Contemplating Justice
The Law as a Tool of Justice and Human Rights

An Address to the Annual General Meeting of ReprieveAustralia

12 October 2005
Owen Dixon Chambers
Melbourne

by

The Hon Alastair Nicholson AO RFD QC
Honorary Professorial Fellow,
Department of Criminology, The University of Melbourne
Former Chief Justice of the Family Court of Australia

"We're now seeing the war on terrorism letting another ugly genie out of the bottle into the Australian political arena. That capital punishment is resonating with the Australian public as one way to deal with terrorism is a further small but significant and depressing victory for the terrorists, who are not only taking Western lives but undermining important Western values.

Newspoll reported yesterday that 56 per cent favoured introducing the death penalty in Australia for terrorists"

*(*Michelle Grattan, *The Age,* 20 August 2003*)*

In commencing this address I would like to express my thanks to my dear friend and colleague, Danny Sandor for his great assistance in preparing it and in particular, for his helpful criticisms and suggestions. I would also like to express my thanks to my dear wife Lauris for her critical appraisal, particularly having regard to her doubts about the validity of some of my propositions.

I am deeply honoured to be requested to present this address tonight, although I regret that the subject matter is one that gives rise to considerable pessimism. I thought it appropriate to open an address to this body with such a quotation, particularly when it appeared in the context of an article that also reported that the Prime Minister thought that it might be time to re-open the debate on capital punishment.

The Prime Minister's comment came only one year after his Foreign Minister had trumpeted the following seemingly unequivocal stance of the Federal Government in a media release concerning the upholding of a sentence of death by stoning imposed by a Sharia Court of Appeal in Nigeria:

> ***"The Australian Government is universally and consistently opposed to the use of capital punishment in any circumstances. The death penalty is an inhumane form of punishment which violates the most fundamental human right: the right to life. If this sentence were to be carried out, it would be received with outrage in Australia and in the wider international community"*** [1]

Following bomb attacks in Indonesia which claimed Australian lives, Mr Downer's position is now no longer as unqualified in respect of non-Australians in foreign jurisdictions. [2] So far as the Prime Minister is concerned, he is on record as supporting the death penalty being imposed on Saddam Hussein if convicted, and having "no intention" of making representations to the Indonesian Government that it not carry out the death sentence imposed on Amrozi bin Nurhasyim in respect of the 12 October 2002 Kuta bombing. [3]

Fortunately the Prime Minister has not taken the issue of domestic capital punishment further to date, but given recent events it would be

no surprise at all if he were to do so. Indeed the current neo-conservative climate in this country is such that we must all show special vigilance lest we are once again subjected to state-sponsored killing in this country as well as seeing them carried out elsewhere as we already do.

Tonight I propose to concentrate on reactions to terrorism and the existing and proposed ASIO legislation, and Federal and State Territory legislation extending police powers. However my concern is that the process will not stop here and that our liberties and our democracy are under a more serious threat than that posed by terrorists as a direct result of the reaction of our leaders, the media and in turn the public, to that threat.

A little over two months ago I gave a presentation in Hobart in which I strongly attacked the proposal by the Attorney General to extend the three year sunset clause in respect of the existing ASIO legislation. The bulk of that address was written prior to the London bombings but it was delivered after they occurred. I expressed the view that the bombings did not constitute a reason for extending the operation of the legislation; rather, that event strengthened my view that Australia needs a Bill of Rights, one with effective remedies that individuals have a real-life ability to invoke. I will be referring to that address further during the course of this one as it constitutes a more detailed study than is possible in the time available to me tonight.[4]

When first asked to speak this evening I expressed a concern that by the time that I did so, the situation in this country would have become worse. I must confess that I did not contemplate how much worse. We have since experienced a complete failure of political leadership on both sides of politics, that has led to a lemming-like rush by the two major political parties to outdo each other in proposing more and more extreme legislation directed at combating a threat of terrorism in this country.

We have also experienced a further tragic bombing incident in Indonesia which has cost Australian lives and which has already been relied upon as providing further evidence of the need for the sort of draconian legislation that is contemplated.

It should be remembered that we already have security legislation which many people, me included, regard as objectionable. However the attacks in London or Bali will be more than sufficient to justify the desire of governments to introduce additional powers in the name of security. And again in the name of security, in circumstances which are reminiscent of the works of Joseph Heller and George Orwell, the public is prevented from knowing the evidentiary basis which justifies such powers. This is the case with new legislation and also, as U.S. activist Scott Parkin discovered, where the powers are applied to an individual.[5]

Following 9/11 and in response to it, the *Australian Security Intelligence Act* 1979 (Cth) was amended to confer unprecedented specific powers upon ASIO. Sections 34A to 34X authorised that organisation to question not only persons suspected of having committed or planning to commit crimes but also to question others whom the investigators believe may have information. The Act is far too convoluted to reproduce relevant sections here. It was the subject of considerable debate in Parliament and although the end result is draconian, it was considerably watered down from its original form, which would have permitted the detention and interrogation of children, amongst other things.

Professor George Williams has described the original form of amendments in the following graphic terms:

> ***"In its original form, the Bill allowed adults and even children who were not terrorist suspects, but who may have useful information about terrorism, to be strip searched and detained by ASIO for rolling two day periods that could be extended indefinitely. The detainees could have been denied the opportunity to inform family members, their employer, or even a lawyer of their detention. There was no right to silence and a failure to answer any question put by ASIO would have been punishable by five years in prison. The regime applied to all Australians, including to journalists who could not have protected the confidentiality of their sources. While the Bill stated that detainees 'must be treated with humanity and with respect for human dignity', there was no penalty for***

ASIO officers who subjected detainees to cruel, inhuman or degrading treatment. In fact, s 92 of the Australian Security Intelligence Organisation Act 1979 still provides that it is an offence (punishable by imprisonment for up to one year) to publish the identity of an ASIO officer." [6]

He went on to say:

"I described the original ASIO Bill as being 'rotten to the core' and as one of the worst Bills ever introduced into the federal parliament. It would have conferred unprecedented new powers upon a secret intelligence organisation that could have been used in ten, twenty or even fifty years' time against the Australian people by an unscrupulous government. In its original form, the Bill would not have been out of place in former dictatorships such as General Pinochet's Chile. The Parliamentary Joint Committee on ASIO, Australian Secret Intelligence Service and Defence Signals Directorate unanimously found that the ASIO Bill "would undermine key legal rights and erode the civil liberties that make Australia a leading democracy."

It is worth noting that had the Howard Government then had control of the Senate, this is the Bill that would have been passed into law. The Bill as passed still has a number of objectionable features, particularly following subsequent amendments. In the same speech, Williams had this to say about it:

"The original Bill is different in important respects from the final Act. As amended, the detention regime in the Australian Security Intelligence Organisation Act 1979 only applies to people aged 16 years and over. Detainees have access to a lawyer of their choice, although ASIO may request that access be denied to a particular lawyer where the lawyer poses a security risk. Australians may be questioned by ASIO for 24 hours over a one week period. They must then be released, but can be questioned again if a new warrant can be justified by fresh information. A person can only be held and questioned under the Act when ordered by a judge, and the questioning itself will be

before a retired judge. The questioning must be videotaped and the whole process will be subject to the ongoing scrutiny of the Inspector-General of Intelligence and Security (who is effectively the Ombudsman for ASIO).

These additional protections in the hands of independent people blunt some of the worst excesses of the original Bill. However, even in this form, the Act can be justified only as a temporary response to the threat to national security posed by terrorism. This is reflected in the sunset clause added to the law, which means that it will lapse after three years (that is, in 2006) unless it is re-enacted.

The passage of the Terrorism and ASIO Bills has not seen the end of new Australian anti-terrorism laws. Indeed, there has been a steady steam of new proposals and laws. In 2003, the ASIO Legislation Amendment Act was passed to increase the time allowed for the questioning of non-suspects by ASIO from 24 to 48 hours when an interpreter is involved. Another change brought about by that Act made it an offence, for two years after someone has been detained, to disclose "operational information" about detention under the Act. The penalty for doing so, even if the information is provided as part of a media story on the detention regime, is imprisonment for up to five years. The impact of this provision upon freedom of the press is of great concern. It means that two years must pass before abuses involving the operational activities of ASIO under the regime can be exposed through media reporting."[7]

The importance of the sunset clause in this legislation cannot be over-estimated.[8] This is, after all, legislation that permits interrogation coupled with detention without trial, albeit for a limited period.

Absent the death penalty and the official approval of torture, loss of individual liberty is the most extreme sanction that can be inflicted by the state on our autonomy and integrity. Historically, our legal systems and institutions reflected this fact and the concept of the "liberty of the subject" is one of the cherished doctrines of the

common law. Indeed, the capricious use of detention often lay at the heart of popular portrayals of totalitarian regimes in contradistinction to ours. Now, in a society where democratic virtues are hailed as the foundation of our personal freedoms, we seem to have come to accept the legitimacy of the extended use of incarceration, one which could have perilous, ever-increasing application.

A former Prime Minister, the Rt Hon Malcolm Fraser said recently:

> ***"The hardest thing for those who believe in human rights to accept is that we should argue for the human rights of those whose views we abhor and despise, who seem to be the antithesis of everything decent in human life. That principle, however, is paramount if we believe in the rule of law and if we believe in our own system.***
>
> ***If we believe that exceptions can be made for terrorists, then we will find pressure to make further exceptions for different groups whose views do not coincide with our own standards. The whole point of the rule of law, the whole point of human rights enshrined in domestic and international law, is that the law applies to all people. Adherence to that principle is first in the fight against terrorism."***[9]

By way of contrast, the Federal Attorney-General was reported on 12 July 2005 as follows:

> ***"Mr Ruddock renewed his support for legislation granting increased powers to ASIO to detain and question suspects to be made permanent. Under a sunset clause the increased powers, now under review by a parliamentary committee, are set to lapse within months.***
>
> ***He said that domestic security arrangements were under constant review. Criticism of ASIO's powers, and the need to respond to the organisation's critics, was detracting from the fight against terrorism, Mr Ruddock said. "Every time that you have to go through and justify the continued existence of a power that is at the moment being an***

important part of our armoury in dealing with the risks that we face, you take people away from other tasks that they would otherwise be involved in," he said.

He said that the Government had not publicly catalogued all that security agencies had discovered about the involvement of Australians in training for terrorist activities.

It is believed that the list of possible suspects in Australia has grown following information from the French judge in charge of the case of alleged al-Qaeda operative Willie Brigette, who was detained in Sydney and deported in 2003".[10]

It is hard to imagine a greater contrast between the two views. It is of interest to note however that Mr Ruddock was not then arguing for any change to the existing legislation but rather an extension of its operation.

The second paragraph of Mr Ruddock's remarks as quoted is particularly troublesome, containing as it does more than a whiff of McCarthyism. In substance he is saying not only that the Government should not have to justify the existence of such extended powers but also that those who require it to do so are assisting the terrorists by distracting counter-terrorism efforts by requiring officials to have to deal with such criticisms.

This is an astounding statement for an Attorney-General to make. Surely the expansion of police powers at the expense of civil liberties is something that the Government should be prepared to justify and to do so thoroughly in a free society. I also find it difficult to understand how a requirement that this be done can ever be said to interfere with the process of combating terrorists. Surely there are enough people employed by Government to enable this task to be undertaken without detracting from anti-terrorist activities.

Let me make my own position clear. I do not for a moment suggest that we do not need ASIO or other intelligence gathering organisations, nor do I suggest that they should not be properly

empowered to carry out their functions. Those functions are primarily the gathering of intelligence. The important question is as to what is a proper empowerment. It is simply not good enough for the Government to assert the need for a power without justifying it as the Federal Government and now the Premiers seek to do.

Similarly it is important that police have sufficient powers to act to prevent terrorism and to detect the perpetrators when it has occurred. As to the latter, the British Police, apart from mistakenly shooting an innocent person, seem to have done an efficient job without these extended powers and it is difficult to see how the exercise of the sort of extended powers now sought to be conferred upon ASIO, the AFP and State police forces in Australia would have prevented the July bomb blasts.

The present powers conferred upon ASIO are extensive and represent a considerable invasion of civil liberties. The fact that they have apparently been exercised sparingly to date, while commendable, is no answer. The fact is that police powers of this type are always open to the possibility of abuse.

The first problem about this sort of legislation is to identify what factors are said to lead to a need for it. In relation to the new provisions, as was the case with the existing legislation, we are not told what these factors are. All that we are told is that the Government and subsequently the Leader of the Opposition and all of the State and Territory Premiers became convinced of the need for it following briefings by ASIO and the Australian Federal Police. With nothing more, the public is simply expected to have blind faith and trust in political leaders having been persuaded by the secret information to which they are privy but we are not. As Michelle Grattan observed, the context for this persuasion and the outcome was permeated by:

> ***"The Federal Government's command of formidable security information, combined with all leaders' wishes to make sure no one can ever accuse them later of not doing enough..."*** [11]

Now it is not my purpose to attack ASIO and the AFP which both perform an essential function in this community. However what must be remembered about them is that they are security organisations and have a vested interest in extending their powers of action as far as possible. This is understandable given their very considerable responsibilities and their legitimate desire to achieve as much protection as possible from terrorist threats. Such organisations do not and cannot be expected to have great concerns for traditional liberties if they see them standing in their way of carrying out their tasks.

However, I think that we are entitled to expect that our political leaders should have such concerns and should weigh very carefully the cost of accepting that sort of advice and its consequences. They should also be prepared to question the accuracy of such advice given the history of similar advice as to weapons of mass destruction, and given the failure of such organisations to accurately forecast or prevent the attacks that have occurred in the past, it is at least sobering to contemplate that one of these attacks took place in London, which has been the scene of many earlier terrorist attacks and where similar organisations can be expected to be more experienced than ours.

No doubt the leaders would say that they have taken these matters into account but in my view it is simply not good enough to accept their assurance in this regard without further clarification.

Although we have not been provided with the detail of what has occurred, the checks and balances that it is suggested should be included are laughable. The present ASIO legislation in relation to terrorism had a sunset clause of three years and yet the Premiers apparently regarded it as something of a victory that they obtained agreement to a ten year sunset clause in relation to the new legislation. In this regard they did rather worse than the Opposition in the Senate despite having considerable bargaining power.[12]

The provision for judicial review is no more than window dressing. It is a meaningless safeguard because the judge or magistrate concerned has no way of testing what is produced by the authorities. Any judge who has had experience of authorising telephone tapping

or the use of listening devices can testify that this is no safeguard and that the judge is little more than a rubber stamp. It is for this reason that most federal judges now refuse to have any part in authorising such applications. The proposed legislation will provide nothing better and the provision for judicial review is included largely to create a false impression of due process.

The second problem about this sort of legislation is that it is likely to lead to a situation where Government and its agencies will use it for other and improper purposes, including its own political ends. Alternatively, those responsible for its administration will bungle its use in such a way that it will have the effect of blighting people's lives in the same way as the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has done in respect of many of the asylum seekers under its charge.

If an example of the first type of improper usage is needed, it can be found in the Government's usage of the existing ASIO legislation to suppress dissent. There are signs that this may already have happened in one case.

On 23 June 2005, SBS television screened the program *Truth Lies and Intelligence* produced by Carmel Travers. The subject matter of the program largely related to the truth of statements made by President Bush and Prime Ministers Blair and Howard in 2003 justifying the attack upon Iraq upon the basis that Iraq possessed weapons of mass destruction. The program featured interviews with Andrew Wilkie, a former senior intelligence officer with the Office of National Assessments in Canberra.

A chilling fact that emerged was not so much the contents of the program itself, but rather that in the course of making it the producer received a visit from persons purporting to be from the Attorney-General's Department. These persons demanded access to her computer and apparently destroyed its hard drive. When she attempted to film them doing so, they threatened to charge her with an offence carrying a penalty of 7 years' imprisonment. Apparently they were seeking information about her communications with Mr Wilkie.

Apart from a brief article in the Sydney Morning Herald on 18 September 2004[13] and SBS, which also featured the matter on Dateline on 22 June 2005, the only other mainstream media mention of this affair that I have been able to discover appeared in *The Age Green Guide*, of all places. It emerged from *The Sydney Morning Herald* article and the Dateline programme that similar actions had taken place in respect of others with whom Mr Wilkie had been in contact, including the well-known commentator, Professor Robert Manne[14].

One would have thought that such behaviour would have been the subject of media headlines in normal circumstances. This once again suggests that the media at least, has become inured to governmental attacks upon our liberties, or to take a more sinister view, that it or parts of it are engaging in self censorship. Another possibility is that it was cowed into silence by the relevant provisions of the legislation to which I have referred. It is apparent from the transcript of the Dateline programme that participants were careful to take legal advice as to what they could or could not say.

For an example of the second type of problem, namely the maladministration of legislative power, we need look no further than DIMIA and the findings that have been made about it in two separate independent reports, albeit with very limited terms of reference. This is an example of what can occur when powers are exercised largely in secret and directed against minorities. The failure of the two relevant ministers, Ruddock and Vanstone, to accept any responsibility whatever for what went wrong is a breathtaking departure from long-held understanding of ministerial accountability in a Westminster style parliamentary democracy.

The powers under ASIO and related legislation are all exercised in secret and the responsible minister is none other than Mr Ruddock. In the unlikely event that any evidence of maladministration emerges, given the secrecy provisions of the legislation, Mr Ruddock and the Prime Minister will no doubt wash their collective hands of the matter and blame some junior ASIO operative, or the culture of the Department.

Contrary to the misnomer “The War on Terror”, this is not a war and the threat to Australia is much less than it was in the Second World War or even the Cold War. Nevertheless the history of the surrender of liberties in times of war is not an attractive one. In Australia during the Second World War, extensive powers were granted to the Attorney-General to detain and intern people suspected of affinities with the enemy. Most of the exercise of such powers later proved to be unnecessary.

For example a group of eccentrics from the ‘Australia First Movement’ were interned, most, if not all, of whom were entirely harmless and we also received and interned Jewish people of German nationality sent here from Britain, who were by and large implacably opposed to the Nazi regime. The picture in the U.S. was no better where Japanese Americans were interned in large numbers, even though the vast majority were loyal U.S. citizens.

It is all too easy to assert the need to employ these sorts of powers and yet the reality may be that to do so can be entirely counter-productive. No doubt the vast majority of Islamic people living in Australia are good and peaceful citizens. If they start to feel that they are being targeted because of their religion their attitude to this country may well change and the very zeal employed to protect us may have a reverse effect of encouraging a situation where terrorism can flourish, particularly amongst suggestible young people.

Let there be no mistake, the Islamic community do feel targeted by this legislation and do so with justification. I have spoken to Muslim people who have expressed fear and a feeling of alienation from what they had come to believe was their country. Such fear and alienation provides fertile ground for those who would seek to foster terrorism in this country.

There might be a case for a government conferring additional powers upon police and investigating authorities in the aftermath of a tragedy such as occurred in London, but if there is such a case, it should be for a very limited period and for the specific purpose of identifying and capturing the perpetrators. I am far from convinced that there is any need for a blanket power such as now exists, albeit with a sunset clause, and no evidence has been produced that the existence of

such a power has served any useful purpose, nor is it or the contemplated further extension likely to do so.

What makes this and the contemplated legislation even worse is the secrecy that surrounds the exercise of powers under it. It is difficult to understand the need for secrecy about the existence of a warrant issued under this legislation or that such secrecy should continue to exist for two years after its issue. This effectively prevents the person or persons affected or anyone else from drawing public attention to any irregularity or abuse associated with the issuing of such a warrant or any detention and interrogation conducted pursuant to it. It is also a significant interference with freedom of speech and expression and freedom of the Press.[15]

It would appear that our "leaders" have thus managed to undo liberties that have stood the test of time in our community for hundreds of years, all in the name of combating this threat of terrorism. Of course, entwined with concern for the public interest was political self-interest in avoiding the accusation that any of them are seen as "soft on terror", particularly if there is a future tragedy within our borders which enables conservatives to begin a blame-game directed at leaders who wouldn't adopt the full precautionary package due to qualms about civil liberties.[16]

The secret status of the intelligence material that secured unanimity with the Federal Government has conveniently ensured that leaders of State and Territory Governments and the Leader of the Opposition can acquiesce with impunity since there can be no informed public debate and thus criticism of them concerning the proportionality or rationality of the security response as measured against threat evidence that is kept under wraps.

It's a win-win situation all round politically. If Australia escapes a domestic attack, it can be said that *ipso facto* the civil liberties sacrifices were warranted. If an attack does occur, and no doubt it was this possibility that was of greatest political concern, the stage has been set for there being no weak link in the leadership chain to attract recriminations.

We can expect to see more of this tidy secrecy-based formula in the future and further instances of leaders failing or refusing to heed the warning which issued from within the Federal Government's ranks by Petro Georgiou; that:

> ***"in the course of defending the democratic values which terrorism attacks, we do not inadvertently betray them".*** [17]

It is with these developments in mind that I want to now turn to analyse how we came to this state of affairs and in particular to consider the respective roles of our political system and its leadership, the courts and the law in bringing it about.

Turning first to our political system and its leadership, I think it fair to say that a major contributor has been the failure of leadership on all sides of politics and that this has been coupled with a failure by ordinary Members of Parliament generally to discharge their responsibilities to the Australian people.

Gerard Henderson unwittingly made this point in an article that appeared in the Sydney Morning Herald on the day that the Prime Minister and the Premiers met in Canberra to consider extended security legislation. After castigating "the intelligentsia" (read – "thinking Australians") he quoted the Prime Minister as saying that civil liberty advocates "normally oppose any extension of the law and of course, if something goes wrong, governments are attacked for not having acted earlier", he concluded:

> ***"Sure, there is opposition among large sections of the intelligentsia to the national security stance of both Howard and Beazley. Yet these politicians' slightly different positions are popular with the Australian electorate – which helps explain why the Labor leaders will possibly be inclined to give broad support to the Prime Minister in Canberra today."*** [18]

To me that says it all about the quality of our leadership.

The Government under the leadership of this Prime Minister has embodied a true neo-conservative approach to Government modelled

upon the worst possible examples of this approach in the United States of America. The list is a lengthy one that I will not attempt to reproduce here. I simply mention the Government's attitude on social issues like same-sex marriage and marriage of transsexuals, restricted availability of IVF treatment, aligning family law changes to the demands of the fathers' movement and disadvantaging female care givers, refusing to look for better solutions to drug problems such as harm-minimisation, and its neo-colonial attitude to Indigenous people. To these must be added the Government's reactionary approach to asylum seekers and its attempt to make judicial appointments of people in its own image.

However the Opposition is not without blame in this saga and bears much of the responsibility for the introduction of the destructive immigration policy that this country has pursued since the early 1990s. Nevertheless this Government has pursued it with messianic vigour to the point where many thinking Australians, myself included, have felt ashamed of their country.

I doubt that anyone even as late as the 1980s could have contemplated an Australian Government using mandatory detention against innocent men women and children who had committed no crime other than entering this country seeking succour and assistance. This has since become so common place that the Government, cravenly supported by the Opposition is now proposing to extend this sort of treatment to citizens and others lawfully resident in Australia, on the suspicion of secret policemen and faceless intelligence operatives that these people may commit a crime.

I think it fair to say that the rot really started with the Prime Minister's failure to distance himself from the racist policies of Pauline Hanson in 1996 and his subsequent adoption of those policies, particularly against asylum seekers, for short term political advantage. There also developed a climate of opposition to multiculturalism and a fear of ethnic minorities in our community, which became much more marked after 9/11 and has continued to be a problem in our community ever since.

Next came the Government's narrow electoral escape in 1998, followed by its disastrous polling in the early part of 2001. In that

context the ‘Tampa’ affair, the children overboard claims and the attack on the Twin Towers came as political manna from heaven to the Government. No doubt it was its parlous political position that caused it to realise that there were votes in demonising asylum seekers and making capital out of being tough on terrorism.

Who can forget the disgraceful affair of the ‘Tampa’ and the Government’s handling of it. Out the door went all issues of principle relating to maritime rescue or treatment of refugees and instead we had the improper use of the Defence Force, the use of Pacific Client States in a cynical ruse to get around Australian law and the complete obliteration of the rights of refugees.[19]

We also had the appalling tragedy of the ‘Siev X’, an affair that has never been properly investigated, but when it is I doubt that Australia will emerge creditably.

Finally we had the saga of the administration of the policy in relation to asylum seekers by the Government from the time of the ‘Tampa’ episode to date. It is unnecessary to dwell on this further as the facts are finally becoming known and they bear out all the worst fears of the critics of the policy.

None of this reflects any credit on the Government or its leadership, but I regret to say that much the same can be said of the Opposition. In the aftermath of the Tampa the opposition rolled over and said “me too” and in the ensuing years it did little or nothing to expose the enormities of the harm and injustice of the Government’s immigration policy, no doubt because of its less than creditable association with its inception. It has had its own leadership crisis with the disastrous election of Latham as its leader and its reversion to another lacklustre leader in Beazley.

However nothing could have prepared me for the role of the Opposition in relation to the issue of national security legislation as it has demonstrated in the past few weeks. In this area Beazley is now performing the same spineless role as he did with asylum seekers.

My feelings were very well put in an Age article last week by a former State Labor member, Denise Allen, when she said.

"In the past week, I have heard Kim Beazley talk about counter-terrorism laws that not only mirror, but seem to go further than, John Howard's. I have seen all the Labor premiers' sign up to more of Howard's draconian anti-terrorism laws.

OK, you may say, it has to be done. We now live in dangerous times as we are constantly reminded every day with brainwashing anti-terror television and radio ads and silly fridge magnets.

But it is only so because the Howard Government's fear agenda has been allowed to flourish as the Labor Party has sat back like the little kid at school who gets sand kicked in his face and who is too frightened to upset the big boys.

The Labor Party I know would have fought tooth and nail against Australians' involvement in Iraq without UN sanctions. They would have protected Australia from terrorism by simply not being party to an illegal war. Their voices would have been loud and would have clearly defined what they stood for. The Labor Party I know would have countered Howard's fear agenda with one of peace.

This climate of fear is Howard's creation and instead of counteracting it with an alternative, forceful, intelligent debate, the Labor Party blindly accepts it and helps promote it."[20]

The reality is that we have witnessed a complete and abject failure by Australia's politicians to provide much needed leadership to this country and they have sacrificed our freedoms in the process.

This brings me to the role of the media. In Australia we have the extraordinary situation of the media being controlled in very few hands and in particular, the conservative Murdoch Press having unprecedented coverage and power. There are fortunately some exceptions but those are under significant threat. The ABC has been the subject of a war of attrition by the Howard Government which has

at the same time sought to load the board with its supporters, a good example being the recent appointment to it of Ms Janet Albrechtson. As a result of the Government's changes to media law the independence of the Fairfax press is under threat of a takeover, possibly by Packer interests, which would effectively end its independent role. Commercial television and radio is similarly tightly held.

There is little doubt that the conservative media do censor or downplay news that does not suit its interests. A good example occurred last week with the release of the Comrie Report which was highly critical of the Immigration Department and hence the Government. It was front page news in the Fairfax press and led the ABC news and rightly so. It made page 2 of *The Australian* and page 22 of *The Daily Telegraph*.

There is also no doubt that an active and critical media can call government to account and this appears to be what governments now fear.
Terrorism has presented the Government, aided by the media, with a golden opportunity to create a climate of fear and concern and an atmosphere where the public will accept the sort of legislation that I have been discussing. The respected senior journalist Geoffrey Barker summarised this neatly in an ABC radio interview last week when he said:

> ***"I think there's a tendency when these things are happening for people to become frightened and for people to think they have to be compliant with the government. I think there's a fair amount of compliance in the media, a willingness to go along with what the government's doing. It's hard to question what the government's doing. If you find yourself taking a questioning position, a sceptical position, you seem to other people to be soft on terrorism. To maintain an independence and a scepticism of view, is fairly difficult when the whole drumbeat all the time is the front page pictures of blood and death and the government and the opposition for that matter, because there's not much difference between the government and the opposition on these issues, all saying Be afraid, but we***

must take unusual actions for unusual times. So the government introduces various legislation, which has implications for civil rights, and says Well we wouldn't do this if we didn't have to, but times are very serious. The opposition tends to largely go along with it and the person who wants to say No there are some permanent values that matter, and even worse the person that wants to say, Look, terrorism's awful, it's ghastly, but it's not an existential threat to us, finds himself very much playing the role of the outsider.[21]

I find myself very much in that position tonight but I make no apologies for it because it is in these sorts of situations that it becomes vital for us all to stand up and be counted. The stakes are extremely high.

In the same interview Barker referred to this country as a result of this legislation moving into "…the twilight of liberal democracy, moving into what I call the controlled society…" I agree with him and I am horrified by the prospect.

Against this background it becomes pertinent to examine the role of the law and the courts. I think that recent developments make it clear that we can no longer look to the courts to protect our liberties. In my Hobart address I said of the role of the High Court of Australia in the various immigration cases:

"Finally, despite the efforts of the Federal Court of Australia in cases like Minister for Immigration and Multicultural Affairs v Al Masri[22] and the Family Court of Australia in B and B v Minister for Immigration and Multicultural Affairs[23] to find ways to overcome the problems created by the legislation, I believe that our highest court, the High Court of Australia lamentably failed to do justice to the unfortunate people, including children, languishing in immigration detention, whose appeals came before it[24]. Justice is indeed in a sorry state in this country when that court, albeit by a narrow majority, held in Al-Kateb's case[25] that it was constitutionally open to the legislature to authorise the executive to hold people in

detention indefinitely". (footnote numbering different in the original)

The approach adopted by the majority in that case was that of legal technicians, rather than independent judges. I think that the cause of the problem lies in the common acceptance including by judges of what I regard to be an entirely spurious proposition: that the courts, staffed as they are by 'unelected' judges have no role in the protection of individual liberties in this country.

Of course judges are unelected and a very good thing it is that they are not. But does this mean that they are rendered unsuitable or incapable of interpreting legislation designed to protect our liberties? After all they interpret and apply the criminal law and the law contained in the many statutes that are passed by our Parliaments. Very often that legislation is expressed in ambiguous terms or contains gaps from which it is not possible to discern the intentions of Parliament. It is not suggested that judges should not in such circumstances interpret the law, even if it involves making new law. Indeed the whole structure of the common law is dependent upon judges doing so.

In this regard, the judgment of the Chief Justice, Murray Gleeson in the case of *Al-Kateb v Godwin* warrants mention. Hardly a social radical, it proved too much for him to stomach that an Act of Federal Parliament should be read so as to authorise the indefinite detention of anyone unless it was expressed in the clearest terms. He said:

> ***"Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the***

> ***legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness".***[26]

Unfortunately, four of his colleagues took a different view.

In my Hobart address I continued:

> ***"This reflects a concern that I have for the future of the independence of the judiciary in this country. It has become a popular conservative view, largely reflected by the press, that there is something intrinsically wrong with so called "activist" judges who seek to interpret the law in such a way as to make it compatible with justice, or who draw public attention to the existence of injustices. Such people prefer legal technicians who adopt a strict "black letter" approach to the law and refrain from public comment about it."***

It is worth reflecting for a few moments upon what an activist judge is and this in turn requires us to consider what we expect of a judge. Quite obviously, judges are not free to decide cases on the basis of what they think should be the correct result, regardless of the law. At the same time I believe that the reason why we have an independent judge, rather than some bureaucratic functionary to decide these important issues, is because a judge is expected to inject wisdom, fairness and humanity into the decision making process. This is something which I always strived to do and if this be judicial activism then I am proud of it.

However the prevailing view, particularly amongst conservatives is strongly against judicial activism, particularly when it produces results that they disagree with. This view has been largely accepted and put

into effect by the courts, thus effectively neutralising the judiciary as a bulwark of liberty.

Indeed the view has recently been expressed in England that even where there is a guarantee of individual liberty such as a Bill of Rights, judges have always failed the test of protecting the individual and have fallen on the side of unrestrained executive power.[27] I do not accept this view and even in this country there are examples in the past of the High Court of Australia taking a different approach.[28] *Al Kateb's* case makes it unlikely that it will do so as presently constituted, but the result might be different if there was some legislative or constitutional protection of individual rights.

In discussing the High Court of Australia I must pay tribute to the person that I regard as the one shining light in a dark and gloomy sea and that is Justice Michael Kirby.[29] If there were more judges like him, then the discussion tonight would be very different. He does stand out as a bulwark of liberty and liberal values and the pity is that this Government has set itself to ensure that there are no other judges like him appointed to the High Court of Australia.[30]

In the context of this gloomy scenario one can only ask the question "Is there a solution?" In my Hobart address and elsewhere I have argued that a Bill of Rights may provide an answer. We are however a long way from achieving it. Even the model adopted in the A.C.T and the one under discussion in Victoria are far too tentative in their approach and are pale imitations of the real thing.[31]

The real question is why are our politicians so fearful of a Bill of Rights? Why is it dismissed by them in such peremptory terms? It would be, after all, a legislative expression of the basic individual rights that they claim that we all have.

I suggest that it places a check and balance upon their exercise of power that they find unacceptable and that the opposition or at best indifference of politicians indicates that they do not trust the people, or for that matter the courts and that they do not wish their power over the people to be curtailed.

In my opinion it is false and misleading argument to say that because parliamentarians have been democratically elected and because they can be voted out of office, that provides a sufficient safeguard to the people against misuse of power. Given the means by which it is now possible to manipulate public opinion in Australia in particular, this is a very slender reed upon which to rely.[32] Moreover, in human terms, a great deal of damage can be done under rights-abusive legislation before it is ballot-box time again.

The electoral argument takes no account of the principled need to protect minorities and those with the least power and advantage in society. For example, Indigenous people will never represent a majority of Australians, but this does not provide a justification for over-riding or ignoring their rights. The same can be said about asylum seekers and children, who have no vote at all. It is axiomatic that effective standards and mechanisms for their realisation is of greatest importance to those whose status and circumstances render them vulnerable to violation of their rights.

What is wrong with trusting the courts? The courts are trusted to deal with all other legislation and indeed the nation could not function without them doing so. Why is it that Australian politicians, unlike those of Europe, the United States, The United Kingdom, Canada, South Africa and New Zealand, to name but a few cannot trust the Australian people and the Australian Courts to administer a Bill of Rights?

Why then should they not interpret instruments such as a Bill of Rights? If it has a purely statutory basis then it is always open to the Parliament to make an over-riding amendment if it disagrees with a judicial interpretation. If it has a constitutional basis then the answer I think was given by Alexander Hamilton as long ago as 1787-88 when he said:

> ***"Nor does this conclusion (the superiority of the Constitution over legislation) by any means suppose a superiority of the judicial to legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people,***

declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by fundamental laws rather than by those which are not fundamental."[33]

It is sometimes said that there is little support for a Bill of Rights in the community but surely it is for politicians and others to lead on issues such as this as Trudeau did in Canada and Blair in the UK, to say nothing of James Madison (the drafter of the Bill of Rights) and other US founding fathers.

It is more than time that Australian politicians showed some leadership on this and other issues. If they continue to fail as they do now, then it is our democracy and our future that will suffer.

Professor George Williams put the point succinctly in a recent article when he said:

"With each new terrorist attack, it is possible that governments will seek harsher and harsher national security laws. Other nations are in the same cycle, in what appears to be a race to the bottom, although their laws are at least tempered by their explicit protection of fundamental rights.

Driven by fear and the need to act, we run the risk of a series of overreactions. This is the very dynamic that terrorists rely upon. What they cannot achieve by military might, they seek to achieve by stimulating our fears. Indeed, it is by our own actions that we are likely to isolate and ostracise members of our community who might then become targets for terrorist recruitment. It is also by our own actions that we travel further from our ideal of what a democratic and open society based upon the rule of law should be"[34]

[1] The Hon. Alexander Downer MP "Death by Stoning is Inhmane", *Media Release FA114*, 22 August 2002.

[2] There was no condemnation of the punishment evident in his very recent position in respect of the death penalty imposed in respect of Iwan Darmawan, known as Rois, one of the people found quilty of the bombing of the Australian Embassy in Indonesia. Former Democrats Senator Sid Spindler said of Mr Downer's logic

"This position is questionable on two counts: to argue that the death penalty will function as a deterrent, as Mr Downer does, makes no sense (if it ever does) when we are dealing with people willing to die in a terrorist attack. Second, to say that we will not intervene to save an Indonesian citizen, but would do so in the case of an Australian citizen is to betray the basic principle of a civilised society- that all persons deserve an equal measure of respect as human beings." Letter to the Editor, *The Herald Sun* 15 September 2005.

A spokesman for Amnesty International, Tim Goodwin expressed concern that inconsistency in the Federal Government's position would undermine clemency arguments in the future for Australian citizens against whom the penalty has been imposed.

"One of the reasons we are able to make such a strong case in defence of those individuals is because we're not just standing up for Australian citizens but we're also expressing Australia's principled stance on the basis of human rights against the use of the death penalty against anyone." Jane Holroyd "Beazley preferred 'life' for bomber" *The Age*, 14 September 2005.

[3] "PM supports death for Saddam" *The Age* 15 December 2003; ABC Radio program *PM* www.abc.net.au/pm/content/2003/s919735.htm

[4] Nicholson A. *Reflections on Social Justice – Australian Democracy, Law and Justice. What has happened to the checks and balances?* (Anglicare Tasmania Inc 2005) – available online at www.anglicare-tas.org.au

[5] *"The authorities may indeed have sound reasons for deeming Mr Parkin a security risk, but we can't know for sure because they won't tell us. Mr Parkin is appealing to the Migration Review Tribunal over his proposed deportation - but Mr Ruddock could apply for a certificate to prevent the hearing. There is a distinctly Orwellian logic at work here: the Government justifies a decision to curtail an individual's liberty by invoking national security and then refuses to provide evidence because national security allegedly is at stake. There's nothing new about governments hiding behind the cloak of national security, but this Government is now proposing that it be allowed to do so more often."*: "Arrest sets off alarm bells on security powers" *The Age*, editorial, 14 September 2005.

[6] Williams G. *Gilbert + Tobin Centre of Public Law*, University of New South Wales, 23 June 2005 http://www.apo.org.au/webboard/results.chtml?filename_num=01211

[7] For a satirical vignette of the serious issues raised by the legislation, see the transcript of Bryan Clarke and John Dawe's 30 June 2005 segment on the ABC program 7:30 Report available at http://www.abc.net.au/7.30/content/2005/s1404424.htm.

[8] Section 34V Australian Security Intelligence Act 1979

[9] http://www.theage.com.au/news/opinion/lets-not-compromise-the-rule-of-law/2005/07/12/1120934239578.html

[10] http://www.theage.com.au/news/war-on-terror/list-of-terror-suspects-grows/2005/07/11/1120934184644.html

[11] "Are we really safer now", *The Age*, 28 September 2005.

[12] The Human Rights and Equal Opportunity Commission issued a press release after the outcomes of the summit with State and Territory leaders were announced, saying:

"Mr von Doussa [the President of the Commission] said that a five-year review of the proposed terror laws and a 10-year sunset clause as agreed to today is excessively long, recommending three years (as prescribed in the current ASIO legislation) as necessary to regularly review the requirement for such laws.

"Invasive laws of these kinds can only be justified by real ongoing risks of the highest order. It is important that there be periodic debate in parliament to determine whether these laws are still necessary. Our leaders were given a briefing today by security agencies to satisfy them that these laws are needed – it stands to reason that the community should also be given the same assurance by periodic public disclosure of the main matters underlying the current risk assessment which are said to justify the continuation of the laws," he said." "New Terrorism Law – Tough on Terror, Tough on Human Rights, 27 September 2005 available at http://www.hreoc.gov.au/media_releases/2005/42_05.html

[13] http://www.smh.com.au/news/Anti-Terror-Watch/Big-Brother-sends-in-hit-squads-to-clean-up-security-threat/2004/09/17/1095394005626.html
[14] http://news.sbs.com.au/dateline/index.php?page=transcript&dte=2005-06-22&headlineid=981
[15] In discussing the proposed identity card, Michelle Grattan writing in the Age of 20 July had some interesting comments to make on this issue – see http://www.theage.com.au/news/michelle-grattan/battle-of-the-books/2005/07/19/1121538971035.html
[16] *"No government wants to appear soft on terrorism and any such perception would be punished severely by voters if there were a terrorist attack in Australia. This also explains why Labor - a party traditionally defensive of such civil liberties - has been reluctant to challenge the Government's proposed anti-terror laws. So the political path is set and it is highly unlikely that state and territory leaders will derail the Prime Minister's plans when they meet to discuss them in Canberra on September 27."* Cameron Stewart "Terror fact and fiction" *The Australian*, 17 September 2005.
[17] Quoted in *The Age* editorial of 24 September 2005 "Finding a balance between security and freedom".
[18] Gerard Henderson "*The 'ayes' have it on anti-terrorism laws"*; Sydney Morning Herald 27 September 2005
[19] For a full account of this episode see *Dark Victory* by David Marr and Marian Wilkinson (Allen &Unwin) Sydney 2003.
[20] http://www.theage.com.au/news/opinion/why-i-just-had-to-resign-from-the-labor-party/2005/10/03/1128191653445.html
[21] *The Media Report* 6 October 2005 ABC radio, accessed at http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s1475927.htm
[22] (2003) 126 FCR 54
[23] (2003) Fam CA 451
[24] See *Minister for Immigration and Multicultural Affairs v B* [2004]HCA 20; *Al-Kateb v Godwin* [2004] HCA 37; *Re Wooley ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49
[25] Ibid *Al-Kateb v Godwin*
[26] Ibid *Al-Khateb v Godwin* at Para 19 per Gleeson CJ
[27] Adam Tomkins *Our Republican Constitution* Hart Publishing UK, 2005
[28] For example *Australian Communist Party v The Commonwealth*;(1951) 83 CLR 1; *Ah Hin Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273.
[29] One of his Honour's many extra-judicial roles is that of Founding Patron of ReprieveAustralia. His address to the 6 October 2003 Annual General Meeting of ReprieveAustralia in Melbourne, "The High Court and the Death Penalty – Looking Back, Looking Forward", can be accessed at http://www.crimbarvic.org.au/pdf/Justice%20Kirby%20speech%20-%206%20Oct.pdf
[30] The Government's most recent appointment to the High Court, Justice Susan Crennan, hopefully indicates a retreat from its puruit of ideologocial appointments.
[31] In respect of the Victorian proposal, particularly as it relates to children, see the August 2005 consultation submission by Nicholson A, Sandor, D and Tobin, J *The Treatment of Children and Young People in the Bill of Rights Proposed for Victoria* available at http://www.dci-au.org/victorianbill.doc
[32] See the discussion in Manne R. *Murdoch's War*; *the Monthly*, Melbourne, July 2005, http://www.themonthly.com.au/currentIssue/index.html
[33] The Federalist, no 78; *Law A Treasury of Art and Literature p174* Hugh Lauter Levin Associates, Inc, New York (1990)
[34]Gilbert + Tobin Centre of Public Law, University of New South Wales, 26 September 2005, http://www.apo.org.au/webboard/print-version.chtml?filename_num=36579