

Thank you for the opportunity to join you today and permitting me to ask some fundamental questions about our laws.

One must, I suggest, begin by asking what is the role of law? In earlier times, the answer seemed obvious: it was to maintain order and flagellate evildoers. The common law of England was strongly influenced by Christianity. St Paul had described the secular authorities as God's agents of punishment and the early writings on the common law all had a strong religious flavour. The famous English judge, Lord Eldon, actually proclaimed that Christianity was part of the law of England, though not everyone would have warmed to his conception of Christianity. He opposed laws that abolished slavery, closed the debtors' prisons, and permitted Roman Catholics to vote. He reportedly wept in court when informed that the death penalty would no longer be available for petty larceny. Lord Birkenhead observed that his Lordship had thought that 'an ordered universe was shivering into fragments'.

The blessings of this religious influence were not always apparent to litigants. Early English legal procedures were often brutal and unfair. Courts relied upon divine intervention to arrive at the truth. Wealthy or noble born litigants would be permitted to call upon their peers to swear that their cause was just. It was assumed that they would not risk God's punishment for perjury. Others were not so lucky.

The alternative was proof by ordeal, which was based on the expectation that God would reveal the truth in a more tangible manner. There were various forms of ordeal. One form required the litigant to hold a red-hot iron or plunge his hand into boiling water. If his hand had not festered within three days, it was assumed that God had intervened to declare him innocent. It is not clear whether screaming was regarded as an admission of guilt. Another form was the cold-water ordeal. This involved binding the accused person and throwing him into a river or pond. If he floated, he was presumed guilty and could be executed; if he had the good fortune to sink, however, it would be presumed that God had declared him innocent. Of course, he may have drowned being vindicated. A good man was a dead man, as a medieval feminist might have said, thought was mainly women who died when this practice was subsequently revived during the witch-hunts that swept through Europe.

The Norman innovation of trial by battle offered a defendant the tantalising prospect of surviving. All he had to do was kill or maim his adversary, or keep fighting until the stars came out. This form of dispute resolution was based on the belief that God would strengthen the arm of the righteous. Such piety was not for the squeamish. The record of one contest in the 12th century reveals that a knight who had been beaten to the ground was able to recover and demonstrate the justice of his cause by tearing off his opponent's testicles. The attending clergy may have found this robust example of divine intervention spiritually uplifting, but they mercifully declined to incorporate such a rite into their regular Anglican liturgies. Women were permitted to have champions, though if a distressed damsel wanted to beat up a male opponent herself, gender equity would be ensured by requiring him to fight with one arm tied behind his back and buried to his waist in a pit.

Of course, the good times couldn't last. Trial by jury emerged as the preferred system of justice. Some defendants refused to cooperate by pleading guilty or not guilty and such obduracy led to the introduction of the *peine forte et dure*, a procedure which involved piling large rocks onto a defendant's body until he changed his mind. This too was

defended on religious grounds. A report in 1322 noted that even if the defendant were pressed to death, this would be 'healthy for the soul provided he bore it with resignation'.

Fortunately, western societies gradually stopped drowning defendants, skewering them with broadswords, or squashing them with rocks and, whilst the law was still concerned with the maintenance of order, its role was gradually extended to the protection of individual rights and freedoms.

was increasingly seen as the protection of lives and property and this

As early as 1215, the Magna Carta had recorded King John's reluctant proclamation: 'To no one will we sell, to no one will we deny or delay right or justice.' More than five centuries later the American Declaration of Independence famously affirmed that all men are created equal and are are endowed by their Creator with certain inalienable rights, including life, liberty and the pursuit of happiness. The American Bill of Rights was enacted in 1789 and the French Declaration of the Rights of Man and of the Citizen followed in 1793.

Of course, these affirmations were applied selectively. Not everyone was keen to acknowledge that the creator had bestowed equal rights on women or slaves. Yet the underlying principles were sound and for more than 200 years western democracies generally embraced them, not as mere left wing aspirations but as indispensable incidents of free and democratic societies. Nor were they seen as luxuries to be jettisoned when danger threatened. In fact, the Universal Declaration of Human Rights in 1948 reflected the world's reaction to the Holocaust, and an international consensus that no one should ever again be denied basic human rights.

Some of these rights are now being eroded. The principal culprits have been politicians beating the law and order drum. They tell us that they will be 'tough on crime', as though this is a new concept rather than one that they have been harping on for years. They imply that past tolerance or weakness has been responsible for all of society's present problems, and have little patience for any suggestion that these problems involve profoundly difficult issues, or that toughness may not be a panacea for all ills.

They are aided and abetted by journalists who paint verbal pictures of a simplistic world in which the only questions that need to be asked is why criminals are not promptly arrested and imprisoned. Any 'shock jock' with an eye for the ratings can tell you what is wrong. It's all the fault of the bleeding hearts: the people who raise tedious quibbles about civil liberties, oppose mandatory sentencing, object to children being locked up when they deserve it and think mental illness should be an excuse. Zero tolerance is the answer: lock them up and throw away the key. If that doesn't work, there is always the death penalty. How can you expect to have a civilised society if you don't kill people?

The rhetoric has been shallow and misleading; despite public perceptions to the contrary, crime rates have generally been falling and sentences increasing; but it has struck responsive chords in an increasingly fearful and vengeful public, especially since the attack on the World Trade centre in September 2001. We have constantly been told that we now live in a new world and that old standards can no longer be sustained.

Of course, the horror of terrorist attacks is inescapable. It is revealed with excruciating clarity by television coverage that seemingly transports the bloodied bodies of the slain and the shocked anguish of the survivors into our own living rooms. We no longer have the emotional insulation of learning of these things only through the written word. We can see the blood on the pavement and the smoke in the air. We can hear the screams of the

wounded and watch them writhing on the ground. We are confronted by the agony of parents vainly trying to make some sense of the death of their children. The carnage has intruded into our lives, and horror and fear have become part of our own reality.

America responded by substantially abandoning many of the principles that they had previously insisted would be defended in the last foxhole. All people were no longer endowed by the Creator with rights to liberty; the theology of the Declaration of Independence had been supplanted by the neo-conservative heresy that the Creator had only bestowed such rights upon Americans, and even they were not inalienable. Arrest without charge, imprisonment without trial, cruel and degrading treatment, and the attempted creation of a law-free zone at Guantanamo bay, all became part of the new regime. A nation that had long been a beacon of hope to those seeking freedom had decided that people should be confined in a concentration camp for years without charge; it was sufficient that an unknown official thought that they may have done something wrong, even if unable to articulate what it might have been.

America still rationalises the substantial abandonment of its founding principles by the contention that it is actually at war with al-Qaeda, the Taliban, and 'associated forces'. Hence any whom it classifies as 'enemy combatants' may be held indefinitely without trial until the 'war' has ended. This sophistry has not been dispelled by the Obama Administration. In early 2009 Obama's nominees for the positions of attorney-general and solicitor-general both agreed that if someone captured in the Philippines was suspected of financing al-Qaeda, that person would be considered "part of the battlefield". In other words, anyone anywhere in the world may be arrested on mere suspicion and kept in prison indefinitely, perhaps until they die. While they might now be treated more humanely, they should not expect a fair trial or, indeed, any trial.

Nor was this moral abdication confined to America. The Howard government almost fell over its collective feet in the rush to support the decision to keep two of our citizens at Guantanamo Bay. We were told that it was too dangerous to permit them to be brought before a normal court. President Bush described David Hicks as amongst the worst of the worst. Yet when finally charged, the offence to which he was asked to plead guilty was limited, in essence, to training with al-Qaeda, carrying out surveillance, being issued with weapons, guarding a tank, and spending two hours on the front line before fleeing.

An earlier generation had reacted quite differently when, at the end of World War II, it emerged that at least six million men, women, and children had been brutally murdered in the Holocaust. There were no flat-screen television sets to convey the carnage into western lounge rooms in living colour, but our grandparents watched graphic newsreel footage of skeletal remains being bulldozed into mass graves. Even after a global war, the magnitude of this horror was unimaginable. Yet still America and her allies adhered to their principles, and insisted that Nazi war criminals be given fair trials in open court. And when Adolf Eichmann was charged in Israel with offences involving the transportation of millions of Jews to the gas chambers, a Jewish state gave him a fair trial which started within 11 months of his arrest and was broadcast live. Did anyone really believe that people like Hicks were more dangerous than the Nazi war criminals? Or did we simply lack the moral courage of earlier generations?

The threat of terrorism has now become a toe in the door for unrelated incursions into accepted rights. For example, America insisted that it was responding to terrorism when it introduced 'delayed notice' warrants requiring accountants and other third parties to

produce records without informing the owners that this had occurred until certain periods had elapsed. Yet in 2008 it issued 763 such warrants; 3 related to terrorism investigations.

Our laws have also been influenced by the perception that our safety can only be ensured by drastic measures. Many Australians might be surprised to learn that people may be held in custody without being suspected of any crime, and even more surprised to learn that members of their family may be sent to prison for mentioning the detention. Suppose, for example, that a mother is informed that her teenage daughter is being held under a preventative-detention order to 'preserve evidence'. The mother is permitted to tell the teenager's father only that she is safe but unable to be contacted for the time being. The father explodes, 'What? You mean she has been kidnapped?' She dutifully repeats the permitted formula, but this fails to reassure him and, as he is about to storm out the door in panic, she reveals the truth without pausing to consult a police officer. In that event, she has committed an offence punishable by five years imprisonment.

Some state governments have also introduced draconian laws unrelated to terrorism. The South Australian attorney-general may now make declarations effectively banning particular organisations, if satisfied that their members associate for the purpose of serious criminal activity and that the organisations present a risk to public safety and order. The attorney-general must act on the advice of the police commissioner but is not required to provide any reasons. There is no provision for a declaration to be disallowed by parliament, and its legality may not be reviewed in any court. These laws are said to be aimed at 'bikie' gangs, but the Act does not mention them. Declarations can be made against any organisation. If the attorney-general is misled or abuses the power by, say, banning an organisation that has been critical of police corruption, those affected will have no legal redress. Other states have since rushed to introduce somewhat similar legislation.

Late last year the Western Australian government announced that police will be given new powers to stop and search people and vehicles in declared areas, even if not reasonably suspected of any wrongdoing. Why? Why should people be harassed in the absence of even a reasonable suspicion that they are doing something wrong? Western Australia also has mandatory detention laws that apply to children as young as ten. A child who has been found guilty of burglary for a second time must be incarcerated for at least a year, even if emotionally disturbed or fleeing from sexual abuse. Is this still part of Australia?

The Victorian government announced in March this year that it will reverse the onus of proof when people are charged with possession of a knife and given an on-the-spot fine. The premier said that those found carrying knives would be presumed 'guilty until proven innocent'. Why? Are chefs, scouts and others, like my dear old father, who simply like to have a penknife on hand, deemed so subversive that they must be denied the presumption of innocence that extends to rapists and serial killers? The suggestion that reversal of the onus of proof is necessary to permit the operation of such laws is nonsense and the proposal sets a disturbing precedent. Are we to see other laws based upon the presumption that we are all guilty until we prove our innocence?

There has also been a trend towards permitting reliance upon 'criminal intelligence', which is a euphemism for opinions based upon undisclosed material that may be highly unreliable. In some cases people may have their liberty curtailed by control orders without even knowing what they are supposed to have done. An Adelaide restaurateur has recently been denied a liquor licence on the ground of criminal intelligence even though the Solicitor-General admitted that this can include "all kinds of rumour and innuendo". It

may now be dangerous to antagonise a cranky or mentally unbalanced neighbour who might be moved to make an anonymous phone call about you.

Some current policies have actually made things worse. Terrorism is fuelled not only by religious extremism but also by notions of honour and revenge and our recent strategies almost seem to have been devised with a view to radicalising as many hot-headed young Muslims as possible. In particular, the denial of human rights at Abu Ghraib and Guantánamo Bay continue to provide al-Qaeda with vivid footage for videos and other visual media that is bound to outrage the intended audience. As Sir John Major, the former conservative Prime Minister of England has warned, "if our own standards fail it will serve to recruit terrorists more effectively than their own propaganda could ever hope to."

Even long standing
~~Other~~ policies have needlessly endangered lives. Perhaps the most obvious example is the so-called war on drugs. Whilst illegal drugs are obviously dangerous, this social problem should be seen in the context of others. In 2000, the American Medical Association estimated that illegal drugs were collectively responsible for the deaths of 17,000 Americans each year. In contrast, tobacco killed 435,000, poor diet and physical inactivity killed 365,000 and alcohol 85,000. Incidents involving firearms killed another 29,000 and what were coyly described as 'sexual behaviours' killed 20,000. Yet our American friends remain addicted to guns and even the religious right has not yet called for a war on sex. The latest Australian figures reveal a somewhat similar picture. In 2004-2005, 14,901 Australians were killed by tobacco but only 872 by illegal drugs.

Of course, illegal drugs nonetheless cause immense human suffering. However, the draconian policies pursued by western governments for the last four decades have not only proven substantially ineffective but tragically counterproductive.. New offences have been created, penalties have been massively increased, law-enforcement bodies have been given new powers, and hundreds of thousands of people have been arrested and sent to prison. Politicians and senior officials have constantly told us that they are winning the war, that the flow of drugs into our countries is being stemmed by the rigorous enforcement of the law, and that sooner or later the problem will be wholly overcome. I wish I could believe them. I wish I could believe that narcotics and other dangerous drugs will one day be driven out of our lands like St Patrick is said to have driven the snakes out of Ireland. I wish I could believe that drug dealers will follow the dodo into extinction and that I will never have to attend any more funerals for young people who were little more than children when their lives ended in misery and squalor.

Who knows? Perhaps such a utopian day will dawn in some future age when new technology provides new investigative tools or introduces such wonders that drugs lose their attraction. But in the world we currently inhabit, these claims are false. They can only be attributable to ignorance, blind faith, an obdurate refusal to acknowledge the truth, or political opportunism. The more strident proponents of these claims strive to support them by dramatic announcements about the seizures of drugs and occasional shortages. This is supposed to prove that the tide of drugs is being driven back. In reality, it is like a modern-day re-enactment of the legend of King Canute ordering the incoming tide to turn back. The backwash of waves from the surf may momentarily encourage optimistic children to believe that their sandcastles are safe, but they do not show that the tide is actually receding. Nor, overall, is the flow of drugs.

The truth is that we have not even managed to keep drugs out of prisons. I first became aware of this in 1974 when, as a young counsel, I represented some prison officers at an

inquiry. My clients claimed that fully 20 per cent of prisoners were using drugs in prison, and the authorities were prepared to concede that 10 per cent were doing so. The schemes for smuggling drugs were quite sophisticated even then. One involved LSD microdots impressed into the pages of library books in the lace of full stops. That was 36 years ago. Now drugs are so prevalent in many prisons that previously non-dependent prisoners may become addicts during their sentences.

All this is counter-intuitive. We expect the stringent enforcement of laws prohibiting the importation, sale, or even possession of drugs to lead to fewer people using them. If this is failing, we may assume that this must be because the police have insufficient resources or because sentences are inadequate. It is shocking to imagine that the drug trade may defy all efforts to suppress it, even when billions of dollars are spent on drug-law enforcement, police have unprecedented powers, and maximum penalties of life imprisonment may be imposed for some offences.

Yet, the number of drug users has simply exploded and, despite occasional seizures, drugs are so plentiful that the prices have plummeted. In real terms, cocaine now costs about one-sixth of what it did in 1980 and heroin costs about one-tenth. Does the solution lie in greater stringency? Well America now has 2.4 million people in prison, the vast majority for offences related to drugs. More live in American gaols than some states like West Virginia or, for that matter, Western Australia. How much more stringent could they be? Yet countries like America and Australia that have waged the war most fiercely tend to have the highest rates of drug usage. The disturbing truth is that we seem to have been making the problem worse rather than better.

There is a critical need for new approaches and that should start with a fundamental shift in perception. Drug usage needs to be seen for what it is; a public health problem. The goal should be to save as many lives as possible. The single minded reliance upon the criminal law seems to be based upon at least two fantasies.

The first is that the legal policies send important messages to potential drug users that this reduces the overall level of consumption. We are presumably asked to believe that teenagers constantly respond to the offer of joints by saying, "No. I am sure that our laws reflect wise decisions by our political leaders to ban the bad drugs and permit the safe ones, like ...er ... tobacco and alcohol." The message actually conveyed is that drugs are 'forbidden fruit'. Whilst some young people use drugs as an anodyne for their emotional pain, most try them because it is "cool". Why? Because they are forbidden. Earlier generations of children showed how cool they were by smoking cigarettes behind the school toilets; today's children do so by taking drugs in defiance of the threatened criminal sanctions.

A further factor is that the structure of the illegal market exerts a seductive influence. Few addicts can fund their drug usage by legal means. Some rely on property crimes or prostitution but many ultimately resort to selling drugs to others. Their dealers are unlikely to offer them a list of established clients; so they are forced to find clients of their own and set out to persuade others to sample their wares. And young people tend to assume that, unlike middle aged conservatives in suits, these people, who use drugs themselves, know what they are talking about. The pyramid selling scheme so created and the perception that drug usage is cool together increase the allure. Illegal drug dealers also target children. An American study found that by 2003, fully 14 per cent of those being admitted to drug-abuse treatment facilities had first used drugs when 12 years old or even younger.

The illegal nature of the market also creates added dangers. There is the risk of overdose due to variation in potency and additives intended to increase the apparent quantities. Then there are the dangers generated by the diversion of a vast flow of money into criminal coffers. The Americans made the same mistake in the prohibition era and it led to the rise of famous criminals like Al Capone and unprecedented levels of civil violence. The war on drugs has been even more catastrophic. Violence has erupted on a global scale with many thousands being murdered every year. And now we have the new threat of what has been described as narcoterrorism. Terrorist groups have increasingly become involved in drug trafficking, in some places training criminal gangs to fight police and in other places effectively licensing illegal crops. The Taliban take US\$100 million from the annual opium crop in Afghanistan alone. Vast sums are spent on weapons. We may one day even face the chilling spectre of an organisation like Al Qaida acquiring weapons of mass destruction if the world does not act decisively to cut off the flow of drug money.

The benefits of prohibition are few. Imprisonment rarely has the therapeutic effect sometimes claimed by naive defenders of the status quo and more often leads to young people being brutalised or even sexually abused. It is true that some success has been achieved by courts using the "carrot and stick approach" whereby a drug dependent offender is given an opportunity to attend a full time residential course of rehabilitation whilst the threat of imprisonment hangs over his or her head like the sword of Damocles but I do not believe that the casualties of the war on drugs can be justified even on this basis.

The second fantasy is that decriminalisation would unleash hordes of potential drug users who have remained abstinent but are champing at the bit waiting to legally experiment with drugs. No one claims to have actually met such a person and when Portugal decriminalised the use of all drugs in 2001 these mythical people did not emerge.

There is, I suggest, a desperate for fresh approaches. In the long run the best strategy would be licensing and control of currently illegal drugs and addressing usage rates with the much same strategies we use in dealing with tobacco usage. Those strategies have been reducing cigarette smoking whilst our reliance upon the criminal law has been substantially ineffective in containing, let alone reducing, the use of of illegal drugs.

All of the dire predictions made in Australia whenever such a fundamental change is mooted were made in Europe prior to decriminalisation in Portugal, but a study of the first seven years of that approach revealed that none of the nightmare scenarios had occurred. On the contrary, the number of people receiving treatment for drug dependency increased dramatically, the number of new cases of drug-related HIV infection and AIDS declined, the incidence of hepatitis B and C infections was reduced, and there was a very substantial reduction in the number of drug-related deaths. The courage of the Portuguese authorities have saved many of their young people, though the drugs are still drawn from illegal dealing and large sums of money still flow into criminal coffers. Licensing and regulation could avoid that problem, ensure purity, restrict sales to children and have users consulting health professionals rather than criminals.

Sadly, our main political parties in Australia remain in thrall to the disastrous policies of our American allies and we are unlikely to embrace even the Portuguese approach in the immediate future. Progress has been made only when pioneered by others.

The first needle exchange program in Australia was introduced in 1986 only when medical staff at St Vincent's Hospital in Sydney were moved to break the law after government approval was repeatedly withheld. Within months, there were government-run programs in

all Australian states and a report commissioned by the Commonwealth Department of Health has estimated that by this year these programs will have saved the lives of more than 4,500 people who would otherwise have died from AIDS and hepatitis C. Incidentally, the programs cost less than \$150 million and in the long run saved more than \$7 billion.

The first medically supervised injecting centre was opened in 1999, a year in which 1,116 young Australians died from heroin overdoses. This again occurred only when concerned people felt obliged to break the law. The current centre in Sydney has been a resounding success. In the first six years it managed 2,106 overdose-related events. Many young people would have died had the overdoses occurred elsewhere, but in fact all survived. Medical care and advice was also provided and drug users were referred to other services for treatment, including drug rehabilitation, on 6,243 occasions. At least 28 other rigorous studies have also shown that such facilities have reduced overdoses and produced other health benefits, including increased uptake of detoxification and treatment programs, without leading to increases in drug-related crime or rates of relapse.

The NSW government has at last agreed to the permanent retention of this facility. Yet there is still opposition. Why? The most common response is that 'it sends the wrong message to our young people.' In reality, of course, adolescents offered their first taste of forbidden narcotic fruit are not deterred by the absence of adequate public-health programs. And one must ask how many young people should be allowed to die for the sake of an imaginary message?

Of course, the ranks of the mourners are unlikely to approach the countless thousands who mourn those killed by tobacco and alcohol, but their pain will be no less acute. We cannot spare all of them their suffering, but we could take an unflinching look at what could be done to alleviate the dangers. We could abandon the sterile rhetoric that has characterised the last four decades and try to minimise the harm that is being caused day by day in every corner of the world. And we could recognise a moral responsibility to care for the vulnerable, even if endangered by their own foolishness or misjudgment.

Sadly, our laws do not always protect people and
In ~~short~~, the rights of ordinary Australians are being progressively eroded by politicians who sometimes seem unable to understand that our laws apply to everyone and that provisions intended to undermine the rights of those thought to be criminals will also undermine our rights and those of our children. And, since Australians have no entrenched bill of rights, courts may be powerless to avoid unintended injustice.

Our children and our grandchildren will inherit their places in societies that are shaped by the decisions we now make. I am sure that they, like us, will want to feel safe, but they will also want to enjoy the rights and privileges that should be their birthright. They may look back to us with pride and gratitude, or wince at our cowardice in the face of danger, and begin a long struggle to regain what we were too frightened to defend.

It may require courage to be the voice of reason in the face of vehement demands for drastic action but, in the long run, it will be those who stand against the tide and insist on adherence to our values and principles who will do the most to ensure that future generations are able to grow up in free, open, and tolerant societies.