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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL
PROCEEDINGS OF A SEMINAR ON
A NATIONAL CRIMES COMMISSION?

FOREWORD

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The Hon Justice M D Kirby CMG *

A TIMELY MEETING

The sober, scholarly gathering of the Australian and New Zealand Association for the Advancement of Science (ANZAAS) was an unlikely venue at which to launch a major national controversy about organised crime in Australia. Yet in May 1983 in the beautiful setting of the University of Western Australia, on the banks of the Swan River, Mr Douglas Meagher QC, Counsel Assisting the Royal Commission into the Federated Ship Painters' and Dockers' Union (the Costigan Commission), delivered a three hour resumé of his perception of organised crime, from the viewpoint of that major national inquiry. The picture he painted — of prostitution, pornography, race fixing, tax rackets and so on spread like wildfire around the nation — indeed around the world. Suddenly, the 'lucky country' was portrayed as a land increasingly overtaken by drug pedlars, vice racketeers and corrupted officials.

All of this happened, as Mr Bob Bottom points out in the papers of this seminar, on the tenth anniversary of the first of the recent series of Australian Royal Commissions of Inquiry into aspects of organised crime. That was the Moffitt Royal Commission. Justice Moffitt's work was soon followed by the labours of Justices Philip Woodward, Williams, Edward Woodward, Stewart, the Costigan Inquiry that brought Mr Meagher into the arena, and numerous other past and current investigations, great and small. Words like 'cancer in our midst', 'Mr Big', 'wild beasts of crime' and 'corruption out of control' became commonplace. Banner headlines screamed anxiety at commuters as they proceeded home. Even the magistracy and Ministers of the Crown were said to be involved. In these circumstances, it seemed, the ordinary forces of law and order were breaking down. Long established ways of controlling crime in Australia appeared to be failing. Something more, it was claimed, was necessary.

In the wake of the revelations of the early reports of the Costigan Commission, the Fraser Administration had introduced and secured the passage through Federal Parliament of the National Crimes Commission Act 1982. It was an important piece of legislation, hastily put together. It provoked much opposition during the debate in Federal Parliament. Moreover, it attracted the opposition of State Governments of differing political persuasions, both because of its terms and because of the haste with which it had been enacted. A Queensland judge (Sir Edward Williams) was named to head the new body. But when the writs were issued for the Australian General Election held in March 1983, the Act had not been proclaimed to commence. It remains in this legislative limbo to this day.

The Hawke Administration adopted a more cautious stance. The indefatigable new Federal Attorney-General, Senator Gareth Evans, was sensitive to the unusual combination of opposition ranged against the 1982 statute. In the hope of attracting a consensus around the need for action and the design of a more appropriate response, Senator Evans issued a consultative document. This document canvassed the problem of organised crime in Australia and the models, compatible with the Federal Constitution, that could be adopted to address that problem. One model was a kind of permanent Royal Commission : an inquisitor and prosecutor. The other was more like an intelligence-gathering unit designed to assist the established agencies of the police and prosecutors to perform their tasks more effectively.

To debate these models, other possibilities or just simple opposition to any form of Crimes Commission, the Attorney-General summoned a number of participants to a meeting in the Australian Senate Chamber at Parliament House, Canberra, on 28-29 July 1983. On the plush red leather benches, where the Senators normally sit, gathered an unusual collection of commentators : State Government delegations, Judges, Royal Commissioners, past and present, Police Commissioners and police unionists, representatives of the organised legal profession and of Councils for Civil Liberties.

The meeting was opened by the Prime Minister, Mr Hawke. There were, he said, three distinct levels to the questions which had to be asked and answered:

First, is the problem of organised and sophisticated crime such that some further and better investigatory machinery than we have at present is needed to cope with it? Secondly, if the answer to that first question is yes, is the concept of a standing Crimes Commission preferable to alternative approaches, including in particular upgrading the powers and capacity of the police and continuing ad hoc Royal Commissions and Inquiries?

Thirdly, if a National Crimes Commission is a preferred alternative, what should the precise functions, powers and composition of that Commission be?

Driven remorselessly by Senator Evans and Mr Kim Beazley MP, Special Minister of State and therefore Minister responsible for Federal police affairs, the participants addressed themselves to these issues over the two-day meeting. They are the issues which are also addressed in these proceedings of the Institute of Criminology. Indeed, some of the participants in the Institute's seminar also attended the meeting in Canberra. Others, such as Dr Braithwaite and Mr Bottom, were not invited to participate in Canberra. From different perspectives, they offer a vigorous critique of and an alternative viewpoint upon the conclusions which Senator Evans offered at the end of the national conference. Summing up the meeting in the Senate Chamber, Senator Evans indicated:

Clearly the notion of a National Crimes Commission with a full range of Royal Commission-type powers on a standing permanent basis and with very wide jurisdiction ... is not likely to command much acceptance on the evidence of these last two days ... The strongest measure I discerned in discussion was support for the graduated response approach of the kind ... where police, assisted by special investigators, exercised traditional powers and further down the track contemplate a Royal Commission inquiry.

THE PROPONENTS

As at the Canberra conference, the Institute's seminar divided quite sharply between the vigorous supporters of a National Crimes Commission, the sceptics and those, frankly unconvinced, who at this stage were opposed.

The paper by Mr Bottom, now a journalist and formerly Special Adviser on Organised Crime to the New South Wales Government is emphatic. If only there had been a Crimes Commission 10 years, if only the Moffitt Royal Commission had enjoyed wider powers and a wider reference, the current Australian problems of vice, illegal gambling and tax frauds would not have reached their epidemic proportions. According to Mr Bottom, the Royal Commissions since Justice Moffitt's inquiry have clearly established the need not only for a National Crimes Commission but for State Commissions as well to supplement them. The underworld has mushroomed. It is corrupting the police, the media, the legal and accounting professions. It stretches to organised shoplifting, arson and even bird smuggling, illegal immigration, social security fraud and so on. Most frightening of all, it has now infiltrated the formerly virtually impregnable fortresses of high Crown service — even the Federal Attorney-General's Department.

Reaching similar conclusions is the contribution of Mr John Hatton MP, an independent Member of the Legislative Assembly of New South Wales. Mr Hatton has for many years been campaigning for action to tackle the insidious effect of corrupting crime. Amongst his chief concerns is the need to provide the ordinary citizen with a neutral trusted venue for legitimate complaints, to which he can resort without fear of retaliation, intimidation or whitewash. Mr Hatton concedes the need for law reform in some of the areas of the law that give rise to corruption — laws on gambling, vice and drugs — where there are few complaining victims and where modern Australian society exhibits ambivalent values. But he is unconvinced that law reform alone can adequately tackle the problems of modern crime. The law lags behind. The parliamentary process is extremely slow — an observation proved by the failure of the NSW Parliament in 1982 to reform the laws on homosexual offences. And there is a vital need for immediate solutions to urgent problems.

Mr Hatton is not singleminded. He concedes the need for additional, supplementary reforms. These include a role for multipartisan parliamentary committees. They also include reform of the police, so that improved recruitment and personnel procedures will ensure higher standards. But he feels that the centralisation of our society and the impersonal nature of the modern Australian urban community provide a splendid breeding ground for crime. Our present instruments of social retaliation are inadequate and need reinforcement.

THE CRITICS

The critics of the proposal to establish a National Crimes Commission found an articulate voice in Professor Richard Harding, Dean of Law in the University of Western Australia and more recently appointed Director of the Australian Institute of Criminology in Canberra. Professor Harding is frankly sceptical about the assertions by Mr Douglas Meagher and others concerning organised crime. To dismantle fundamental principles of criminal justice and basic rules in the relationship between authority and the individual, something more is needed than the assertion of a few commentators, however distinguished. It must be proved, says Richard Harding. When questioned, he asserted that it must be proved to him — to ordinary citizens, not simply to Royal Commissioners and governments. At stake is nothing less than our traditional civil liberties.

Professor Harding's scepticism about the so-called 'Meagher report' to ANZAAS was heightened by the absence of substantial factual material, the inaccuracy of at least one factual matter that could be checked and the tendency as in overseas cases to chase folk devils rather than, boringly enough, paying attention to systematic improvement of the law and of its enforcement bureaucracy.

Furthermore, Professor Harding's caution was enlivened by what he called the 'organised moral panic' engendered by supporters of the National Crimes Commission. All too often they adopted a simplistic diagnosis of the problem and then ventured simplistic solutions to match. Whilst prepared to contemplate the compromise proposal suggested by Senator Evans at the close of the national conference in the Senate Chamber, Professor Harding emerges from these pages as distinctly unconvinced. He appears dubious that a Crimes Commission could be designed with adequate protections. Instead, Professor Harding repeats the call for the attention to the difficult business of law reform and the seemingly intractable problems of raising the quality and integrity of police by adopting new and more imaginative personnel and recruitment policies for police and other law enforcement agencies.

To the same point is the contribution of Mr John Marsden, a Sydney solicitor and now President of the NSW Council for Civil Liberties. Mr Marsden was a participant at the Canberra conference. He reviews the unusual combination of voices that expressed doubts at that conference. In particular, he calls attention to the telling reservations voiced in the Senate Chamber by Justice Alastair Nicholson of the Supreme Court of Victoria. That judge, who had himself conducted a relevant inquiry into criminal activities, had said:

If one is to look for historical comparisons with the National Crimes Commission I would equate this proposal in terms of potential danger with the Communist Party Dissolution Bill of the 1950s ... I doubt if there is a real community awareness of the extent of the affront to privacy and liberty involved in the conferring on a Royal Commission or similar body of compulsory powers to examine witnesses or produce documents. I must confess that I now appreciate the enormity of such power. I must confess that I had not appreciated the enormity of such powers myself until I was firstly in a position of being able to procure their exercise as Counsel assisting an inquiry and secondly when I exercised such powers myself, when conducting an inquiry.

THE UNCOMMITTED

Between these polar responses to the National Crimes Commission came the cautious and the uncommitted. Dr John Braithwaite was irritated by the assumption of participants that the problem of organised crime could be tackled by locking up more criminals, especially big criminals. He pointed to the experience in the United States and the 'displacement factor'. Destroying the large organised criminals of one city simply left a vacuum that was soon filled by enthusiastic replacements from other cities — perhaps worse than those locked up. The National Crimes Commission Act 1982 established, de facto, a Grand Jury system akin to that operating in the United States.

But it did so without the backdrop of constitutional guarantees in favour of due process and against self-incrimination. Dr Braithwaite makes the important point that a Crimes Commission can succeed even without successful prosecutions. He cites the alert provided by the early Costigan report concerning the national problem of bottom-of-the-harbour tax evasion schemes. But he cautions about the need to introduce any such new institution under the discipline of a legislative 'sunset clause' and constantly to evaluate and monitor its performance for its impact on traditional civil rights.

Professor Duncan Chappell, now of Simon Fraser University in Canada, also produced a paper for the ANZAAS Congress in Perth. It did not attract the coverage given to Mr Meagher's effort. It is reproduced here, with Professor Chappell's permission. It provides a useful commentary on likely future directions in the investigation of crime. Its special value is its reference to North American experience with Crimes Commissions. It points out that in British Columbia, Canada, where Professor Chappell is now resident, the establishment of a Crimes Commission was rejected by the government in favour of reliance upon expanding the resources of existing law enforcement agencies. Professor Chappell returns to his oft-repeated themes : the need for better recruitment and personnel policies in the established police forces, the need for a more scientific approach to criminal law enforcement and the need for better co-ordination of law enforcement agencies within Australia.

It is this last point that Professor Richard Harding asserts to have been the chief value of the Australian national debate on a Crimes Commission. Now, at last, it is realised that the constitutional division of responsibility for the criminal law may not necessarily be appropriate for the problems of crime in today's generation. Crime, nowadays, ignores State and even national boundaries. With the development of computers and means of rapid transport, this reality will become increasingly obvious in the years ahead. The substantial confinement of law enforcement effort to State jurisdictions weakens the response of organised Australian society. Efforts of the past to secure co-operation between State law enforcement agencies have generally foundered on the rock of jurisdictional and institutional jealousies, so rife in Australia. Now, it is increasingly realised that better co-ordination and co-operation of law enforcement bodies is necessary. But as Professor Harding points out, such co-operation must be developed within a framework of rules sensitive to our legal traditions, our established respect for civil liberties, our obligations under the International Covenant on Civil and Political Rights and the developing national jurisprudence of human rights.

LAW REFORM NEEDS

As we continue to refine our thinking about crime, organised crime and the appropriate Australian response, it is to be hoped that we do not lose sight of the needs of law reform. If major targets of a proposed National Crimes Commission are crimes of which there are few complaining victims (gambling, pornography, prostitution, homosexual offences, marijuana etc) it is vitally important that we should tackle the urgent needs of law reform that exist on these topics. All too often, these are subjects upon which the law, reflecting an earlier morality, says one thing. Large numbers of otherwise perfectly decent and law-abiding citizens are doing another. If organised crime is big in Australia, as Mr Meagher asserts, it is big with the participation of very many ordinary Australian citizens. The message of these Proceedings would appear to be much the same as the message of the national conference organised in Canberra. It is that there is no simplistic solution to the complicated problems of crime in a modern society such as Australia. Certainly a National Crimes Commission provides no panacea for the nation's ills and evils. Some form of institutional response may be necessary. But, without reform of the law, we must be cautious in disturbing things long settled especially where attributes of freedom are involved. Without reform, we must be specially cautious before establishing institutions, manned by enthusiasts — particularly where the unreformed laws which they will vigorously enforce may catch in their net of computers, inquisitorial powers and intelligence systems, a surprising number of fellow citizens — neighbours of yours and mine.

M D KIRBY *

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* Chairman of the Australian Law Reform Commission. Judge of the Federal Court of Australia. Member of the Advisory Committee of the Institute. Views expressed are personal views only.