Future directions

By Anna Katzmann SC

It is a great honour to be elected to the position of president of the NSW Bar. As *The Daily Telegraph* recognised in an editorial last year, the common depiction of lawyers as 'rapacious, self-interested and parasitical' is a stereotype far removed from the reality. 'In truth', as the editorial noted, 'the majority of the profession's members are people of decency and integrity, people genuinely interested in real justice'.[1]

That editorial appeared on the day of the launch of the Fair Go for Injured People campaign spearheaded by the former president, Michael Slattery QC. It was a real privilege to serve in a Bar Council led by Michael. His enthusiasm was infectious, his drive and optimism remarkable, his leadership outstanding. He will certainly be a hard act to follow.

Securing our freedom

Michael was first elected president in November 2005. That was at the time of the debate about the Commonwealth's Anti-Terrorism Bill (No 2) which set up a regime of control and preventative detention orders. 15 December this year marks the second anniversary of the introduction of that legislation which was enacted in much the same form,[2] not only in the Commonwealth, but also in all states and territories. Now that the dust has settled, it is time to revisit the question whether these laws are unnecessary and/or go too far. Control orders have an alarming impact on human rights. They may limit or prevent a citizen's freedom of movement and freedom to communicate for no offence. They facilitate indefinite detention of the kind practised by the military junta in Burma and to which Aung San Sui Kyi has been subjected for years. Preventative detention by definition involves detaining a person who has not committed an offence, a concept, until relatively recently, no modern democracy would countenance. Under the Australian regime, neither the fact, nor the period of detention may be disclosed and communications between the detainee and his or her lawyer are monitored by the Federal Police. Judges are given administrative roles but there is no right to be heard before a preventative detention order is made. Nor is there a facility for unlimited merits review. The AAT has jurisdiction to review certain but not all orders and then, only after the orders have expired.

Many of the provisions of this legislation offend numerous articles of the International Covenant on Civil and Political Rights which Australia ratified. Of course, as the High Court has pointed out more than once, the ratification by the executive branch of government of an international treaty has no direct effect on domestic law unless and until specific legislation is enacted implementing the treaty obligation.[3] Only in the ACT are the powers, there called 'extraordinary temporary powers', tempered by human rights safeguards. The ACT Act emphasises that counter-terrorism measures should be consistent with international human rights obligations. It also excludes children under 18 from the preventative detention provisions. In NSW there are no such protections. Of course, the ACT has a Human Rights Act. NSW does not.

If the purpose of the so-called war against terror is to protect our democratic institutions and our way of life, then we are in grave danger of throwing out the baby with the bathwater. Specific legislation that recognises the rights we grew up thinking were universal may go some way to restoring the right balance between securing our freedom and having something worth securing. This is an issue where the Bar can provide real community leadership. Moreover, I believe it is our responsibility to do so. As Steven Rares SC (now Rares J) wrote in an article in the *Australian Bar Review,* 'the hard won privilege of our independence should remind us of our responsibilities to seek to uphold fundamental human rights, however hard that may be. For if we are silent, who will speak'.[4] It is true that minds may legitimately differ about the best way to protect human rights. However, I believe that it is high time that legislatures throughout Australia gave express recognition to them and that governments are held to account if they violate them.

The last Bar Council supported the previous state attorney general's call for community consultation over a charter of rights and was disposed to support the introduction of a statutory charter in NSW. However, it resolved to consult the membership before going any further. I urge all who have not yet done so, to read the Options Paper produced by the Human Rights Committee. It is available on the Bar's website. So, too, is an excellent paper by the Hon Michael McHugh AC QC on the general question of whether Australia needs a Bill of Rights.

The Law Council and the Australian Bar Association play an important role in raising public consciousness about these issues on a national level. The NSW Bar will continue to work with both organisations on national questions and, where appropriate, to coordinate our approach on issues of common concern.

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Health issues

Depression is reportedly high in the legal profession. In *Bar Brief* I wrote about the issue of safeguarding the welfare of our members and the need to divert practitioners from the disciplinary process where their problems were essentially health related. During this year I propose to devote considerable time and energy to advancing the matters I raised in that article. The association is in discussions at the moment with the aim of employing a welfare officer who will provide confidential assistance to members. Mental health problems are under-reported throughout the community. We do neither ourselves nor our colleagues any favours by ignoring them. Early detection is as important here as in other areas of medicine. What is more, we work in a service profession. Unless we pay proper attention to our own wellbeing, we cannot think we are in a position to help others. Early intervention may spare us or our colleagues from disciplinary action or worse.

Fair go for injured people

Although the Fair Go for Injured People campaign was directed at the politicians in the lead-up to the March state election, the failure of the major political parties to embrace its aims is a matter of some concern. The campaign called for consistency in the legislation, something the chief justice had publicly pleaded for. It was a plea for fairness and justice. Its requests were modest. They were affordable. They were made at a time when, and against the background that, the insurers were enjoying record profits. Still, they fell on deaf ears. It puzzles me that a state Labor government, in particular, would be so resistant to changes designed to restore fairness and balance in the provision of compensation for injured people, some of the most vulnerable members of our community. I hope that in future the government can be persuaded to make, at least, some amendments which will remove some of the more iniquitous and, perhaps, unintended consequences of the legislation that was introduced under the leadership of the former premier, Bob Carr. Seriously injured people, who were said to be the beneficiaries of some of the Carr-led changes, have in fact suffered. For instance, workers who sue at common law for industrial injuries lose their right to recover from their employer the cost of their medical treatment or care. If a third party is at fault and they choose to sue it, rather than their employer, they often lose a considerable part of their damages. If the employer and the third party are both sued, and the worker succeeds against both, the costs regulations ensure that in many cases the worker will recover no costs of the action against the employer. In the motor accident area, many people with serious back or neck injuries, often involving major surgery, recover no damages for their pain and suffering because they fail to meet the 'greater than 10 per cent threshold' imposed by the Motor Accident Compensation Act.

Michael was optimistic that the Fair Go campaign would achieve some measure of success. I may not share his optimism but I live in hope that the government can be moved to act on some of the harsher aspects of the legislation, even if it cannot see the wisdom of more radical changes.

Equality of representation

For years now women have been elected to Bar Council in numbers that are out of all proportion to the gender distribution of the membership. This year, of the 21 members of the newly elected Bar Council, 10 (including four of the nine silks) are women. Yet, women still constitute less than 17 per cent of the Bar as a whole and only five per cent of the senior Bar and this despite the fact that, for decades, more women than men have been graduating from, and excelling at, law schools across the country.

Self-employment should, in theory at least, make it easier for women to practise at the Bar. However, that is plainly not the perception. Why are we still seeing significantly fewer women than men coming to the Bar? Are women receiving less rewarding work? Is it simply explained by the fact that in most households women continue to bear the major responsibility for child-rearing and housework? Are the relentless pressures of the Bar incompatible with family life? Clearly not, for many men with families thrive at the Bar and a number of very successful women are also mothers. Are there other factors at play?

In previous years the association introduced a number of schemes to try to improve the position of women. There was the programme introduced in 1991 for visits to chambers by final-year female law students, the mentoring programme for female barristers in their second year, the child

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care scheme and the adoption in October 2003 of the Equitable Briefing Policy. In addition, the Women Barristers Forum has taken its own initiatives especially in promoting networking amongst women. Perhaps there have been some dividends from the various initiatives. The figures are improving – albeit slowly. In 1996 women comprised only 11.3 per cent of barristers and now we represent more than 17 per cent. But I am impatient. The increases are too slow. Although the last readers' intake included close to 44 per cent women, the current Bar practice course has seen the proportion drop significantly to 31.5 per cent. It seems that our initiatives have been insufficient to change the general complexion of the Bar. It is incumbent on all of us to determine why more women do not see the Bar as an attractive career move and to do more to encourage those who do take the plunge to stay in the pool.

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I expect the next 12 months will be challenging. I look forward to the challenge and I am very grateful for the many offers of support and encouragement I have received.

Endnotes

1. *Daily Telegraph,* 19 September 2006.
2. With important differences in the ACT. See *Terrorism (Extraordinary Temporary Powers) Act 2006.*
3. See, e.g. *Dietrich v The Queen* (1992) 177 CLR 292, at 305; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 480-482;. *Minister for Immigration & Multicultural Affairs* (2003) 214 CLR 1 at [99].
4. 'The independent Bar and human rights' (2005) 26 ABR 11.