtained through controlled operations.

It has also been noted that none of the three mechanisms of intervention is ideal. Proper investigation management and operational planning includes planning and drafting applications to undertake covert investigation, and investigators in both jurisdictions considered in this paper regard such mecha-

¹³² Alongside the Australian case of *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 can be set three English cases in which the Lincolnshire Police were found to have breached the *ECHR* by using a lawful audio surveillance tactic in particular circumstances of unlawful intrusion: see *R v Sutherland* (Unreported, Crown Court, Newman J, 29 January 2002); *R v Sentence* (Unreported, Crown Court, Judge Heath, 1 April 2004); *R v Grant* [2006] QB 60. For commentary on these three cases, see David Ormerod and Adrian Waterman, 'Abusing a Stay for Grant?' [2005] *Covert Policing Review* 5; Rees, above n 126. Whilst the *RIPA* does not specifically prohibit the surveillance and interception of legally privileged communications, an accompanying Code of Practice makes clear that art 6 of the *ECHR* may be engaged in such circumstances: Home Office (UK), *Covert Surveillance and Property Interference: Revised Code of Practice* (2010) 41 [4.22]. Consequently, additional safeguards are set out for circumstances in which legally privileged information is likely to be captured.

nisms as unduly onerous. Deviance can often begin with resistance to norms and procedure. In circumstances where investigators may self-authorise, investigators' subjective hostility towards the bureaucracy overshadows the objective reality that self-authorisation is a privilege and an expression of community trust in the investigating agencies. Such trust, if abused, may be irretrievably lost, leading to an authorisation regime less tailored to agency convenience.

The efficacy of external scrutiny is, to a certain extent, undermined by the fact that it is inevitably indirect: it involves scrutiny of administrative processes rather than scrutiny of investigative conduct. But that is not necessarily fatal to its purpose nor does it frustrate its intended outcome. Where investigators in good faith adopt and enact the recommendations that emerge from such scrutiny, then the value of this governance mechanism is clear. Annually repeated recommendations suggest that too often the message is not successfully getting through or else is being ignored.

Case law is the ultimate intervention and as such might be considered the final word; however, it is hardly definitive. The laws of evidence were not designed to hold investigators to account for covert conduct, and using the wrong tool for a job will never achieve the best outcome. Their use will exclude relevant evidence from the truth-finding process of a trial cannot but undermine the search for the truth in favour of protecting the accused and the fairness of the trial.¹³³ But is it manifestly unfair to weight an adversarial contest in favour of one party: the inevitable consequence of privileging the subjective presumption of innocence over the objective search for the truth?¹³⁴ Mere happenstance determines whether or not an issue is argued at trial or on appeal; hence, any given outcome may be very particular and of little general applicability, yet nevertheless become an established principle.

Hitherto the governance of covert investigation — posited as *proactive* policing for a new criminal environment — has itself been entirely *reactive* in its construction. Neither in England nor in New South Wales (nor the neighbouring criminal jurisdictions in the United Kingdom or Australia) is it apparent that any concerted effort has been expended on debating and designing a strategic policy for covert investigation and its governance.¹³⁵

¹³³ 'The basic purpose of a trial is the determination of truth': *Tehan v United States*, 382 US 406, 465 (Stewart J) (1966). The extent to which this is universally accepted for adversarial trials is debatable.

¹³⁴ On the presumption of innocence and clash of values operating in the criminal trial process, see Laudan, above n 41, chs 4, 9.

¹³⁵ In 1999, the author, representing the law enforcement agency for which he worked, sat as a member of a pre-legislative consultation group that met regularly in the Home Office to consider how the *Interception of Communications Act 1985* (UK) c 56 should be updated in a new Act. The author also sat as a participant in another meeting series in another ministry to draft policy for legislation to cover investigation (both covert and overt) of encrypted digital data. At the same time, colleagues were sitting in a third group also hosted by the Home Office to draft policy for new surveillance legislation in the wake of the *Human Rights Act 1998* (UK) c 42. Only comparatively late in the piece did it appear that the decision was taken to combine all three aspects into one bill (which eventually became the *RIPA*) rather than to proceed on the basis of three separate bills (one of which had been the *Electronic Commerce Bill 1999* (UK) and so outside the remit of the Home Office with its oversight of policing).

Debate, such as it is, is now being confused by the different needs of national security agencies, not least because political rhetoric has ‘established’ organised crime as a national security issue. National security agencies incline away from resolution by way of prosecution although that option is available to them. Exposure at trial compromises other areas of their work which must necessarily remain out of view. The police undertaking criminal investigations essentially have prosecution as their only mechanism for resolution.¹³⁶ Thus, there are two rather different attitudes to evidence and two different perspectives on what success looks like — a distinction not always drawn in policy debate and not helped when, as in the *RIPA*, both national security and intelligence agencies use the same covert powers as police investigators.¹³⁷

The purpose of covert investigation asserted at the outset of this paper is very much focused on criminal investigation. Hence, a successful outcome may simply be defined as the lawful acquisition of relevant and admissible evidence. Other agencies using the same powers may define success rather differently, in which case a different purpose is implied, and arguably different governance architecture is needed. This begs questions about whether general principles for covert investigation and its governance can be identified. At the very least, policy-makers and practitioners need to step back from the reactive paradigm that has prevailed since the New York terrorist attacks of 2001 — which is characterised by a sense of urgency because of perceived imminent disaster — to think proactively about what it is they are seeking to achieve and whether or not thinking anew is required. Such reflection is needed because the evidential and criminal procedural precedents that have informed the reactive strategy are pointing in conflicting directions.

Outwardly similar in appearance (at least from the perspective of facilitating criminal investigation), the two governance frameworks considered here in fact are predisposed by the relevant statutory objectives to achieve different outcomes. Both seek compliance with the legislation, but in New South Wales the nature of the legislation is such that that actual outcome is an overall context in which criminal conduct by police might be disapproved of in principle, but in certain circumstances is in fact approved in order to achieve policing objectives. This is a mixed message about integrity for domestic policing. It also has potential transnational implications. Evidence obtained under the *Ridgeway* solution may not be admissible in European jurisdictions governed by the *ECHR*, given Strasbourg case law in this arena.¹³⁸ That may constrain collaboration in the investigation and prosecution of transnational criminality.¹³⁹

¹³⁶ Some alternatives to prosecution can be applied in certain circumstances, for example, a police formal caution.

¹³⁷ See *RIPA* sch 1 pt I items 1–6.

¹³⁸ See *Teixeira de Castro v Portugal* [1998] IV Eur Court HR 1451, 1463 [36].

¹³⁹ See generally Clive Harfield, ‘Managing Human Rights and Covert Methods in Transnational Criminal Investigations’ in Saskia Hufnagel, Simon Bronitt and Clive Harfield (eds), *Cross-Border Law Enforcement: Regional Law Enforcement Co-Operation — European, Australian and Asia-Pacific Perspectives* (Routledge, 2011) 231.

Governance frameworks are defined by the characterisation of deviance. This influences what the governance frameworks can achieve and how they are perceived by those whose conduct is being governed. Consequently, in the context of a criminal justice system, the governance of its actors influences and shapes the character of the system itself. In a regulatory approach, the means must be proportionate to the ends. In an excusatory approach, the vulnerability remains that the ends may be seen to justify the means.¹⁴⁰

¹⁴⁰ This gives rise to the organisational vulnerability that well-intentioned investigators can lose a sense of perspective and go too far by committing not just incidental criminality, but conduct all but indistinguishable from serious organised crime: cf *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120, 141–2 [57] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).