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THE UNIVERSITY OF SYDNEY

INSTITUTE OF CRIMINOLOGY

FACULTY OF LAW

THE PROBLEM OF CRIME IN A FEDERAL SYSTEM

FOREWORD

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

December 1979

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THE FEDERAL IDEA

Some writers trace the history of federalism to the city states of ancient Greece. The Achaean and Lycian Leagues of the second and third century B.C. established strong common authorities in communities linked by treaty. Other observers find federal elements in the treaties which bound together certain city states of Medieval Europe. Geoffrey Sawer in Modern Federalism points out that it is relatively easy to trace federal elements in earlier communities, now that modern federalism has been developed. But it was the establishment of the United States of America by the leaders of the Thirteen Colonies which laid the basis for modern federalism : one of the most persistent legal and political phenomena of the last two centuries. It is not too much to say, with Sawer, that the originators of American federalism come as close to a band of philosopher kings as any who have taken on the task in human history to establish a new, revolutionary, innovative and workable form of government.

The influence of their idea is still working its way through the political institutions of the world. Frenchmen and New Zealanders rarely understand the federal system. In only five countries, the United States of America, Canada, Australia, West Germany and Austria does it exist in full rigour. There are other unions which have strong federal features : Switzerland, India, Malaysia and Nigeria. In Britain, discussion of devolution, and the solution of Scottish and Irish nationalism revolves around the adoption of a federal constitution of some sort. The European Communities and the direct election of a European Parliament represent an incipient phase in a move towards some form of European federalism. Even the U.S.S.R. and Yugoslavia appear to be moving towards constitutional arrangements which are not federal in form only.

In Australia, there is occasional desultory talk of rearranging the federal compact or redistributing the powers among central, state and local government. Attempts at constitutional change by referendum have not been notably successful in Australia. Attempts to get agreement amongst the political leaders of the Commonwealth and the States have also not proved notably successful. In these pages, Senator Durack, Federal Attorney-General, discloses the efforts, largely unsuccessful so far, to interest the States in participation in a Commonwealth Human Rights Commission. Assistant Commissioner Watt of the Federal Police recounts the co-operation between Federal and State Police in Australia. But underlying some of his comments are the tensions and difficulties that occasionally plague the relations between Federal and State law enforcement officers.

When the Australian Constitution was negotiated, no agreement was reached, as in Canada, to commit to the Federal Parliament the general power with respect to enacting the criminal law of Australia. But it is not accurate to say, as the Privy Council said too widely in Oteri v. The Queen (1976) 11 A.L.R. 142, 145, that :

> "The legislative power of the Commonwealth of Australia does not extend to criminal law. That lies within the competence of the States".

The Commonwealth has, and has frequently asserted, constitutional power to enact criminal laws in support of and incidental to other heads of power conferred on it. But the administration of criminal justice in Australia remains overwhelmingly a State business. The preponderance of the States is, in fact, encouraged by the way in which the Commonwealth has utilised State resources. As a result of the autochthonous expedient, Commonwealth offenders are, outside the Territories, almost without exception, tried before State courts. For those who are convicted, the sentence is almost universally imposed and reviewed by State judicial officers. Pursuant to s.120 of the Constitution or, in the case of Territories, an Executive agreement, convicted offenders are received for detention in State prisons. For statistical purposes, very few distinctions are made for federal crime. Probation and parole are frequently supervised by State welfare officers.

Three developments, elaborated in the seminar, suggest that we have come to a watershed in the consideration of federal crime in Australia. The first is the establishment of the Federal Court of Australia, with its appellate and original jurisdiction in certain federal criminal matters. The second is the establishment of the Australian Federal Police, represented at the seminar by Assistant Commissioner A.J. Watt. The third is the reference which Attorney-General Durack has given to the Australian Law Reform Commission to inquire into and report upon the reform of the law governing the sentencing and punishment of federal offenders in Australia.

FEDERAL CRIME IN AUSTRALIA

The reference to the Law Reform Commission is the catalyst. Senator Durack explained in his written paper that his aim in giving the reference was to secure a report that would assist all those involved in the administration of criminal justice in Australia. Because State courts exercise federal jurisdiction, any reform of Commonwealth laws and practices in relation to federal offenders is bound, whilst we preserve these constitutional arrangements, to impact the

State system. In his oral comments, the Attorney explains how he was moved to give the reference because of concern expressed to him by magistrates about the lack of sentencing alternatives available to them in respect of Commonwealth offenders. Furthermore, the growth in federal crime has meant an increase in the numbers and complexity of parole decisions which the Attorney-General must personally consider, under present Commonwealth parole arrangements.

Professor Chappell's paper is important because it represents one of the first attempts to describe the discrete area of federal crime in this country. The lack of separate data on federal crime is only equalled by the poverty of national crime statistics generally in Australia. Professor Chappell outlines the steps taken by the Australian Law Reform Commission to secure data from which it could understand the patterns and trends in federal crime. The results make fascinating reading. From an examination of police files and other records, and with the help of the Australian Bureau of Statistics, a number of features have emerged which suggest that federal offenders have special characteristics. There are more female offenders than in the general offender population. There are fewer young offenders. The great bulk of offenders are charged with what may be termed "white collar" offences : fraud, forgery, false pretences and misappropriation. Other contributions to the seminar suggest that the growth area of federal crime is concerned with offences under the health insurance legislation. In the space of a few years, such offences have increased from less than one percent of Federal Police business to nearly one third.

Numerous difficulties in administering the federal criminal law are outlined. The operational problems of joint exercises with State forces are mentioned. So too are the tensions that exist even within the Commonwealth's sphere, where law enforcement functions are performed by non-policemen. The difficulty which police face in enforcing laws that are not generally supported by the community is mentioned by Mr. Watt. The need for a comprehensive review of the

criminal offences in federal legislation is stressed by Professor Chappell.

Senator Durack outlines a number of initiatives taken in the federal sphere in matters relevant to the criminal law. Although the establishment of a single system of Australian courts is declared "futuristic" a number of other important reforms are said to be closer. These include :

* Reform of criminal investigation by Federal Police following the Law Reform Commission's report *Criminal Investigation* (ALRC2) 1975
* Reform of sentencing and punishment of Commonwealth offenders, now referred to the Commission
* Review of the transfer of prisoners between the States, which is now under consideration by the Standing Committee of Attorneys-General. Not only would this permit a prisoner to serve his sentence in closer proximity to supportive family and friends. It might also avoid problems of aggregate sentencing identified in these pages by Professor Shatwell.
* A general review of the Crimes Act 1914 (Cth) has been initiated in the Federal Attorney-General's Department.

These and other initiatives taken stress the limitations on the Commonwealth. Here is no bold, conceptually tight approach to the reform of the administration of criminal justice. Because of its constitutional limitations, the Commonwealth's involvement, is and for the forseeable future will continue to be, a limited one. The figures produced by Professor Chappell, however, suggest that its sphere is growing. It is unlikely that it will long remain possible for the Commonwealth to continue the improvised course adopted to date. The pressure for the Commonwealth to accept greater responsibility for the administration of its area of criminal justice already exists and is likely to increase. There are already distinct features in Commonwealth crime. The likelihood is that it will grow in new, non-traditional areas, such as white collar crime generally, computer crime, terrorism and narcotics law

enforcement. The special features will increasingly call into question the acceptability of the current improvisations.

THE PHILOSOPHICAL QUANDARY

Identified in this seminar is a philosophical quandary which lies at the heart of any federal arrangement, particularly one such as we have adopted in Australia by which a great part of the Commonwealth's criminal concerns are handed over to State officers. Mr. Justice Roden points out, in a contribution from the floor, that any concentrated effort to reduce disparities in the treatment of federal offenders from State to State is likely to result in equally undesirable disparities _within_ a given State, if federal offenders and State offenders are dealt with in a different way. It will be difficult for judges to apply different standards, depending upon whether or not they are exercising federal jurisdiction. It will be difficult for prisoners in adjoining cells, punished differently for similar offences. The possibility of confusion and even unrest is raised as a spectre. Against this, Professor Chappell presents a compelling case for the removal of the inequity of dealing differently with Commonwealth offenders, depending upon the State jurisdiction in which they are tried. Without embracing absolute determinism in sentencing, it is difficult to justify significant disparities in the treatment of like Commonwealth offences in different parts of the one country. Professor Chappell spells out suggested solutions to this quandary, one of which is the development of an entirely separate criminal justice system, with federal magistrates and federal prisons : an exclusive system akin to that of the United States. We may come to this. But it seems more likely that we will persist with the autochthonous expedient for a while longer, remembering that it is said to be the one original idea of our Antipodean federal system.

FEDERAL VIRTUES AND TALENTS

The subject matter of this seminar is therefore novel and timely. It is perhaps a remarkable thing that it has taken nearly eighty years of Australian federalism for us to begin the understanding of federal crime. When, at last, it is examined, it is found to have peculiar features. It is also growing rapidly and likely to continue to expand. The calls for the abandonment of federalism and the adoption of a centralised system of government seem fewer today than once they were. Whether this arises from resignation about the difficulty of securing constitutional change in Australia or from a positive conviction that federalism permits decentralisation of control and local experimentation, is not debated here. Professor Sawer, evaluating it, called federalism "a prudential system" best suited to the relatively stable, satisfied societies of "squares" such as abound in Canada, Australia, West Germany and Austria "and probably still constitute the majority in the U.S.A.". "It is not", he declares, "a swinging system", although he was prepared to concede a preference for "a moderately incompetent affluent federalism than ... any centralised system".

The focus of the debate in this seminar is upon those aspects of federal incompetence and inconvenience that cause injustice. To identify areas of injustice, and the other problems of crime in a federal system, it is first necessary to map out the realm of Commonwealth crime. The papers and discussion in this seminar represent a useful, if somewhat belated, introduction to a topic of which we will hear more. Simon Bolivar, liberator of the Hispanic Americas declared :

> "Among the popular and representative systems of government, I do not approve of the federal system : it is too perfect and it requires virtues and political talents much superior to our own".

Whether we can solve the problems of crime in a federal system identified in these pages depends upon whether we in Australia have the virtues, talents and, I would add, imagination and patience, of which Bolivar despaired.

M.D. KIRBY

Australian Law Reform Commission
17 December 1979