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**LAW COUNCIL OF AUSTRALIA
32ND AUSTRALIAN LEGAL CONVENTION
CANBERRA, 12 OCTOBER 2001**

AUSTRALIAN LAW - AFTER SEPTEMBER 11, 2001

The Hon Justice Michael Kirby AC CMG

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LOOKING BACK

It is an honour to be asked to address the opening plenary session of the Centenary of Federation Australian Legal Convention.

My first convention was also in Canberra - in 1975. I had just been appointed to judicial office. The Governor General, Sir John Kerr, opened the meeting¹, reminding Australian lawyers of their links to the world, to the Commonwealth and to their region symbolised through Lawasia which he had helped to found². The Prime Minister, Mr Whitlam (quoting Tacitus of course) praised his government's many legal achievements, including the establishment

* Justice of the High Court of Australia

¹ (1975) 49 ALJ 308.

² *Ibid*, 309.

of the Law Reform Commission which I then led. He too adopted a broad outlook³:

"I believe we want a world in which the rights of citizens, rich or poor, are effectively protected by a vigorous legal profession, in which the mechanism of the law remains a primary and effective instrument for social justice".

As was common in those days, the opening address was given by an English Law Lord, Lord Cross of Chelsea. His Lordship's theme was legal aid. He seemed to lament that law students were too law abiding. He thought that an "admixture of the heady wine of the social sciences with the sombre diet of the law might not come amiss"⁴. That was lordly advice soon taken up with unexpected enthusiasm.

Most of the topics of the 1975 conference concerned subjects still relevant to lawyers today. Unmet needs for legal services⁵. Teaching legal skills⁶. Estate⁷ and tax⁸ planning. Some hints of the

³ *Ibid*, 310.

⁴ *Ibid*, 314.

⁵ H Whitmore, "Are the Needs of the Community for Legal Services Being Met by Our Universities?" (1975) 49 ALJ 315.

⁶ D Ross, "Legal Skills Course in Australia - Their Need, Their Value and Their Prospects" (1975) 49 ALJ 327.

⁷ D G Hill, "The Latest Developments in Estate Planning" (1975) 49 ALJ 344.

future were found in papers of automation of conveyancing⁹, updating court procedures¹⁰; the rights of women and children under the coming family law¹¹; environmental law¹² and some closing self-scrutiny about what was wrong with the adversary system¹³.

I knew, or came to know, most of the speakers whose papers are found neatly printed in the forty-ninth volume of the *Australian Law Journal* of 1975. Distinguished judges (like Lord Cross, Sir Richard Blackburn and Sir Richard Eggleston) have died. Leading lawyers have become judges and many of them have retired, and some have died. A few of the problems of 1975 have been solved; but most have not. New problems have arisen. And of those who held judicial office when we convened in Canberra then, only Justice

⁸ C V Cullinan, "Latest Developments in Tax Planning" (1975) 49 ALJ 353.

⁹ D J Whalan, "Automation and the Effect on Australasian Conveyancing in the 1980s" (1975) 49 ALJ 359.

¹⁰ R A Blackburn, "Updating Civil Court Procedures for the 1980s" (1975) 49 ALJ 374; J D Davies, "Updating Civil Court Procedures for the 1980s" (1975) 49 ALJ 380.

¹¹ A Asche, "Changes in the Rights of Women and Children Under Family Law Legislation" (1975) 49 ALJ 387.

¹² L D Bowden, "Evolution of Involvement of Lawyers in Environmental Problems" (1975) 49 ALJ 399; P H N Opas, "The Place of the Lawyer in the Administration of Environmental Legislation" (1975) 49 ALJ 411.

¹³ R Eggleston, "What is Wrong with the Adversary System?" (1975) 49 ALJ 429; P D Connolly, "The Adversary System - Is It Any Longer Appropriate?" (1975) 49 ALJR 439.

Kemeri Murray (at the time a judge of the District Court of South Australia) and I are left. When Canberra's turn comes around again, the concerns of the law and of Australia and of the world will still be there.

The law grants its practitioners many privileges. But one of the chief of these is a sense of history and of perspective. We are companions on a long journey. Our legal tradition boasts an almost unbroken chain of eight hundred years. It has many imperfections, and we will speak of them. But it also has strengths. These mostly go unsaid. At the beginning, we should reflect upon both.

THE AGENDA

These conventions have changed over the last quarter century. Yet this is still the only occasion that brings together the entire judiciary and legal profession of Australia to address issues of common concern. Looking at the programme, it is interesting to notice the continuing themes and those that are new.

New are the examination of topics of special interest to young lawyers, a breakfast of women lawyers, meetings of those working for equal opportunity and with indigenous legal issues. All of these sessions present aspects of the legal profession almost totally missing from the 1975 conference. Legal aid, family law, business law and legal admission and training are still on the agenda. So is

access to justice. The innovation of the State of the Judicature Address by the Chief Justice of the High Court will be continued in the closing session. Back in 1975, the news about the High Court related to the announcement of the intention to go ahead with the building of the Court's headquarters in Canberra¹⁴. There was also an editorial in the *Australian Law Journal* about "five New South Wales judges on the High Court"¹⁵. On this, the editor's comments were not entirely favourable.

However, it is the centenary of our national Constitution that sets the theme for most of the plenary sessions this year. The conference will address the challenges of cooperative federalism; the issues of constitutional reform relating to republicanism as it might affect the States; and the topic of basic liberties.

It was inevitable and appropriate that the planners of this conference should decide that its overall theme would be woven into reflections about our hundred year old Constitution. At this time and in this place that topic really chose itself.

Yet it does seem difficult to enliven interest amongst the Australian population about their Constitution: about what it says

¹⁴ Unveiling of the plaque (1975) 49 ALJ 559.

¹⁵ (1975) 49 ALJ 109.

and how it works. This point is made in a new book by Melissa Castan and Sarah Joseph that affords "A Contemporary View" of the Constitution¹⁶. Summing it up, the authors say:

"A perusal of the Australian Constitution reveals it to be pragmatic rather than an inspiring document. ... The desire to federate did not evolve from a desire to be free from the colonial master ... The colonies predominantly wished to federate for practical reasons rather than revolutionary reasons. This may be contrasted with the decolonisation experience of the United States where a war of emancipation was fought to eject the British. One result of this contrast ... was that the drafters of the US Constitution were much more concerned with issues of emancipation and freedom from oppression. ... Freedom of the individual was not a major concern of the drafters of the Australian Constitution [which] adhered more closely to the British tradition of parliamentary sovereignty and trust in the rule of law. The Constitution essentially reflects the contemporary attitudes of the drafters and the persons in power in the colonies, white, wealthy men. Indeed, in most colonies only men were permitted to vote on whether to adopt the draft Constitution ... Indigenous Australians had no input ... Women were also largely excluded from the Convention Debates [so that] the Constitution reflects a gendered [male] view of the 'essentially federal matters' that deserved explicit attention. Whereas public, external 'male' concerns such as defence, trade and commerce and external affairs were addressed ... the chief concerns of women of that time, such as social welfare reform, the welfare of the family and domestic 'private' sphere were in the main omitted and therefore left constitutionally unregulated, within the States' domain".

For all that, the seeds of new ideas were there in the Constitution awaiting discovery. At Federation, women had secured

¹⁶ M Castan and S Joseph *Federal Constitutional Law - A Contemporary View* (2001), 24.

the right to vote in South Australia and Western Australia. Accordingly, s 41 of the Constitution became a suffragette mandate. It guaranteed to all persons with a State franchise the right to vote in federal elections. Moreover, the inclusion of the federal power over "external affairs" afforded unexpected means by which federal involvement in areas of private law could be expanded beyond the wildest dreams of the suffragettes and other social reformers of 1900¹⁷.

Every lawyer knows of the ongoing debate about constitutional interpretation. Should it be performed with a dictionary, speaking only in the language and concepts of 1900? Or should it move with the times¹⁸? Different justices of the High Court have held different views on this and sometimes possibly different opinions in different cases¹⁹. But that great judge, Sir Victor Windeyer, said, surely correctly, that it was inevitable that each new generation of judges and indeed citizens would look at the text and see in its sparse words the meanings apt for the time they lived in²⁰. Given the great

¹⁷ See eg *Tasmanian Dam Case* (1983) 158 CLR 1; *Victoria v The Commonwealth* (1996) 187 CLR 416.

¹⁸ M D Kirby, "Original Intent - A Form of Ancestor Worship?" (2000) 24(1) *MULR* 1. See eg *Grain Pool (W.A.) v The Commonwealth* (2000) 74 ALJR 648 at 662 [78], 609 [110]-[118]

¹⁹ cf *Sue v Hill* (1999) 199 CLR 462 and *Grain Pool* (2000) 74 ALJR 648 at 670 [116].

²⁰ *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 398.

difficulty of achieving formal constitutional change²¹, it is just as well that the High Court has, over the past century, looked creatively at the document put in its charge. Had this not been done, our Constitution would have remained an instrument for giving effect to no more than the aspirations of rich white males of the nineteenth century. Fortunately, we have done better than this.

The successes must be placed at the door chiefly of the people of Australia who have continued to accept their constitutional settlement and made it work. Next must come the Parliaments of Australia that have enacted laws, sometimes pushing the envelope, to respond to the needs of their times. Then there are the public servants, faithful anonymous toilers for the Commonwealth. But judges and lawyers can also take some credit for the continuing success of constitutionalism in Australia. If you look at the great cases of the first century of the Constitution, most of them, we can say with the wisdom of hindsight, represented the right decision for Australia and its people. The *Engineers' Case*²²; the *Air navigation cases*²³; the *defence powers cases* in time of war²⁴; the *Bank*

²¹ Forty-four Constitution Alteration Bills have been presented to the electors on a total of nineteen referendum days. Only eight have been passed in accordance with the Constitution, s 128.

²² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 141-144.

²³ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 639; *Airlines of New South Wales v State of New South Wales* (1964) 113 CLR 1; (1965) 113 CLR 54.

*Nationalisation Case*²⁵; the *Communist Party Case*²⁶; the *Tasmanian Dams* decision²⁷; and to these I would add the *Native Title Cases*²⁸ - although that chapter is by no means complete and it is not strictly a product of constitutional law.

It was natural that the rich, confident white males of the 1890s who wrote the Constitution should reject the idea of a Bill of Rights. In a largely monochrome society, isolationist, somewhat racist and imperial - it was perhaps to be expected that unalloyed faith would be placed in the elected Parliaments of the nation to defend individual civil liberties. Generally speaking, this faith has been justified. Some politicians, perhaps anxious about the stimulus to their labours that a Bill of Rights might give, remain resolutely of the 1890 view.²⁹

²⁴ *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 at 81.

²⁵ *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1; (1949) 79 CLR 497 (PC).

²⁶ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

²⁷ *Tasmanian Dams Case* (1983) 158 CLR 1.

²⁸ *Esp Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²⁹ R Morris "Two year inquiry rejects rights bill" in *Daily Telegraph* 4 October 2001, reports on the rejection by the Standing Committee of Law and Justice of the NSW Parliament (chaired by Mr Ron Dyer) of a proposal of the former Attorney-General, Mr J.W Shaw of a state Bill of Rights.

Given time, our elected Parliaments in Australia will usually work their way towards just laws that reflect respect for all citizens. That is the kind of majoritarian rule that our Constitutions, federal and state, envisage. Over the century we have made great strides. We have at last begun to address the legal wrongs to the indigenous people of Australia. We have reformed many laws that disadvantaged women and people of non-European descent. We have provided protection against stereotyping on the grounds of disability. Within recent weeks federal legislation to abolish compulsory age retirement has been introduced³⁰. Alas, it will be of no benefit to High Court Justices.

Most citizens are members of some minority or disadvantaged group. The laws against homosexuals were still firmly in place in 1975 at the last convention in this city. To this day, serious disadvantages persist in our law and work injustice in that regard, including against me. If you have been on the receiving end of injustice in the shape of law (or if someone close to you has suffered in that way) you do not like it. It helps you to see that the law is not always beautiful and praiseworthy. It can sometimes be an instrument of oppression, even in Australia.

³⁰ Abolition of Compulsory Age of Retirement (Statutory Office-Holders) Bill 2001 (Cth).

This is why, despite the political opponents, many consider that Australia needs a constitutional Bill of Rights. Even Britain, now itself less monochrome, has recently adopted national legislation³¹. It has long been subject to the *European Convention on Human Rights* and the Strasbourg Court that upholds it. If Australians were to accept the goal of a charter of fundamental rights, the precedents of Canada, New Zealand and the United Kingdom would seem the safe way to go. This would involve enacting such a measure first as a statute. The attempt to go directly to constitutional incorporation seems too bold for Australian tastes.

There are plenty of contemporary topics for us to talk about at this Convention. Puzzling, serious concerns of the Australian legal profession and judiciary. The media are full of our subjects. Headlines proclaimed "uproar" over judges' pay³²; but the cause of the uproar depends on who you speak to. The editorials call for opening up of courts, with cameras filming the third branch of government as they do activities of the other branches³³. Chief Justice Gleeson has demurred³⁴. There is never ending, indeed

³¹ *Bill of Rights Act 1998* (UK).

³² *Courier Mail*, 13 June 2001, 1.

³³ *The Australian*, 26 June 2001, 14.

³⁴ A.M. Gleeson, "A Changing Judiciary" (2001) 75 *ALJR* 547 at 553-554.

increasing, burden of cases involving unrepresented litigants.³⁵ Proposals for a National Judicial College seemed to be progressing in the right direction but at a somewhat stately pace³⁶. The establishment of the Federal Magistrate's Service has created a new Chapter III court effectively for the first time since the Federal Court and Family Court of Australia were set up soon after the last Canberra Convention³⁷. The question of a judicial code of conduct or guidelines for our expanding judiciary is on the agenda³⁸. Many practical topics crowd the stage: insurance indemnity following the collapse of HIH Insurance; professional immunity from suit³⁹; the role of lawyers as financial advisers⁴⁰; our contribution to the establishment of a new justice system for East Timor⁴¹; proposals

³⁵ *Ibid*, see also R D Nicholson, "Litigants in Person" (2001) 5 *The Judicial Review* 181; cf NSW Bar Association *Guidelines for Barristers on dealing with self-represented litigants* (2001).

³⁶ Attorney-General's Press Release, 25 July 2001, No 1017.

³⁷ *Federal Magistrates Act* 1999 (Cth). The Australian Industrial Relations Court has been set up but ceases to function save for fundamental cases.

³⁸ The *Bangalore Draft of the Code of Judicial Conduct* is contained in (2001) *Commonwealth Lawyers Journal* and will be published in the 2001 issue of the *University of Queensland Law Journal*.

³⁹ *Boland v Yates Property Corporation Pty Ltd* (2000) 74 ALJR 209 at 235 [125], 280 [360].

⁴⁰ "Financial Services Reform" in *Australian Lawyer*, September 2001, 1.

⁴¹ C McDonald, "Out of the Ashes – A new Criminal Justice System in East Timor", unpublished paper for the International Society for Reform of the Criminal Law. Canberra, 30 August 2001.

for a new code or restatement of contract law to fit the age of informatics and so on⁴². The list is virtually endless. Were the times different, we might reflect with greater enthusiasm upon them all.

But it is October 12 and we meet in the aftermath of dramatic events of September 11, 2001. That day seems to have changed much about the world, its economy, its confidence and its legal systems. What do we make of the change?

It is impossible for Australian lawyers to gather and to proceed in these next few days as if nothing has happened. It is impossible for us even to see our Constitution as if it speaks only to Australia and Australians. It speaks about us to the world⁴³. It is impossible to pretend that the comfortable topics of the legal profession have the same priority at this moment. It is necessary for us to reflect upon the times we are living through. Yet we must do so keeping our sense of proportion and viewing recent events in the context which our Constitution, our institutions, our law and our tradition of human rights demands that we remember.

⁴² E Clark, "Let's Drag Contract Law out of the Nineteenth Century", *Canberra Times*, 2 July 2001, 1.

⁴³ *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 418 [166].

A CENTURY OF TERRORISM

The last century - during which our Constitution came into force and matured - was a century of terrorism. It was not always called that. Yet from the early days - from the anarchists and communists of the turn of 1901, that was the reality.

The Great War began with an act of terrorism in 1914. The reality struck home within the British Isles in the Easter Rebellion in Dublin in 1916. Not a year of the century was free from terrorism. Mahatma Gandhi deployed a very skilful combination of peaceful resistance, sporadic violence and political showmanship ultimately to lead India, the jewel in the Crown, out of British dominion. Mohammed Ali Jinnah did the same with Pakistan. Nelson Mandela carried forward, over many decades (most of them in prison on Robben Island) his leadership of the African National Congress, modelled on that of India. For decades the ANC was called a "terrorist" organisation. What did these three leaders have in common? All were lawyers. All were gifted communicators.

Other "terrorist" movements were led by people who honed their skills on the battlefield - Mao Tse-tung, General Giap, Ho Chi Minh, Jomo Kenyatta, Colonel Boumedienne, Colonel Nasser. All around the world, as the old European empires crumbled, terrorists struck at the quarry. They also did so against the autocratic Soviet and Nazi empires and were repaid with fearsome reprisals. They did

so against the relatively benign British empire in Palestine, Kenya, Malaya, Aden, Cyprus and elsewhere. They attacked the faded glories of France in Algeria and Vietnam. The new empires that took the place of the old were themselves attacked, as in East Timor, West Irian, Chechnya, Kosovo. Terrorists mounted their separatist campaigns in Northern Ireland and Quebec. Our own region has not been spared. The successive coups in Fiji involved unconstitutional and violent means. Bougainville, the Solomons and East Timor were uncomfortably close.

Back in 1975, it was within living memory of those gathering in Canberra to recall the Cyprus campaign of General Grivas. He was a commander of no more than 250 EOKA terrorists with extreme nationalist sympathies. Those few ultimately drove 28,000 British troops from the island by destroying their political capability to wage war⁴⁴. The same was the fate of the French in Algeria. The same has not proved true of Northern Ireland. Yet whereas the "colons" constituted only 2% of the population in Algeria, the overwhelming majority of the Muslims in that country had a common interest in forcing their increasingly desperate and violent French rulers to leave⁴⁵. Eventually they succeeded. In Northern Ireland, there were always, and still are, substantial numbers in both of the

⁴⁴ A Mack, "The Utility of Terrorism" (1981) *Aust and NZ Journal of Criminology* (14), 197 at 201.

⁴⁵ Mack, above n 42, 203.

divided communities who found continuing connection with the United Kingdom acceptable and terrorism unacceptable⁴⁶.

Why did the Red Brigades in Italy and the Baader-Meinhof faction in Germany fail to undermine liberal democracies when other terrorist groups succeed? Are there any lessons for the law in the way different societies have tackled terrorism? Are there lessons for us in Australia as we properly address our own security after September 11?

The story of Uruguay is particularly instructive. Before 1974, it was one of the few longstanding, stable constitutional democracies of South America. It had adopted a new and stronger constitution in 1967. This document incorporated rule of law and human rights principles that were impeccable. But then Uruguay suffered a serious economic downturn that threatened its welfare laws. On top of this it had to grapple with the challenge of a small determined band of terrorists known as the Tupamaros.

The Tupamaros resorted to indiscriminate acts of violence and cruelty that shook Uruguayan society. The citizens, and especially the military, began to look around them. Coups had occurred in

⁴⁶ *Ibid*, 207.

Brazil in 1964, in the Dominican Republic in 1965, in Chile in 1973. In Uruguay, in 1974, the military, police and their supporters struck.

After the coup, one by one, the constitutional guarantees were dismantled. More than 5,000 civilians in a country of fewer than 3 million inhabitants were incarcerated for very long prison terms for having committed purely political offences. Other detainees were kept incommunicado. *Habeas corpus* was gradually withdrawn. Immunity was granted to officials against an ever broader range of invisible illegal acts. The country that had been known as the "Switzerland of Latin America"⁴⁷ fell into a period of escalating lawlessness. At first, the strong tactics had much public support out of fear of the Tupamaros. But increasingly unaccountable power bred oppression. True, the Tupamaros were defeated. But it took fourteen years and enormous struggle to return Uruguay to constitutionalism⁴⁸. Even then there had to be amnesties for the military, police and other officials. And a deep scar was left on the body politic.

Australia has had nothing like the threats of terrorism in Cyprus, Algeria, Northern Ireland or Uruguay. Naturally, everyone wants to keep it that way. It is true that at the Commonwealth

⁴⁷ *Ibid*, 223.

⁴⁸ R K Goldman, "Uruguay: Amnesty Law in Violation of Human Rights Convention", *ICJ The Review*, No 49, 1992, 37 at 38.

Heads of Government Conference in Sydney in February 1978 a bomb incident occurred and three people were killed. This led to what one analyst called "[a] synthetic panic which gripped the government (and was exploited by the media)"⁴⁹. Leading officials "accepted without question the assumption that there was a real and present [terrorist] threat in Australia"⁵⁰.

That bombing led to inquiries⁵¹ and legislation⁵². Justice Hope, the Royal Commissioner, found that there was little evidence that Australia's security organisations had the qualities of mind necessary for what he called the "skilled and subtle task" of intelligence assessment⁵³. This was unsurprising. Earlier inquiries into the special branch files of police in New South Wales and South Australia - the latter conducted by Justice Michael White⁵⁴ - found ludicrous biases in the identification of the supposed threats to security. According to Justice White, all State Labor leaders automatically became the subjects of index cards as suspected

⁴⁹ R Hall, *The Secret State* (1978), 115.

⁵⁰ Sir Robert Mark (Commissioner of Australian Federal Police) quoted Hall, 118.

⁵¹ R M Hope (Royal Commissioner) *Protective Security Review* (AGPS, 1979).

⁵² *Australian Security Intelligence Organisation Act* 1979 (Cth).

⁵³ Mack, above n 43, 220 quoting the *Protective Security Review*.

⁵⁴ M White (Commissioner), *Special Branch Security Records* (1977), 33.

"subversives". As he put it, "Like the Maginot Line all defences against anticipated subversion, real or imagined, were built on one side"⁵⁵. This reflected, in the antipodes, the preoccupations of the FBI in the United States where the ratio of files on left versus right-wing organisations was a hundred to one⁵⁶. The Police Commissioner of South Australia defined subversion as "... a deliberate attempt to weaken public confidence in the government"⁵⁷. Which is exactly what, in a constitutional democracy, Opposition parties are supposed to do, do all the time and will be doing in Australia with rare abandon in coming weeks.

So if we ask why did terrorism succeed in Cyprus and Algeria but had only limited success in Ulster and Quebec and failed abysmally in Italy, America (and to the extent that it has occurred) Australia, the answers are complex. But they are there to be found. The most important is that those societies that have succeeded best against terrorism that have refused to play into the terrorists' hands. They have rejected the terrorist paradigm. As the Rand Corporation's analyst, Brian Jenkins has pointed out "Terrorists want a lot of people watching and a lot of people listening and not a lot of

⁵⁵ *Ibid*, 52.

⁵⁶ *Ibid*, 52.

⁵⁷ Quoted *ibid*, 107

people dead"⁵⁸. They want publicity, the last thing that most perpetrators of non-political violence seek. They form a symbiotic relationship with media. They create media events. Kidnapping, hijacking and suicide bombs introduce elements of high tension, as does indiscriminate brutality⁵⁹.

Free societies must, do and will cover such events in their media - which is itself now particularly adapted to vivid images and to sites of death and suffering. But keeping such visual horror in perspective is an important clue to defeating terrorists at their game. So is keeping one's sense of balance and priority. So is analysing the reasons, that may lie behind some the acts of terror, to see if some of them reflect understandable grievances that need to be addressed.

According to Justice Hope's review, between 1968 and 1977 1652 deaths could be attributed to international terrorism⁶⁰. Such losses, appalling though they are (and worse still when they are multiplied), pale into insignificance beside other global causes of death and suffering. The 20 million dead from HIV/AIDS. Dead to

⁵⁸ B Jenkins, *International Terrorism: A New Mode of Conflict* (1975), 3. See also "Is There an Effective Democratic Deterrent to Terrorism?" (1996) *The Parliamentarian*, 325.

⁵⁹ Mack, above n 44, 217.

⁶⁰ Hope, above n 51, 9.

the general indifference of humanity. The millions dying, mostly in developing countries, from nicotine addiction and its consequences. From malaria. From lack of water and food. Millions dead in State-run wars. Millions in refugee camps. Anonymous dead and living. Few vivid images. Boring reality. No media interest. No news. Relatively little political appeal. Victims of compassion fatigue.⁶¹

The countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law.

INTERNAL SECURITY

Exactly fifty years ago, the Australian Constitution received what was probably its most severe test in peacetime. The enemy then was viewed as a kind of global terrorist and widely hated throughout the land. His ideas were subversive, methods threatening and goals alarming. I refer to the communists. Of course, the communists did not fly commercial aircraft into targets in crowded cities. But they did indoctrinate their young. They had many fanatical adherents. They divided the world. They were

⁶¹ S.D. Moeller *Compassion Fatigue* (1999)

sometimes ruthless and murderous. They had a global network. They opposed our form of society.

Out of fear, Governments around the world rushed to introduce legislation to increase powers of surveillance, restrictions on democracy and deprivations of civil rights. In South Africa, the *Suppression of Communism Act* 1950 became, before long, the mainstay of the deteriorating legal regime that underpinned apartheid and brought forth Nelson Mandela and the ANC "terrorists". In Malaya, Singapore and elsewhere, the colonial masters introduced the *Internal Security Acts* which is what the South African Act was later called. Sadly, many of those statutes remain in place, post-independence, to oppress dissident opinion.

In the United States of America, the *Smith Act* was passed by the Congress to permit the criminal prosecution of members of the Communist Party for teaching and advocating the overthrow and destruction of the government.⁶² The law was challenged in the courts of the United States. The petitioners invoked the First Amendment guarantees of freedom of expression and assembly. But in 1950 in *Dennis v United States*⁶³, the Supreme Court, by majority,

⁶² 54 Stat 671; 18 USC (1946 ed) paragraph 11

⁶³ 341 US 341 US 494 (1950).

upheld the *Smith Act*. They held there was a "sufficient danger to warrant the application of the statute ... on the merits"⁶⁴.

Dissenting, Justice Black drew the line between overt acts designed to overthrow the government and punishing what people thought and wrote and said⁶⁵. Those things, he held, were beyond the power of Congress. Also dissenting, Justice Douglas acknowledged the "popular appeal" of the legislation⁶⁶. But he pointed out that the Communist Party was of little consequence in America⁶⁷:

"Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or State which the Communists could carry. Communism in the world scene is no bogeyman; but communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution ... would have any success. In days of trouble and confusion, when breadlines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today, there are no such conditions. The country is not in despair; people know Soviet communism; the doctrine of Soviet revolution is

⁶⁴ *Ibid* at 511 per Vinson CJ for the Court.

⁶⁵ *Ibid*, 579.

⁶⁶ *Ibid*, 581.

⁶⁷ *Ibid*, 588.

exposed in all of its ugliness and the American people want none of it".

A few months after *Dennis* was decided a similar challenge came before our High Court. There was no First Amendment. There was no established jurisprudence on guaranteed free expression and assembly. Most of the judges had had no political experience. Most of them were commercial lawyers whose professional lives had been spent wearing black robes and a strange head adornment. An Australian contingent was fighting communists in Korea⁶⁸, the federal government had a mandate for its law. Most Australians saw communists as the bogey-man - indeed their doctrine of world revolution and the dictatorship of proletariat was widely viewed as a kind of political terrorism.

Chief Justice Latham, like his counterpart in the United States, upheld the validity of the Australian law. He quoted Cromwell's warning: "Being comes before well-being"⁶⁹. He said that his opinion would be the same if the Parliament had legislated against

⁶⁸ M D Kirby, "H V Evatt, the Anti-Communist Referendum and Liberty in Australia" [1992] 66(12) *Australian Bar Review* 93 at 95.

⁶⁹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 141.

Nazism or Fascism. But the rest of the Court rejected the law⁷⁰.

Justice Dixon pointed out that⁷¹:

"History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power ... [T]he power to legislate for the protection of an existing form of government ought not to be ... only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them in the form of government they defend".

So far as Dixon was concerned it was for the courts to ensure that suppression of freedoms could only be done within the law. The Constitution afforded ample powers to deal with overt acts of subversion. Responding to a hated political idea and propagation of that idea was not enough for validity of the law.

Given the chance to vote on the proposal to change the Constitution, the people of Australia, fifty years ago on September 22, refused. When the issues were explained, they rejected the enlargement of federal powers. History accepts the wisdom of our response in Australia and the error of the over-reaction of the United States.

⁷⁰ *Ibid*, 143.

⁷¹ *Ibid*, at 187-188

Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. We should not forget these lessons. In the United States, even in dark times, the lessons of *Dennis* and of *Korematsu*⁷² need to be remembered⁷³. Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. If emergency powers are clearly required, it may be appropriate to subject them to a sunset clause – so that they expire when the clear and present danger passes⁷⁴. Always it is wise to keep our sense of reality and to remember our civic traditions, as the High Court Justices did in the *Communist Party Case* of 1951.

⁷² *Korematsu v United States* 323 US 214 (1944). In that case the majority upheld as lawful the incarceration of Japanese Americans during the Second World War.

⁷³ G Alcorn, "Civil Liberties at Risk as Fear Wins Over Freedom", *Sydney Morning Herald*, 26 September 2001, 2; J Lancaster, "Legislators balk at giving police stronger powers", *Sydney Morning Herald*, 2 October 2001, 13.

⁷⁴ In the United States, Prof B Ackerman of Yale University has proposed this, see "Sunset Can pit a Halt to Sunlight of Liberty" *L.A Times* 20 September 2001

DENOUNMENT

When the United States Supreme Court assembled on October 1st, for the first time since September 11, 2001, the Chief Justice led everyone in the courtroom in a moment of silence in remembrance of the disasters in Virginia, New York and Pennsylvania. "Our hearts go out to the families of the killed and injured", he said⁷⁵. Sitting at the Bar Table was the Solicitor-General of the United States (sometimes called the "tenth Justice") whose wife, Barbara Olsen, was a passenger in the plane that crashed into the Pentagon.

Our hearts too go out to all the American victims. To every victim of terror in every land. And to those who suffer needlessly in every way. But as lawyers, we can join in the words of Justice Sandra Day O'Connor of the United States court. Diverting from a function to launch a new Law School building in New York, she visited the ruins of the World Trade Centre and said⁷⁶:

"We wish it were not necessary. We wish we could put the clock back. But to preserve liberty, we must preserve the rule of law".

⁷⁵ In C Lane, *Washington Post*, 2 October 2001, A3.

⁷⁶ *Ibid*, Justice O'Connor quoted.

In the course of the century of the Australian Commonwealth, we, the lawyers of Australia, have made many errors. We have sometimes laughed at and belittled citizens who, appearing for themselves, fumbled and could not reach justice. We have sometimes gone along with unjust laws and procedures. We have occasionally been instruments of discrimination and it is still there in our law books. We have not done enough for law reform or legal aid. We have not cared enough for justice. We have been just too busy to repair the wrongs that we saw. Yet at critical moments in our nation's story, lawyers have upheld the best values of our pluralist democracy. In the future, we must do so more wholeheartedly. To preserve liberty, we must preserve the rule of law. The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession. It is our continuing challenge after September 11.