THE TWELFTH ALFRED DEAKIN LECTURE

MELBOURNE, 4 JULY 1978

THE DILEMMA OF THE LAW IN AN AGE OF VIOLENCE

June 1978

THE TWELFTH ALFRED DEAKIN LECTURE

MELBOURNE, 4 JULY 1978

THE DILEMMA OF THE LAW IN AN AGE OF VIOLENCE

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

ALFRED DEAKIN TODAY

Exactly one hundred years ago, almost to the day, in this city, Alfred Deakin embarked upon a career that was to take him to the highest public offices of this State and of the country. He was a lawyer by training, although we are told that he was not drawn to the law by its own "irresistible attractiveness".[1] His abiding ambition was to be a man of letters. So it was that in 1878 he paid his first visit to David Syme who controlled and virtually owned *The Age*. He was engaged as a journalist and within a month, in July 1878, he was in full flight as a leader writer. It was the influence of Syme that propelled Deakin, then only 23 years old, into the Victorian Parliament as a candidate for the Liberals. Syme selected him because he was "brilliantly gifted, and a sound Liberal, with all the arguments for Liberalism at his fingertips".[2]

Liberal values in our legal system are under challenge today from many quarters. It is at a time like this that we need to draw inspiration from the life and works of a man who had "all the arguments for Liberalism at his fingertips". Deakin is remembered today as one of the makers of the Commonwealth of Australia.[3] He was a great Australian nationalist. But beyond this he was a thinker, writer and eloquent advocate of liberalism. He realised, more clearly

than most, that at the heart of the liberal movements of the Victorian age was a reforming zeal which involved change, not for its own sake but for the improvement of society. He was a reformer, including a reformer of the law. We do well to pause and recall to mind, in brief outline, his remarkable career. It has, as I shall endeavour to show, relevance for Australian society today.

Deakin was born in 1856. He qualified as a barrister in 1877, entered the Victorian Parliament in 1879, became a Minister in 1883, at the age of 26 and was continuously a Member of the Victorian Parliament until Federation and thereafter of the Commonwealth Parliament until 1913. He was Leader of the Victorian delegation at the First Colonial Conference in 1887 and left a marked impression on English political and administrative leaders. He was head of the Liberal Party in Victoria before he reached his thirtieth year. In the Victorian Parliament he pioneered many important reforms. Amongst these, the most important were those laying down minimum conditions for factories[4] and those encouraging irrigation in all parts of Victoria.[5] In the 1890s he became a leading apostle and propogandist of federation.[6] In 1900 he was sent to London as the Victorian member for the delegation whose task it was to secure the Imperial Act which would establish the Commonwealth. In January 1901 he was commissioned as the first Attorney-General of the Commonwealth. He pioneered the legislation which established the High Court of Australia. When Barton retired to that Court in September 1903, Deakin succeeded him as Prime Minister. He led the Liberal-Protectionist Party and three times he was Prime Minister. When in 1908 it became clear that the Australian Labor Party intended henceforth to act alone and, if possible, to gain power in its own right. This led to the fusion of the non-Labor Parties under Deakin's leadership. In April 1910 Labor achieved a decisive electoral victory in both Houses of the Parliament. Deakin remained on as Leader of the Opposition until his retirement in 1913. He died in October 1919.[7]

Although he was the dominant figure in the political and intellectual life of Australia in the first decade of this

century and although a resolute patriot and active reformer, it is plain that Deakin had few of the traditional characteristics that are nowadays expected of strong leaders. "An intellectual, conciliatory, courteous, charming in company, eloquent in public,but living the private life of a student and mystic, reserved and apart" is how he is described.[8] Thrice he refused an offered Order of Knighthood.[9] He steadfastly declined the formal offer of a Privy Councillorship. Apart from Watson, who held office for only four months and, more lately, Mr. Whitlam, Deakin is the only Australian Prime Minister who did not become a Member of the Privy Council.[10]

Though it is plain that Deakin regarded the practice of his profession in the law as a drudgery, "there is no doubt that his legal training, along with his knowledge of history, wide reading and intellectual alertness, all combined to make him a leader of the Conventions that preceded Federation.[12] Typical of his modesty was his refusal, at the age of 24, to accept the proffered position of Attorney-General for Victoria. He was, he declared, unfit for the post.[13] Nevertheless, upon the achievement of union he became first Attorney-General of the Commonwealth and the youngest Member of the Federal Ministry. Between 1892 and 1900 Deakin, though a private member of the Victorian Parliament, had refused Ministerial Office. He practiced at the Bar but it does not appear from his notebooks that he was greatly interested in the legal profession as such. Mr. Justice Higgins, whose appointment he secured to the High Court and to his creation, the Arbitration Court, put it this way :

> "Deakin's mind and a lawyer's mind travelled in different directions." "A lawyer tends to strip away all leaves and flowers from the bare stem; Deakin would take a bare stick, as dry as Agamemnon's sceptre, and make it bloom. Deakin rarely touched facts but to adorn them".[14]

In the Commonwealth Parliament he presided, as first Law Officer of the new Federation, over a remarkable series

of statutes "of considerable length and complexity, which set a high standard in legal draftsmanship ... [whose] present form basically remains as it was when they were first enacted".[15] The *Customs Act* 1901, the *Judiciary Act* 1902 and the *High Court Procedure Act* 1903 were vital measures and, in many ways represented important reforms. In introducing the legislation to establish the High Court, Deakin foresaw the need for a court of the highest character as "an integral part of the federal system accepted by the people. Without such a safeguard of the compacts of the Constitution and an impartial interpreter of its meaning it would never have been accepted by them".[16]

Additionally, he led reforms which were novel and much before their time in such matters as compulsory industrial arbitration,[17] trade marks legislation, a *Copyright Act*, antitrust laws and national defence.[18] Every session of the Parliament under his leadership was accompanied by enlargement of the role of the Commonwealth but he was never a centralist as his last important political victory, when in Opposition, indicated. In 1911 he successfully resisted the attempt by referendum to give the Federal Parliament general powers over trade, commerce, industry and monopolies. He was fearful of class disputes and, though a champion of the Commonwealth's role, he consistently defended the federal spirit of the Constitution.[19]

Contemporary writers speak of the way this man "moulded the mind of Australia",[20] and inspired Australians with "high national hope ... to great purposes and great achievements".[21] He obviously stamped his own ideals on the constitutional instrument itself, on the early life of the nation and on the philosophies and policies of one of the three movements that had been important in the political life of this country. He was certainly no conservative, as his reformist zeal and active propagation of causes bear eloquent witness. Nor was he prepared to join forces with the growing Labor movement, although for a time he was aligned in office with Labor and was united with it in many important common policies. It is

as an Australian nationalist and as a liberal reformer that we celebrate him. Each of these qualities has lessons for Australian society in 1978.

DEAKIN AND THE PRIVY COUNCIL

The last year has seen come to the fore a debate in which Deakin, the Australian nationalist, was intimately involved when our Constitution was being framed and adopted. It relates to the role of the Judicial Committee of the Privy Council in the hierarchy of Australian courts. In 1891 Inglis Clark of Tasmania had prepared a draft Constitution for a federal union which provided for a Federal Supreme Court and the abolition of any possibility of appeal to the Privy Council in the United Kingdom, whether from the highest courts of the federating colonies or from the Federal Supreme Court.[22] At the Sydney Convention in March 1891 there was a fairly even division of opinion on the abolition of Privy Council appeals[23] although Deakin considered the work of the judiciary committee of the Convention "not thought clear or complete" and "roughly handled".[24] A provision was added to permit the Privy Council to grant leave to appeal from a judgment of the High Court "in any case in which the public interests of the Commonwealth, or of a State or any other part of the Queen's dominions are concerned." The 1898 and 1899 Conventions saw further debate. Barton declared "If Australia is to be the maker of its own Constitution, it is fairly competent to be the interpreter of its own Constitution".[25] Efforts directed at countering an endeavour to restore general rights of appeal produced a compromise, the original clause 74, of the Constitution. It forbade appeals to the Privy Council on matters involving the interpretation of the Constitution of the Commonwealth or a State "unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved".[26] Although preserving the Royal Prerogative to grant special leave of appeal from the High Court to the Privy Council, the draft provided that the Commonwealth Parliament could make laws "limiting the matters in which such leave may be asked".[27]

Deakin, with Barton and Kingston, was despatched to

secure the passage of the hard-won compact through the Imperial Parliament. The task was not made easier by secret private manoeuvres of State Chief Justices, Lieutenant-Governors and even Governors directed at the general retention of Privy Council appeals.[28] Everywhere they went in London, the Federal Delegates were "met with strong criticism of the appea clause contained in letters "marked 'confidential' and published anonymously".[29] Joseph Chamberlain at first insisted upon amendment of the clause to preserve Privy Council appeals generally. The negotiations were tough and bitter. The tale has often been told of Deakin's ingenuity and courage in resisting the proposed subordination of the Australian Constitution to overseas interpretation.[30] Deakin summarised the avhievement of the delegates thus:

> "The fact that constitutional appeals remain capable of settlement by the High Court and that the Federal Parliament possesses the power of amending the law relating to appeals is due therefore entirely to the delegates. They prevented other undesirable amendments but they also secured these two important and significant powers to the Commonwealth".[31]

The "significant powers" were utilised from the outset of Australia's nationhood. Soon after federation, by amendments to the *Judiciary Act* 1903, steps were taken by the Parliament to direct matters into the High Court, to forestall the possibility of appeal.[32] While still a Member of the Parliament, Barton had made it clear that Privy Council appeals, even in the attenuated form agreed to, were accepted "only as the price that had to be paid to prevent more drastic amendments of the Constitution".[33] He said "If I had my own way I would have no appeals to the Privy Council".[34] Senator O'Connor and Attorney-General Isaac Isaacs, both subsequently Justices of the High Court, expressed similar views.[35] Deakin referred to the protest of the New Zealand Bench and Bar following the Privy Council decision in *Wallis v. Solicitor-General*[36] which the Chief Justice of New Zealand described as a cardinal blunder made in ignorance of New Zealand laws and history. Deakin gave like instances in appeals from the Australian courts.[37]

The legislative moves to utilise the facility of limiting appeals to the Privy Council, so hard won by Deakin and his colleagues, have gathered momentum in the last decade. In 1968 the *Privy Council (Limitation of Appeals) Act* limited appeals from the High Court to the Privy Council only when the High Court decision was given on appeal from a decision of a State Supreme Court and then only when the State Court was not exercising federal jurisdiction or the High Court decision did not involve the application or interpretation of the Constitution or of a law of the Commonwealth. Appeals from other Federal Courts and the Supreme Courts of the Territories were excluded. The gap was further closed by the *Privy Council (Appeals from the High Court) Act* 1975. Apart from the anomalous and theoretical exception of the High Court's granting a certificate to permit appeal in the case of an inter se question (theoretical because having regard to the settled practice of the High Court it "is unlikely ever to grant a certificate"[38]), there is now no appeal to the Privy Council by special leave or otherwise from any decision of the High Court of Australia. There is no appeal to the Privy Council by special leave or otherwise from any State Court exercising Federal jurisdiction.[39] However, appeals are still taken direct to the Privy Council from State Supreme Courts in matters not involving the exercise of federal jurisdiction. There are some indications that the numbers of these appeals, far from declining, are increasing. The debates of the 1890s still haunt us. We now have, despite the best endeavours of Barton and Deakin, an anomalous and confusing judicial hierarchy.

> "[T]here are now two co-ordinate tribunals to which an appellant from the Supreme Court of a State (not exercising federal jurisdiction) can appeal. So far as I am aware, this is a unique position. The law of precedent depends upon the existence of a hierarchy of courts and now there is no longer a hierarchy. Therefore the strict law on precedent cannot be applied".[40]

The last year has seen much anxious attention given by lawyers, politicians and others in Australia to the situation that has developed, unhappy for the authority and respect of the law. Faced by conflicting authority, such as is bound on

occasions to occur, between decisions of the High Court of Australia and of the Privy Council, litigants in great areas of the private law of Australia are now permitted an option, at their choosing, to take litigation to a court of their choosing. Clearly, this is taking the doctrine of "selecting a lawyer of your choice" too far. If litigants are permitted to make self-advantaging decisions, likely to affect the outcome of a case, by their choice of venue of appeal, the whole fabric of impartial and, as far as possible, certain justice under the law is severely shaken.

This is not just a theoretical lawyer's concern. In the course of the last year, a decision of the High Court has shown the mischief that can be done by the preservation of two courts of ultimate appeal in Australian law. In *Viro v. The Queen*[41] Viro was convicted of murder. He complained that directions given to the jury by the trial judge concerning his contention that he acted in self-defence, were erroneous in that they followed a 1971 decision of the Privy Council[42] rather than a 1959 decision of the High Court of Australia.[43] The Privy Council decision was given on appeal from the Jamaica Court of Appeal. The High Court unanimously held that it was not bound by that decision and that the decision of the High Court, and its reasoning, were to be preferred. Inevitably, the reasons advanced and the consequential inferences drawn, varied among the seven justices. There were some who asserted that the lawful diminution, in accordance with Deakin's plan, of the scope of appeals to the Privy Council, inevitably diminished the binding force of Privy Council precedents and affected the duty of State courts, as a consequence.[44] Other justices were more circumspect and declined any attempt to direct in general terms the course that Supreme Courts should follow :

> "Unsatisfactory though one must acknowledge it to be, it does not appear that any pronouncement by this court or any direction which it may choose to give can solve the problems in the sense of ensuring that it does not occur. The choice of the tribunal to which the appeal may

> go from the Supreme Court is in the hands of the unsuccessful litigant who will naturally tend to appeal to the tribunal in which he thinks he will fare better and what sounder ground for preference can there be than an existing decision in his favour by that tribunal".[45]

The confusion, uncertainty and opportunities for judicial mischief which exist in the present situation have now been well identified and must be promptly terminated.[46] The unseemly spectacle of Australian State courts choosing to follow (or feeling obliged to submit to) Privy Council decisions rather than those of the High Court of Australia cannot long be tolerated. Rebukes have already been administered by the High Court.[47] But what is to happen if the rebukes are not heeded and it is simply left to the option of an interested party to choose the decision-maker most acceptable to him?

At the Australian Legal Convention the Chief Justice of Australia referred to the problem that now confronts us and to the efforts which have been made to avoid them by some of the founding fathers (including Deakin) who were prescient enough to foresee our difficulty :

> "[A]s you know, the Constitution was not accepted by the Imperial authorities in the terms in which it had been agreed in Australia. Removal of appeals from the High Court to the Crown in Council was not acceptable to the Imperial Government. Section 74 of the Constitution represents the compromise which resulted from the discussion in London between the Imperial statesmen and the delegation from the Australian colonies. ... The frequency of appeals to the Crown in Council decreased after federation. This was due no doubt to the existence of the High Court of Australia and the acceptance by litigants and the practising

> profession of its decisions. Supervening war and depression also played their part in the decrease in the number of such appeals, as did the relatively modest means of Australian litigants. However, with the growth of air travel and the increase in the financial capacity and interests of litigants, appeals to the Privy Council and applications for special leave to appeal have become more frequent in the last quarter of a century. Meanwhile, the Australian Government of whatever political persuasion appears to have concluded that the nation has so far developed its independence and, indeed, its own judicial attitudes as to require the termination of appeals to the Privy Council".[48]

The Chief Justice referred to the "singularly odd" and "perilous" consequences[49] of the present dualism and concluded:

> "It seems to me that this is an intolerable situation in which the continuing maintenance of the appeal to the Privy Council has placed the judiciary and particularly the State judiciary, as well as the litigants who come before them. It is a situation which ought not to be allowed to continue, and in the interest of the due administration of the law should promptly be brought to an end".[50]

The purists may say that the Commonwealth Parliament has brought this problem upon its own head. Had it not proceeded to legislate to limit appeals, a single hierarchy would remain and the High Court (certain constitutional cases apart) would be clearly ranked as a subordinate to the Judicial Committee. But such an argument ignores the need for lawmakers, including judges, to perform their functions sensitive to the special needs and circumstances of their own country, a requirement recognised by the Privy Council itself on occasions.[51] Furthermore, it fails to give due weight to the emergence of Australia as a separate, sovereign nation with qualities of its own which the process of federation was specifically designed to encourage and facilitate. Furthermore, it overlooks

the purpose which was behind the Deakinite compromise, permitting the Parliament to limit further the appeals to London. Anyone who has doubts about the national Australian intentions of the 1900 delegation to London need only read Deakin's account of the tiresome negotiations by which he sought to diminish the future role of the Privy Council. When at last the compromise was struck, limiting constitutional appeals and permitting further legislative restriction on appeal we are told that the following unseemly events occurred :

> "When they left Chamberlain's room they were shown into another room where they could discuss the matter with one another. The form their discussion took was unusual. When the door closed upon them and they found themselves alone, they seized each other's hands and danced, in a ring, around the room. This corybantic behaviour on the part of three middle-aged and solidly-built statesman should furnish an Australian painter with a fine subject for a historical picture".[52]

Therefore, the debate of the past year is not a "flash in the pan". It is not a "latter-day" effort by Commonwealth officers to expand their horizons of influence at the cost of the States. It is a natural development from an opportunity which Deakin, Barton and Kingston preserved for us against Imperial and, let it be said, some Australian opposition which did not foresee, as clearly as they did, the gradual but inevitable development of this country's own national identity.

Within a few days another Constitutional Convention will convene in Perth. It will address itself, amongst other things, to the Judicial Chapter of the Constitution. The referendum of May 1977 shows that the Constitution is not as immutable as it was thought to be. A committee was appointed at the Melbourne Constitutional Convention in 1975 and renewed at the Hobart Convention in 1976 to examine a number of questions relevant to Chapter III. One provision that has come under consideration is section 74. The recent report of the Judicature Committee, after acknowledging that appeals in the Commonwealth's sphere no longer need attention, goes on :

> "There remains the matter of appeals to the Privy Council from the Supreme Courts of the States. So far as matters of federal jurisdiction are concerned, the Commonwealth Parliament has abolished these appeals. The remaining matter of appeals from the Supreme Courts in State matters is a controversial one. The committee considers that it should be a matter for determination by the Parliament of each State".[53]

Three possibilities of abolition are recounted. The first is abolition by the Commonwealth Parliament, although this is said to be "a matter of debate". The second is abolition by the United Kingdom Parliament or Government. But this may not be consistent with modern notions of Australian independence and would in any case probably not be attempted or accepted, unless there was complete unanimity of all States, a possibility not immediately in prospect. The third vehicle is the use of section 51(xxxviii) of the Constitution which permits the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which could at the establishment of the Constitution be exercised only by the Paliament of the United Kingdom. A proposal for the use of this facility was made by Mr. Ellicott in July 1977. The judicature committee has recommended to the Australian Constitutional Convention in Perth that each State Parliament should be able to secure the abolition of appeals to the Privy Council from State Courts if it so wishes. The Convention is urged to consider "the most appropriate means by which this could be secured".[54]

There are, of course, much more important issues than this facing the law and the courts. But this is a symbolic question and important for students of Deakin whose biographer has suggested that :

> "If Deakin ... had lived to extreme old age, in full possession of his memory, he must necessarily have been deeply disappointed by some features of the history of the important and significant "two powers" which the delegates, as he proudly wrote had secured

More recent events suggest that Deakin's nationalist legacy for the design of a wholly Australian judicature is now working its way to its inevitable and proper conclusion.[56]

AN AGE OF VIOLENCE

Deakin never perceived his Australian nationalism as conflicting with loyalty to the Crown,[57] or an attachment to Britain and British liberal values protected by law. On the contrary, particularly in his later years, Deakin was an advocate for greater and not less consultation, communication and trade within the Empire. In Deakin's time, this was a legitimate and probably the only permissible form of internationalism.

He plainly sought to establish a Constitution that would strike the correct balance between individual liberty and effective government:

> "What we should aspire to see is a strong government upon the broadest popular basis, and with the amplest national power. We should seek to erect a constitutional edifice which shall be a guarantee of liberty and union for all time to come, to the whole people of this continent and the adjacent islands, to which they shall learn to look up with reverence and regard".[58]

Despite the efforts of some participants, the Constitutional Conventions did not approve the inclusion in the Australian Constitution of a catalogue of rights, after the American model.[5

Deakin often described himself as an "ultra-Radical". In office, he had to face the dilemma which arises, except at the most tranquil of times, when the demand is made that individual liberties must be diminished for the"general good". In August 1890 one of the most protracted and disastrous industrial conflicts that has ever occurred in Australia crippleс the shipping industry in several States. Melbourne in particula: was filled with large crowds of unemployed workers and their supporters. The employers refused to negotiate. Employees of

the gas works joined the strikers. It was generally expected that public lighting would shortly fail. A serious increase of burglary and violence was feared. A mass meeting was called. On the advice of Deakin, as the responsible Minister, duty detachments of the mounted military forces were called out and quartered in Melbourne.

As is well known, this, the first of the "great strikes" of the early 1890s ended later in the year in the utter defeat of the unions. Deakin's action in summoning the militia is often cited as an indication of a lack of liberal resolve. As it happened, the great meetings called went off without incident. But the crowds were aware that armed militia were within a few minutes' gallop. The summons and Deakin's part in it were bitterly resented. At the time, Deakin defended his action thus :

> "What was plain in connexion with the present perfectly legitimate but most unhappy and most unfortunate industrial struggle ... was that large gatherings of people, great public excitement, and possible darkness in the city streets would afford the criminal classes exceptional opportunities for carrying on their war against society ... The State would not interfere one jot or one tittle with the present conflict at this stage, but at all stages it would feel bound to preserve order".[60]

Later in August 1897 when the Commonwealth Bill was being discussed in the Victorian Assembly, Deakin replied to criticism of his actions in the 1890 crisis. He accepted full responsibility. As Chief Secretary he was head of the police. He was the Minister to whom the task of maintaining the law had been entrusted. "The first duty of a government", he said, "is to preserve order", and to "stop at nothing to protect the community".[61] Must we "*stop at nothing*" to protect the community? This rhetorical phrase, uttered by Australia's most eloquent orator, poses the essential dilemma which faces the law and lawmakers in our form of society, in meeting the challenge of crime, violence and terrorism.

Because of the advances of science and technology, society is more vulnerable today than ever before. Not only are the weapons presently available more devastating and widespread in their effect. The organs of public information ensure the greatest possible coverage : the more cruel and apparently barbarous the action taken or threatened, the greater is the certainty that it will attract nationwide and even worldwide attention. Added to this is the vulnerability of individual officials in any system of Parliamentary and open government and the vulnerability of large numbers of innocent bystanders, trapped in the snares of terrorism, whether in a large plane in Somalia or a domestic train in the Netherlands. The society and the technology that throws us together, exposes us to greater risks.

The development and worldwide marketing of explosives and armaments put into the hands of terrorists intimidatory power which expands their effectiveness, even in a wholly unsympathetic and antipathetic society, which rejects violence. During 1977, one hundred and twelve people were killed and two hundred and ninety eight were injured in the United States as a result of bombings. There were 1,339 criminal bombings and 3,052 explosive incidents, including actual criminal bombings, accidental explosions, attempted bombings, threats and hoax devices. The National Advisory Committee on Criminal Justice Standards and Gaols in the United States concluded last year that the threat of attack in America by terrorists armed with nuclear, biological or chemical weapons was "very real and ought to be realistically and urgently faced".[63] It warned that biological or chemical terrorism was an even greater threat. The dimension of the threat is increasing because of the nature and extent of the potential armoury of terrorists, the development of mass communications which greatly increases their effectiveness, the passion and sincerity with which many of the forces involved are fanatically motivated and, most threateningly, the recent evidence that existing terrorist groups have already formed a loose network for international co-operation and mutual support.

Terrorism has produced international and national reaction. Personal body and baggage checks are conducted at

airports and accepted as an infringement of privacy that must be endured to ensure a greater value : life itself. In the United Nations, the General Assembly last November adopted a resolution condemning air piracy and calling on governments to take steps to tighten security and to agree to prosecute or extradite hijackers.[64] However, this resolution and the condemnations of the Secretary-General have no force as part of international law. Nations cannot agree on a definition of "terrorism". One man's "terrorist" is another's "freedom fighter". No country is immune from terrorism, for terrorists have struck in the Soviet block and even against Arab oil producers. It is the openness and liberal values of Western societies that makes them especially susceptible to the blight of terrorism.

Uruguay is a case in point. At the beginning of this decade it was one of the few liberal and democratic countries of South America. It then fell victim to a small band of determined terrorists known as the Tupamaros. The methods of the Tupamaros were familiar : bank robbery, the kidnapping of eminent officials and important foreigners, the murder of politicians and opposing intellectuals. The response, out of desperation, was typical. It began with claims for increased police power. Arbitrary arrests, telephone tapping, imprisonment without trial and trials in camera followed. The whole apparatus of liberalism was dismantled. The Tupamaros were, substantially defeated. The price was the transformation of a relatively liberal society into the very kind of society which the Tupamaros alleged justified their methodology of terror.

Lest it be thought that there are no lessons for us in the South American example, it is instructive to consider the impact of terrorism upon the administration of criminal justice in Northern Ireland. In December 1972 a Commission under Lord Diplock was required to advise on the arrangements necessary to deal more effectively with terrorist organisations in that Province. After recounting the obligations imposed upon the United Kingdom by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Commission stated

certain basic requirements :

> "The minimum requirements are based upon the assumption that witnesses to a crime will be able to give evidence in a court of law without risk to their lives, their families or their property. Unless the State can ensure their safety, then it would be unreasonable to expect them to testify voluntarily and morally wrong to try to compel them to do so. This assumption, basic to the very functioning of courts of law, cannot be made today in Northern Ireland as respects most of those who would be able, if they dared, to give evidence in court on the trial of offences committed by members of terrorist organisations".[65]

Having found that the main obstacle to dealing effectively with terrorist crime in the regular courts of justice was intimidation of witnesses for the prosecution and that such intimidation was "widespread and well founded" the Commission concluded that extra-judicial process was necessary for the detention of terrorists, subject to safeguards against unjust decisions. Modifications of ordinary rules for police interrogation and the conduct of the Army were also justified.

As a response to indiscriminate bombings in London, responsibility for which was claimed by the Provisional Wing of the Irish Republican Army, an Act was passed by the Parliament titled *The Prevention of Terrorism (Temporary Provisions) Act* 1974. It was passed swiftly and permitted the proscription of named organisations. Section 1 rendered it an offence for a person to belong or profess to belong to a prescribed organisation or to address any public or private meeting of three or more persons knowing that the meeting was to support or further the activities of such an organisation.[66]

These provisions were criticised as unnecessary and too wide :

> "[It has a] potential for catching any well-meaning, simple soul, who thinks it appropriate to debate publicly with a known terrorist. This

is pure guilt by association. It is unfortunate that it appears on the Statute Book".[67]

The Act also permits exclusion and deportation orders to be made where the Home Secretary is satisfied that a person is concerned in the commission, preparation or instigation of acts of terrorism. Part III extends police powers for arrest, search and interrogation. However, certain rights are spelt out for persons under suspicion. Police powers have not been extended without limit. Random searches of houses and other premises are not provided for. The personal warrant of the Home Secretary is required for detention. Even this does not satisfy the commentators:

> "No one wishes to descend into a police state. But it is right to ask whether, conceding the emergency, and conceding the desirability of exceptional powers, more could not have been done to safeguard persons who might come into an unhappy contact with the statute. We are in danger of accepting wide powers virtually without comment; without really inquiring into whether in their precise form they are either necessary or desirable. Governments adopt an uncomfortably holistic attitude to these matters. Parliament, pressed to act in haste, and unwilling to embarrass governments, too often fails to safeguard the subject. Let us by all means take effective steps against terrorism; let us not abandon civil liberties altogether."[68]

We in Australia have not been entirely free of terrorism. Even in recent years, our political leaders have been shot at, airliners have been commandeered, and in February 1978 three innocent persons died as a result of an explosion that occurred outside a meeting of Heads of Government of the Commonwealth of Nations. When it became clear that the incident was an isolated one and that the safety of foreign Heads of State and Government was not at risk, the response of the Australian Government was a measured one. An inquiry into police organisation was commissioned by Sir Robert Mark.[69] An inquiry

to review protective security in Australia was established under Mr. Justice Hope. Security arrangements were tightened around that hitherto most open of institutions, the national Parliament. A number of police are to be sent to study anti-terrorist activities abroad. There was no rush to legislation, On the contrary, the Prime Minister, even at that time, reminded us of the need to protect the country from terrorism whilst at the same time protecting individual liberties :

> "The measures which have been announced today strike the balance between the need to respond decisively to the threat of terrorism and the imperative of preserving Australia's character as an open society and the democratic freedoms which we all hold paramount".[70]

TAKING RIGHTS SERIOUSLY OR
CAN DEMOCRACY COPE?

There is no doubt that the terrorism upon us is both anti-democratic and inimical to civil liberties :

> "[T]errorists' ultimatums are addressed to leadership elites rather than to the people. Because terrorism demands instantaneous decision making, it places great strain on conventional legal mechanisms, which require due process and a strong evidentiary base to take action. Thus the appeal for swift action shifts power in the attacked society to its elites.
>
> ... [T]error violates the civil liberties of those who are non-participants or non-combatants. Terrorists usually have as their foils people who are innocent of any crime. Whatever else civil liberties involves, it rejects holding people who have committed no specific criminal acts responsible for the alleged acts of others."[71]

But in determing how our form of society should respond to terrorism, it is important to keep steadily in mind the fact that the high price of terrorism includes not only the destructic of human life or costly damage to property but also the weakening

of the social and political organisation of society.[72] An American writer puts the conclusion thus :

> "Those who want law and order, of whom there are many, as well as those who want lawlessness and disorder, of whom there are a few, must weigh heavily the premium price to be paid in a punitive state in which a rage for order displaces a rationality of innovation. That price would be nothing short of a total militarisation of the nation. [A] society largely free from terrorism is quite possible to achieve. Fascist systems manage to reduce terrorism by a series of devices : mass organisations in which membership is compulsory; block-by-block spying networks; mandatory police identification certificates; and clear delineation of "friends" and "enemies" of the regime. With the increased sophistication of computerisation techniques such mechanisms for social and personal control loom even larger. The question remains not one of technique but of social policy : does a citizenry wish to pay such a price for tranquility?"[73]

It does seem clear that risks, lack of order, some degree of inefficiency, the acquittal of guilty men and even the escape of terrorists is a price that has to be paid for the general enjoyment of a liberal democratic system. It is entirely appropriate, indeed necessary, that whilst responding to the immediate threats of terrorism and violence, we should be wary of installing procedures and structures designed to anticipate *every* form of terrorism. Democratic systems can slide into totalitarian ones. The result is not made more palatable by the explanation that the process occurred in the name of combatting terror, violence or crime. Unfortunately the hard question, so rarely stated, must be faced. It cannot be avoided. It is this : How much lawlessness and even terror are we prepared as a society to tolerate, rather than convert to the authoritarian alternative that is required to stamp out *all* crime, *all* disorder and *all* terror?

What is unusual about our form of society, is its respect for and tolerance of the individual, even in hard times and when holds an unpopular or minority opinion. Lord Hailsham in the first Robert Menzies Oration put it thus :

> "Law is important precisely when and so far as it restrains the strong, and above all it is important when it restrains the ruler and the powerful group, whether the ruler is one man, a class of men, or an anonymous majority of common men, and particularly when it is a representative government of politicians ... Liberty under the law is the banner of the West. Failure to remember and pursue its precepts is the thing in principle which permits anarchy and brings tyranny in its wake. The task before the Liberal Democrat is always the same. It is to prevent tyranny by promoting laws which foster and institutionalise freedom and protect the rights of individuals and groups, and in particular which foster freedom and protect those rights by subordinating governments and powerful organisations and individuals to the precepts and restraints of law".[74]

Professor Ronald Dworkin in his important book *Taking Rights Seriously* puts the dilemma of our form of society in the words of Learned Hand :

> "We must ... discount the gravity of the evil threatened by the likelihood of reaching that evil".[75]

Dworkin addresses himself to the question which troubles many concerned citizens, including in Australian society. Why, in a time of terrorism and criminality, is there so much talk about individual rights? Why establish a Law Reform Commission? Why set up a Human Rights Commission? Why enact a *Criminal Investigation Bill*? Why provide for the independent handling of complaints against police? Why establish new rights for the individual?

> "...[W]hat of the individual rights of those who will be destroyed by a riot, of the passer-by who will be killed by a sniper's bullet or the

shop-keeper who will be ruined by looting?
To put the issue in this way, as a question
of competing rights, suggests a principle
that would undercut the effect of uncertainty.
Shall we say that some rights to protection
are so important that the Government is
justified in doing all it can to maintain
them? Shall we therefore say that the Government
may abridge the rights of others to act when
their acts might simply increase the risk, by
however slight or speculative a margin, that
some person's right to life or property will be
violated. ... [W]hat [must] a government ... do
that professes to recognise individual rights [?]
It must dispense with the claim that citizens
never have a right to break its law, and it must
not define citizens' rights so that these are
cut off for supposed reasons of the general good.
Any Government's harsh treatment of civil
disobedience, or campaign against vocal protest,
may therefore be thought to count against its
sincerity ... In a policy statement on the issue
of "weirdos" and social misfits, [former Vice
President Agnew] said that the liberals' concern
for individual rights was a head wind blowing in
the face of the ship of state. That is a
poor metaphor, but the philosophical point it
expresses is very well taken. He recognised, as
many liberals do not, that the majority cannot
travel as fast or as far as it would like if it
recognises the rights of individuals to do what,
in the majority's terms, is the wrong thing to
do. Spiro Agnew supposed that rights are divisive,
and that national unity and a new respect for law
may be developed by taking them more sceptically.
But he is wrong. ... The institution of rights is ...
crucial, because it represents the majority's
promise to the minorities that their dignity and
equality will be respected. When the divisions
among the groups are most violent, then this gesture,
if law is to work, must be most sincere".[76]

LAW REFORM AND LIBERAL VALUES

In Australia, a new instrument has been established to assist Parliament in the reform, modernisation and simplification of the law. When the *Law Reform Commission Bill* 1973 was passing through the Parliament, it was the late Senator Ivor Greenwood who proposed its amendment to impose upon the Commission a novel duty but one entirely in keeping with liberal values. It became section 7 of the Act and requires the Commissioners in proposing new laws to ensure, so far as practicable, that their proposals are consistent with the Articles of the International Covenant on Civil and Political Rights and do not trespass unduly on personal rights and liberties.

The Commission has delivered a number of reports dealing with the rights of individuals. Most recently it produced a report on a fair method of handling complaints against Commonwealth Police officers.[77] It is engaged on a programme of important tasks given to it by the Government, all of which involve consideration of the rights and duties of individuals in society today : the legal protection of privacy, new laws for debt recovery, a uniform defamation law, modern rules for compensation in the event of compulsory acquisition of property by the Commonwealth, the provision of new rules to ensure access to the courts, fairer insurance contracts and the dilemma of whether our legal system should recognise any part of the customary laws of Aboriginal Australians.

One major measure of reform which has been accepted by the Government involves the collection in an Australian statute of the legal rights and duties of citizens when under investigation by the Commonwealth's police. The Prime Minister described the resulting Bill, the *Criminal Investigation Bill*, as one "of great importance in relation to human rights".[78]

> "This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform, but not much legislative action . With this Bill, as with the Human Rights Commission Bill, the government is

> proceeding in a way that will ensure adequate opportunity for the views of all interested persons to be presented and duly considered".[79]

I am aware of the fact that some criticisms of the Bill have been voiced, especially in police circles and like criticism was recently expressed in this State by a committee appointed to review the Beach Report. On the other hand, a series of reports, Commonwealth and State, have reflected favourably on its principal recommendations.[80] That there is a need to collect in a single Australian statute these critical civil rights and duties available to all, can scarcely be doubted. That the rules should be rescued from English casebooks and from police instructions, not generally available to the public, seems clearly beyond dispute. That a balance must be struck between the needs of effective law enforcement at a tolerable level and the rights of individuals is equally plain. The *Criminal Investigation Bill* is a case of taking loose talk about human rights seriously. It lapsed with the last Parliament. It has not been reintroduced. It is, I believe, a test for our sincerity about liberal values in the legal system. It converts our professed concern for the individual into action. It distils generalities about protecting minorities, even unpopular minorities into specific legal requirements. It commits the balance to be struck to the judiciary, whose long traditions make it unlikely that they will ignore either the community's needs for effective law enforcement or the individual's right to respect for his liberties.

There are many who see the enactment of laws such as the *Criminal Investigation Bill* and the *Human Rights Commission Bill* and the other laws which assert and defend the position of individuals against authority as a folly which weakens the ability of the organised community to combat crime, violence and terror. Such people, doubtless with entire sincerity, see dissent as dangerous and the protection of individual human rights as an impediment to community peace and social tranquility But the Prime Minister, talking of terrorism, in the wake of the murder of the former Italian Prime Minister, Mr. Moro, said that whilst there can be no compromise with terrorism :

> "There is no more potent deterrent to terrorist activities than the wholehearted and concerted effort by individual citizens to help the Government - any government - in its irrevocable opposition to terrorists and all their evil works".[81]

I am sure that this is right; that it is vital to preserve the open and tolerant society which we have inherited, fortified by the law and upheld by the constitutional machinery in which all can take a part. The effective and acceptable way to diminish violence, and the way which (with few exceptions) it has been traditional amongst English-speaking people to do it, has not been by a resort to authoritarianism. It has been by guarding individual rights, and by encouraging participation in and association with society and by securing the acceptance of the vi that if things are not satisfactory, they can and will be changed by the processes of orderly reform.

Alfred Deakin's exposure to the risks of violence in the great strikes of the 1890s, and the dangers of the military response which he initiated, was typical. It has a lesson for us. When he had the opportunity, in office, he established the Arbitration Court. With its limitations and shortcomings, it survives to this day. It is the reformer's answer[82] reducing social tension to orderly and routine resolution in a low key way.

Deakin's life and achievements and his reforming zeal still have lessons for us all. Even in an age of violence, it is vital that our legal system should not lose sight of its tolerant and liberal traditions. We must resist violence, crime and terrorism. But we must equally resist the temptation to over-react. Otherwise enthusiasts will persuade us that it is necessary to have an unrestricted power to tap telephones or that it is vital to forbid the traditional rights of peaceful protest and dissent or that we need not trouble ourselves too much about occasional infringements by the State of the rights of a minority or of a person who is "probably guilty anyway". When this happens, we are on the slippery path. Preserving our form o society has a price tag. But considering the alternative, I feel sure that most of us would be prepared to pay the price.

FOOTNOTES

1. W. Murdoch, *Alfred Deakin - A Sketch*, (Lon, 1923), 16.
2. *Ibid*, 50.
3. *Ibid*, 311.
4. Murdoch, *op cit.* n.1, 124.
5. *Ibid*, 87.
6. *Ibid*, 190.
7. This brief account draws on J.A. La Nauze, Introduction, J.A. La Nauze, ed. *Federated Australia*, (selections from letters to the *Morning Post*, 1900-1910 by Alfred Deakin), v - vii (1968, Melb.)
8. *Ibid*, vii.
9. J.A. La Nauze, *Alfred Deakin : A Biography*, (Melb., 1965), Vol.1., 202.
10. *Ibid*, 203.
11. Murdoch, *op.cit.*, n.1., 43.
12. Murdoch, *op.cit.*, n.1., 141; La Nauze, *op.cit.*, n.9., 142.
13. Murdoch, *ibid.*, 76.
14. Quoted, Murdoch, *ibid*, 176.
15. A.F. Mason "Law Reform in Australia" (1971) 4 *Federal Law Review* 197.
16. A. Deakin *Federated Australia*, *op.cit.*, n.7., 93.
17. Murdoch, *op.cit.*, n.1., 241.
18. Deakin, *op.cit.*, n.7., 159-165.
19. Murdoch, *op.cit.*, n.1., 288.
20. Murdoch, *ibid*, 311.
21. Sir William Irvine to Mrs. Deakin, 10 October 1919, Deakin Papers, National Library, Item 2565, quoted by J.M. Bennett,"Notes on the Life of Sir William Irvine"(1977) 48 *The Victorian Historical Journal* 295, 301.
22. J.A. La Nauze, *The Making of the Australian Constitution*, (Melb., 1972),25.
23. *Ibid*, 40.
24. Deakin to C.H. Pearson, quoted in La Nauze, *op.cit.*, n.22, 56.
25. Official Record of the Debates of the Australasian Federal Convention, Melb. 1898, Vol. 2., 2330.
26. The text of the successive versions of clause 74 is appendix 6 to La Nauze, *op.cit.*, n.22., 303.
27. *id.*
28. La Nauze, *op.cit.*, n.22, 249; A. Deakin, *The Federal Story*, (Melb, 1944), 15
29. La Nauze, *op.cit.*, n.22, 249.
30. See for example La Nauze, *op.cit.*, n.22, 248ff; Deakin, *op.cit.*, n.28, 150-6
31. Deakin, *op.cit.*, n.28, 157.
32. *Cf.* Murphy J. in *Viro v. The Queen* (1978) 18 *A.L.R.* 257, 314 (hereafter referred to as *Viro*)
33. (1903), 13 *C.P.D.*, (H. of Reps), 803.

34. *Ibid*, Vol. 13, 815.

35. *Ibid.*

36. (1903) *N.Z.P.C.C.* 23.

37. See Murphy J. in *Viro* at 315; *Commonwealth Parliamentary Debates*, Vol.13,

38. Gibbs J. in *Viro*, at 282.
A certificate was given once only in *The Colonial Sugar Refining Co. Limited v. The Attorney-General for the Commonwealth* (1912) 15 *C.L.R.* 182
See also *The State of Western Australia v. Hammersley Iron Pty. Limited* (1969) 120 *C.L.R.* 74.

39. *Cf. Kitano v. The Commonwealth* (1975) 132 *C.L.R.* 231 and Aickin J. in *Viro* at 325.

40. Jacobs J. in *Viro*, at 306.

41. (1978) 18 *A.L.R.*, 257.

42. *Palmer v. The Queen* [1971] *A.C.* 814.

43. *The Queen v. Howe* (1958-59) 100 *C.L.R.* 448.

44. *Viro*, Barwick C.J. at 261, Jacobs J. at 306 and Murphy J. at 317-319.

45. Aickin J. in *Viro* at 326f.

46. E. St.John "The High Court and the Privy Council; the New Epoch" (1976) 50 *A. L.J.* 389; L.V. Prott, "Refusing to Follow Precedents : Rebellious Lower Courts and the Fading Comity Doctrine" (1977) 51 *A.L.J.* 288.

47. *Jacob v. Utah Construction & Engineering Pty. Limited* (1966) 116 *C.L.R.* 200, 207, 217.

48. G.E. Barwick, "The State of the Australian Judicature" (1977) 51 *A.L.J.* 480, 483-4.

49. *Ibid*, 486.

50. *Ibid*, 487. To the same effect, R.J. Ellicott, "Comment on a Paper by the Chief Justice" (1977) 2 *Commonwealth Record* 885.

51. *Geelong Harbor Trust Commissioners v. Gibbs, Bright & Co.* [1974] *A.C.* 810, 819.

52. Murdoch, *op.cit.*, n.1., 203.

53. Australian Constitutional Convention, 1977, Judicature Committee, *Report to Standing Committee D.* 26 September 1977, 10.

54. *Ibid*, 11.

55. La Nauze, *op.cit.*, n.22, 268-9.

56. For another example of Deakin's prescience and relevance to modern constitutional problems see his observations about conflicts between the Senate and the House of Representatives, Murdoch, *op.cit.*, n.1., 165.

57. Deakin, *op.cit.*, n.7., 33ff.

58. Deakin, quoted, Murdoch, *op.cit.*, n.1., 166.

59. La Nauze, *op.cit.*, n.22, 227-32.

60. *Victorian Parliamentary Debates*, Vol. LXIV, 1359, quoted in La Nauze, *op* n.9, 129.

61. Deakin, quoted in Murdoch, *op.cit.*, *n.1.*, *132*.

62. Reported in *The Advertiser*, 21 February 1978.

63. As reported in *The Age*, 21 October 1977.

+. As reported in the *Sydney Morning Herald*, 5 November 1977.

65. Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (Lord Diplock, Chairman), Cmnd. 5185 (1972), paras. 15-16.

66. L.H. Leigh "Comment" [1975] *Public Law* 1.

67. *Ibid*, 2.

68. *Ibid*, 7.

69. R. Mark, *Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Other Related Matters*, A.G.P.S., 1978.

70. J.M. Fraser, *Commonwealth Parliamentary Debates*, (House of Representative 23 February 1978, 155.

71. I.L. Horowitz (Professor of Sociology and Political Science, Rutgers University, U.S.A.), "Can Democracy Cope with Terrorism?" (1977) 4 *Civil Liberties Review*, 29, 30.

72. *id.*

73. *Ibid*, 31-32.

74. Lord Hailsham, *The Inaugural Sir Robert Menzies Oration*, 12 May 1978, *mimeo*, 21-22. *Cf.* Lord Hailsham, "*The Dilemma of Democracy*",

75. R. Dworkin, *Taking Rights Seriously*, V, (Cambridge, Mass., 1977)

76. *Ibid*, 203-5.

77. The Law Reform Commission, *Complaints Against Police : Supplementary Report*, (A.L.R.C.9), 1978.

78. J.M. Fraser, "Speech to the Australian Legal Convention", (1977) 2 *Commonwealth Record* 863, 864.

79. *Id.*

80. Victoria, Board of Inquiry into Allegations Against Members of the Victoria Police Force, *Addenda to Report*, 1976 (Mr. B. Beach Q.C.); Queensland, Report of the Committee of Inquiry, *Enforcement of the Criminal Law in Queensland*, April 1977 (The Hon. Mr. Justice Lucas, Chairman). Review of Post Arrival Programs and Services to Migrants, *Migrant Services and Programs*, 1978, 80-81.

81. (1978) 3 *Commonwealth Record* 518.

82. La Nauze, *op.cit.*, n.9, 296-301. See also Vol. II., 365, 372-7.