

DEAKIN LAW SCHOOL ORATION 2004

NATIONAL SECURITY AND HUMAN RIGHTS

PHILIP RUDDOCK*

I INTRODUCTION

My predecessor, Alfred Deakin, after whom this Oration and this University are named, became Australia's first Attorney-General in 1901. He subsequently became Prime Minister in 1903. I think it says something about Alfred Deakin that this is one of a number of lectures named in his honour. The Melbourne University Liberal Club established a lecture trust in his honour in 1967 -- their lectures continue today. In 2001, the Victorian Government held a series of lectures as part of the centenary of Federation celebrations and in 2005, there will be a further series of lectures named after Deakin dealing with innovation.

What makes Deakin the touchstone that these institutions seek to draw inspiration from? I think there are two reasons. Firstly, Deakin was a great 19th century Victorian liberal. As Harold Holt observed in 1967:

in those turbulent days when the life of the colony was raw and privilege rated high, the liberals spoke for most of the people against the entrenched representatives of the aristocracy of wealth and property...¹

* Attorney-General of the Commonwealth of Australia. The Deakin Law School Oration was held at The McInerney Lecture Theatre, Toorak Campus of Deakin University, Thursday, 19 August 2004.

As a minister in the Victorian Parliament, he sought to improve the conditions of workers in factories and was President of the anti-sweating league.

Deakin's liberalism is evident in the laws he promoted as a Commonwealth Minister such as the *Customs Act* 1901, the *Judiciary Act* 1902 and the *High Court Procedure Act* 1903. He was also a supporter of industrial arbitration, trade marks legislation, a copyright act, antitrust laws and a national defence force. Deakin's biographer, J A La Nauze observed that the Victorian liberals² 'were aimed not at the reconstruction of society, but at the creation of equality of opportunity.' It is these values which continue to resonate with the modern Liberal Party created by Sir Robert Menzies. These liberal values are as important today as they were in Deakin's time.

The second reason that Deakin is so inspiring today is that he was as a builder of legal institutions. Deakin was a passionate federalist. He was involved in the federal conventions which drew up the Constitution. Deakin strongly promoted the use of referenda to amend the Constitution. He was also part of the delegation which went to the UK to support the passage of the *Constitution Bill* in the Imperial Parliament. Encouraging Australians to vote for the Constitution, Deakin said:

[a]mong the federal constitutions of the world you will look in vain for one as broad in its popular base, as liberal in its working principles, as generous in its aim as this measure....let us stand shoulder to shoulder in defence of the enlightened liberalism of the constitution.³

When Federation had been achieved Deakin, as Attorney-General, was charged with creating the laws and policies which would give substance to it. One of his great achievements as Attorney-General was the *Judiciary Act* of 1903. The Act created the High Court which Deakin described as the 'keystone of the federal arch.' This *Judiciary Act* survives today. Although it has been amended, through both major and minor changes, the act was a vital piece of legislation which took all of his skills to shepherd through a sometimes hostile parliament. While the *Australian Constitution* provided for a High Court, it was Deakin who gave form and shape to this most important of Australian institutions.

¹ H E Holt, 'The Liberal Tradition in Australia: Alfred Deakin: His Life and Our Times,' *First Alfred Deakin Lecture*, 31 July 1967.

² J A La Nauze *Alfred Deakin* (1962) 106.

³ Alfred Deakin, Speech at Bendigo 15 March 1898, quoted in his book *The Federal Story* (1963) 178-179.

III THE MODERN ATTORNEY-GENERAL

Some 102 years after Deakin took the job, I became Commonwealth Attorney-General. I am very conscious of the honour which attaches to the position and to the many great attorneys-general who have come before me. Tom Hughes was my predecessor as member for Berowra. I also knew and worked with Sir Garfield Barwick and Sir Nigel Bowen, who were my predecessors as members for Paramatta — the seat to which I was first elected in 1973. The contribution of these men has often gone unnoticed: among other things they were responsible for creating the first federal divorce law, the first wire tapping legislation, the first federal consumer protection legislation, the trade practices tribunal, implementing the single convention on narcotic drugs, reducing appeals to the privy council, and establishing the institute of criminology.

One of my former colleagues who was Attorney-General deserves special mention — that is Bob Ellicott. Probably more than any other person he is responsible for the administrative law system we have in Australia today. Through his work as a member of the Kerr Committee, as Solicitor-General and as Attorney-General, Bob's work has changed the way Australians think about the law and their interaction with government.

It is clear that many aspects of the modern Australian legal system were set in place by Deakin and those distinguished attorneys who followed him. Today, my most visible role as Attorney-General is to protect, defend and enhance these institutions by guaranteeing the security of Australians, particularly from terrorism.

IV THE SECURITY OF AUSTRALIANS

Deakin realised the importance of security to Australia. In words which seem just as prescient today as they were in 1907, Deakin observed:

... an obligation is cast upon us to protect the territory with which we have been intrusted, and the fortunes of our kindred who share its responsibilities with us... There was a time, not long since, when it was confidently maintained that Australia was outside the area of the world's conflicts, and might regard in comparative quietude any hostile movements in other parts

of the globe. That comfortable outlook has long since passed away. No one can contend that Australia is outside that arena today.⁴

V THE CONSTITUTIONAL FRAMEWORK FOR COUNTER-TERRORISM LAWS

The *Australian Constitution*, which of course, Deakin helped to frame, has proven to be a very powerful document. It provides both safeguards and flexibility. It embodies the principles of federalism. It divides power between levels of government (the State and the Commonwealth) and between branches of government (the executive, legislature and judiciary). Despite the absence of a specific head of power to deal with 'terrorism' or 'crime', the *Australian Constitution* provides a patchwork of powers to enact various specific measures designed to protect Australia and deal with terrorism.

While the patchwork of Commonwealth powers is extensive, it is also complex. It is impossible to rule out unforeseen gaps in constitutional support for federal government action. However the fact that the Commonwealth does not have specific constitutional powers need not create a problem. The Constitution allows the Commonwealth to make laws based on constitutional referrals from the states in areas where the Commonwealth might otherwise lack power. As Deakin himself explained, a referral of power provides 'a means by which the [states] may by common agreement bring about federal action ...'

The current federal terrorism offences created by the *Criminal Code* 1995 (Cth) depend to some extent on referrals of state power. The referrals ensured, in effect, that the Commonwealth could enact comprehensive offences and amend them. The Commonwealth has entered into an agreement with the states which provides that future amendments of these offences will not be made without the approval of a majority of the states and territories.

VI OUTLINE OF AUSTRALIA COUNTER-TERRORISM LAWS

This constitutional reference of power on terrorism has been used effectively as we created a number of new offences relating to terrorism. It is now a crime to commit, train or prepare for a terrorist act. In this way, we can investigate and punish not only those who actually commit terrorist offences but also those who offer them any

⁴ Alfred Deakin, 'Defence Policy', *Commonwealth Parliamentary Debates*, Vol XLII, 13 December 1907, 7508.

form of support. It is also illegal to be a member of, or to support, any of the 17 terrorist organisations that we have so far listed.

We have developed legislation to deny terrorists access to the funds they need to carry out their attacks. But just as the threat of terrorism is not static, our counter-terrorism arrangements have been continually reviewed and updated as the need arises. For example, our terrorism offences were supplemented with a further offence after the Bali bombing. There is now an extra-territorial offence of murder to ensure that terrorists who kill Australians abroad cannot escape justice.

Similarly, the process by which Australia listed terrorist organisations was changed to better suit Australia's needs. The long drawn out process of listing Jemaah Islamiyah as a terrorist organisation after Bali highlighted the inadequacies of a listing process tied to the consolidated list of the UN Security Council. To rectify this situation, legislation was passed earlier this year to enable us to list terrorist organisations based on our national interest and security needs, without relying on the United Nations to list an organisation before we do.

The *Anti-Terrorism Act 2004* (Cth), which commenced recently, further improves our counter-terrorism arrangements. Importantly, this act creates a national solution to Bail issues for persons charged with terrorism offences, and certain other offences that are relevant to terrorist activity. The Act also provides for minimum non-parole periods for persons convicted of, and sentenced for, committing terrorism offences and certain other offences that are relevant to terrorist activity.

Australia is leading the world in implementing counter-terrorism legislation after new legislation was passed by the Parliament very recently. The passage of the *Anti-Terrorism (No.2) Act* and the *Anti-Terrorism (No.3) Act* put Australia's counter-terrorism legislative framework at the forefront of international efforts to combat terrorism by creating an offence of associating with a terrorist organisation. I understand similar legislation is being considered by the governments of the United Kingdom and the United States.

VII ASIO POWERS

In addition to new offences, we have also given increased intelligence-gathering powers to ASIO. Information gathered under these powers can be used to prevent an attack, or inform police of lines of inquiry that they may wish to follow in the investigation of offences. The government increased ASIO's powers to question, and detain while questioning, people involved in, or who may have important information about, terrorist activity.

Under the Act, the Director-General of ASIO must obtain a warrant to authorise the questioning of a person from a federal judge or magistrate. The maximum continuous period for which any person may be detained under a warrant is seven days.

These intelligence-gathering powers are an important addition to our counter-terrorism capabilities but they are also balanced by significant safeguards. They protect Australians right to life, liberty and security without offending any other rights.

As the High Commissioner for Human Rights, Louise Arbour noted only last month when addressing the 81st session of the Human Rights Committee: 'respect for human rights and human security are inextricably linked.'⁵ Referring to a recent judgment of the Supreme Court of Canada in which she had participated, she said:

we concluded that the successful protection of citizens and the successful protection of their rights are not only compatible with each other but are, indeed, interdependent. There can be no genuine personal security if rights are in peril, any more than legal guarantees can exist in an environment of fear and anarchy.⁶

VIII CONCLUSION

All of the national security measures and associated safeguards i have mentioned protect the system of government that Deakin and other framers of the *Australian Constitution* set in place more than one hundred years ago. Deakin and his colleagues did their job well. It is a robust system designed to evolve and to adapt to change and also to withstand all the challenges that can be thrown at it.

It was Deakin's role to create such a system to stand the tests of time. And it is my role, inherited from Deakin, and those who came after, to stand guard over this system and gently shepherd it into the future. And just as Deakin and his colleagues were able to protect it from the many challenges of federation, it is my hope that I, together with other members of the government, can protect the Australian system of government from terrorism and whatever other challenges that are presented by the 21st century.

⁵ Louise Arbour, 'Address of the High Commissioner for Human Rights to the 81st Session of the Human Rights Committee, July 2004, available at: <<http://www.unhcr.hurricane/hurricane.nsf/view01>> accessed 17 November 2004.

⁶ *Ibid.*