

444

ATTORNEY-GENERAL'S DEPARTMENT  
DEPARTMENT OF THE SPECIAL MINISTER OF STATE  
MEETING ON THE NATIONAL CRIMES COMMISSION  
SENATE CHAMBER, THURSDAY 28 JULY 1983

NATIONAL CRIMES COMMISSION : ANOTHER ASIO?

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

BRITISH JUSTICE

It is fitting that we should meet on this issue in this Chamber. We are surrounded here by the symbols of our unique legal system. If there are two cornerstones of the 800-year-old tradition we have inherited, they are:

- \* Parliamentary democracy and Executive Government responsive to the people; and
- \* the rule of law made chiefly in Parliament but administered in the courts by judicial officers, independent of the enthusiastic legislators and administrators.

It cannot be said too often that this is an inefficient political and legal system. The inefficiency derives because we deliberately strike a very special balance between the great power and authority of the modern state and the rights of individuals, even criminal suspects. As Mr Landa has said, it is easier to diminish or abolish those rights than later to revive them. The accusatorial criminal trial, is central to our legal system precisely because it defines the relative position of the state and the citizen. Unlike other countries, ours is not a society where officials can stop and search you at random, require identity passes for no cause or otherwise arbitrarily invade your life and property. We tamper with these features of our freedom, at our peril, for when we do so we redefine the relationship between the State and the individual.

Many people in Australia, perhaps even most, are not fully aware of or even sympathetic to these limitations on the powers of officials. Because they do not themselves contemplate crime, they are prepared quite readily to abandon or modify basic principles which govern the relationship between authority and the individual. The defence of civil liberties has never been a particularly popular cause in Australia.

The paper by Mr. Douglas Meagher for the ANZAAS Congress, relied on in the Green Paper, describes 'organised crime' in terms of gambling, prostitution, pornography, video-piracy, drugs and so on. Yet if such organised crime, to which a National Crimes Commission is to be addressed, is big in Australia, it is only big with the participation of large numbers of Australian citizens. Therefore, to the extent that we establish a Crimes Commission and arm it with extraordinary and unusual powers, we must face the fact that we create a body that potentially will impinge on the lives of very many Australians.

Two issues are said to be before this meeting. The first, as stated by the Prime Minister, is the need for a Crimes Commission. Assuming that need is established, the second is the role and powers which it should enjoy.

Now, we are all busy people and if our real job is only to address the second question, we should be frankly told that this is the case, so that we can get on with it. The Prime Minister has announced that the present disposition is that a Crimes Commission will be established in January 1984. The present Opposition secured the enactment of the Act to establish a Commission. Senator Evans has said in one speech that the 'critical question' is the role of the Commission.<sup>1</sup>

If the Government, based perhaps on confidential information that cannot be shared with us, has concluded that a Crimes Commission must be established, we should not tarry here to debate that question further. Whatever private views we may have about the lack of proof of need, or the reliance on assertion rather than reliable evidence, we must just accept that a political decision has been made. Creation of the body is then the entire responsibility of those who have made that decision. The most that observers like us can then do is to offer suggestions to ensure that the body, as created, will be as little as possible incompatible with our constitutional history and legal traditions.

I for one propose to take the first question seriously. I will address myself to the issue of need, though obviously I must do so briefly.

### THE BIRTH OF ASIO

Following the Second World War, there was great anxiety and concern in Australia about Communism. It was said to be insidious and rampant. It was said to be penetrating unions and community groups. It threatened the very fabric of Australian society, so we were told. Until that time the Commonwealth Investigation Service and State Police Forces had the responsibility for scrutiny of subversive activity in Australia. From time to time, these agencies proceeded in the courts with charges involving offences such as sedition. But by 1949 it came to be believed that more was needed. A new institution was needed, particularly to stem the tide of Communism and to protect the basics of Australian society. Thus in 1949 it was the Chifley Labor Government which established the Australian Security Intelligence Organisation (ASIO). It appointed a Judge as its head. ASIO was intended to have many of the advantages now envisaged for the Crimes Commission. A study of the contemporary newspapers and parliamentary debates discloses how very similar was the description of the perceived threat and the suggested inadequacies of traditional laws and institutions:

- \* ASIO would be specifically targeted against subversive groups;
- \* ASIO would be active rather than reactive, as police forces tended to be;
- \* ASIO would have specialist and high calibre staff, capable of understanding the subtleties of the operations of the target groups;
- \* ASIO would be properly equipped with manpower and facilities;
- \* ASIO would have the power, including by means of infiltration of target groups, to combat them effectively;
- \* ASIO would increasingly require modification of traditional civil liberties. Thus telephonic interception came to be introduced and other traditional rules were modified, abandoned and even broken.<sup>2</sup>

Would a Crimes Commission be more effective than ASIO has been? Would it be able to avoid the pitfalls and problems which have dogged ASIO since its establishment and revealed by Mr Justice Hope's earlier inquiry? Chief amongst these problems — even for friends of ASIO — has been the ambiguous place in our democratic society of bodies which are not readily accountable to the elected Government and Parliament. In an understandable endeavour to make the body independent (so that it can pursue its targets without the risk of interference by corrupt or unsympathetic politicians) there is a very real danger of creating an institution which is:

- \* largely unaccountable to the democratic elements of our government;
- \* unable, because of the secrecy of its operations, always to justify its work and its position publicly;
- \* prone, by the nature of its mission, to take on an evangelistic, even messianic role;
- and

- \* able, by the sharing of selected secrets, to win over even initially sceptical or unsympathetic administrators or politicians, admitted into its secret world and to its assessments and points of view.

#### ORGANISED CRIME?

The target of the proposed National Crimes Commission is principally 'organised crime'. That concept seems at least as incapable of satisfactory legal definition in 1983 as 'subversion' was in 1949. But the result of the loose definitions of such key concepts will be, in all probability, that the body enjoys a very free rein. Recent public debates about the Crimes Commission have shown how commentators envisage that organised crime means their pet 'bogey man'. It may be drug syndicates, distributors of porno video tapes or police use of 'verbals'. Unless there is effective political accountability, the risks of such a Commission, however modelled, seem unacceptably great. Whilst there are dangers that accountability to political representatives can sometimes be used to muzzle the effectiveness of a body such as a Crimes Commission, there are far greater dangers in allowing such a body to range widely over the landscape. This is especially so if it has unusual powers within imprecisely defined functions, able to act, unrestrained, at the whim of those who constitute the body and who are not effectively accountable in a democratic way.

#### OTHER OPTIONS

One point that is well made in the Green Paper is the restraint on police forces arising out of the jurisdictional boundaries of Australia. But it seems a pious hope, in the view of State responses to a National Crimes Commission, that old Federal/State official rivalries will suddenly be cast aside and State jurisdiction conferred on the Commission. If interjurisdictional crime is really such a feature of organised crime in Australia, it seems unlikely to me that a new Federal Commission, with mainly Federal functions and uncertain State participation, will succeed. Two alternative options are not really explored in the paper. They are:

- \* First, to spend the money planned for the National Crimes Commission on enhancing the capacity and functions of the Australian Federal Police. This would require, amongst other things, radical attention to new substantive criminal law for the Commonwealth. It seems much more likely to me that the creation of Federal transborder crimes, settled by debate in this Parliament and the development of an effective, modern Federal Police to investigate and prosecute those crimes, would result in success, where Federal/State Police co-operation has failed in the past and looks dubious now.

The second option would be the approach adopted in recent years in conjunction with some Royal Commissions. I refer to the creation of Joint Task Forces for defined interjurisdictional objectives as proposed by Mr Doumany and Mr Robinson. The Task Force model has advantages. It draws on existing police facilities, both for manpower and for sources of equipment and intelligence. It tends to diminish inter-institutional rivalries which seem likely to bedevil any Federal Crimes Commission, however designed, in its operations with established State Police Forces. An effective response to inter-jurisdictional crime involves the use of selected police officers, but as well specialists in computing, corporate affairs, taxation, customs and banking. Even if the National Crimes Commission were to grow as large as ASIO, it could scarcely hope to attract the requisite talent necessary to tackle every particular target. Greater institutional flexibility is required. Task Forces are more likely to be flexible than a Crimes Commission that threatens to be cosmetic.

#### LAW REFORM AND AMBIVALENCE

I would certainly hope that if a National Crimes Commission is created it will have, as one of its functions, addressing the needs for law reform called to attention by its operations. A recent law reform report in South Australia disclosed that the game of tennis, at least Royal Tennis, may still be unlawful in South Australia under Imperial gaming and wagering laws. Boringly enough, many Australians are irrepressible gamblers. The notion of mindlessly enforcing morality laws, whether designed for the reign of Henry VIII or Queen Victoria, in today's Australia is one of the real dangers of the proposed Crimes Commission, especially if it were to fall into the hands of enthusiasts.

This brings me back to the ambivalence displayed in the Green Paper and in the two models it presents for debate:

- \* Model A seeks to justify the powers to compel evidence, issue search warrants and grant immunities by the comforting reassurance that it is basically only an information-gathering and analysing body. Yet there are at least three fatal flaws:
  - \*\* the nature of the criminal offences to which it is to be addressed are not to be limited or defined;
  - \*\* the method of securing (against all the odds) the needed co-operation of Federal and State Police and prosecuting agencies is totally unspecified; and

- \*\* the spectre of the public denunciation of alleged criminals by the media, not in our courts, is clearly held out, as Mr Bingham pointed out. Through reports to Parliament, criminals will have their activities brought to public notice and be identified under the full blaze of publicity, without the checks and protections of normal criminal process in this country.
- \* Model B seeks to reassure us by contemplating that the Chairman would probably be a judge, that law reform recommendations would be made, self-incrimination would be an excuse and people would not be identified as merely suspects. Yet this model too has serious flaws:
  - \*\* the definition of the targets is still very wide and imprecise; and
  - \*\* the method of securing co-operation with Federal and State prosecution and police agencies rests on hope rather than legislative resolution.

#### CONCLUSIONS : FACING HARD QUESTIONS

This ambivalence is not surprising. We may feel dissatisfied with and frustrated by aspects of our criminal justice system. Certainly, in a Federation there are special problems and clearly we should be addressing those. Creating a new institution, even though out of line with our legal traditions, also has obvious political advantages. It is seen to be doing something. And it is so much easier than tackling the hard questions mentioned at the end of the Prime Minister's speech:

- \* reforming the unreformed laws that lead organised crime to flourish;
- \* improving the quality of our police services;
- \* addressing specific needs of co-operation between agencies within Australia; and
- \* improving specific aspects of our criminal laws and procedures.

I have an uneasy feeling that, with a Crimes Commission, we would get the worst of both worlds. Whichever model we choose of the two proffered, we stand the risk of creating either the cosmetics of an ineffective agency or a too-powerful institution, unaccountable, in practice, to the courts or to our democratic institutions.

The hard business of real law reform is to tackle the problems of our criminal justice system. It is not, I believe, to create new institutions, the need for which is doubtful and the real alternatives to which have not been tried.

FOOTNOTES

G. J. Evans, Attorney-General, Address to the Australian Institute of Political Science, Crimes Commission Seminar, Sydney, 15 June 1983 (press release 72/83).

Australian Parliament, Royal Commission on Intelligence and Security, Fourth Report, Volume 1, paras 664, 670, 674, 678, 680, 688, 705-14.