The sesquicentenary of responsible government

By Michael Slattery QC

The one hundred and fiftieth anniversary of responsible government in New South Wales has passed, but with little public attention. It was an important anniversary, not only for the people of this state, but for our Bar as well. It reminds us that nineteenth century barristers expressed a vital, independent voice on the public issues of the day and nurtured sound law reform proposals for the benefit of the community. We still do.

The Bar's contribution to present day public debate concerning the administration of justice is remarkably similar to the one it made at the advent of responsible government. Then, as now, the Bar's role was to advance reasoned, expert opinion independent of party or factional interests. Let us look at both eras.

The New South Wales elections of March 2007 are looming. A frenzy of law and order issues has already surfaced in public debate. In the last six months mandatory life sentences for the killing of police officers, the indefinite detention of serious sex offenders after the expiry of their judicially imposed sentences and the introduction of majority verdicts have been proposed or passed into law. All were opposed by the Bar. Our judiciary has been attacked as a class for being 'lefties', 'soft' or mere 'political appointees'. The Bar has responded to these baseless descriptions of our judges.

The present agitation of law and order issues thrives because of the collective assumptions that we are somehow beset by both increasing personal insecurity and judicial weakness. Both are inconsistent with two indisputable facts.

First, many types of serious crime, such as murder, have declined in this state over the last ten years. According to the Bureau of Crime Statistics and Research, there were 114 recorded murders in NSW in 1996. In 2005 the number had dropped to just 75. When adjusted for population growth over the same period, the murder victimisation rate declined from 1.9 to 1.2 per 100,000 people.

Secondly, between 1998 and 2005, the state's prison population rose by 2,800.

This average annual increase of 400 inmates is equivalent to one additional correctional centre *every year.* A probable explanation for the increasing prison population is that judges at every level have been sentencing more people to longer terms of imprisonment.

Together, these statistics indicate neither a decline in personal security nor any obvious judicial weakness. The Bar will continue to add its voice to the 'law and order' debate and draw attention to facts such as these, even though they are not being advanced by either side in politics.

In 1856 the barristers practising in this state were taking a similarly important and independent view of the public issues of the day. W C Wentworth, a leader of the Bar at the time, also led the movement for colonial responsible government, with a bicameral legislature and a directly elected lower house. So too did the eminent John Darvall QC, who fought the creation of a colonial aristocracy to fill the upper house of the new parliament. Another leading supporter of the cause was the attorney James (later Sir James) Martin who came to the Bar in 1856 and became attorney general and later chief justice of New South Wales.

Responsible government and the democratic ideas that it represented were deeply opposed by pastoral interests and the 'exclusives' who feared it would displace their influence with the governors and the Colonial Office. They also feared democratic rule by the mass of emancipists. The writings and advocacy of the barristers of the day are not to be explained by any alignment with either 'exclusives' or emancipists. Whilst not always agreeing among themselves about the specifics, Wentworth, Darvall and Martin steered responsible government through committee hearings and legislative drafting from 1853 to 1856 with unique determination. Wentworth even traveled to London in 1855 with the final draft Bill to ensure that the Macarthur faction did not inspire any second thoughts in the Colonial Office.

Independent advocacy by barristers for the public good was an essential condition of the introduction of responsible government in this state.

Anti-terrorist legislation and detention without trial

The events of the mid-nineteenth century also offer us a useful caution against any addition to modern legislation authorising the detention of citizens without trial for any purpose. Twice in the last six months, in the *Anti-Terrorism Act 2005* and the *Crimes (Serious Sex Offenders) Act 2006* the New South Wales legislature has empowered the state executive to detain citizens without trial. The Bar opposed the introduction of both pieces of legislation.

Barely thirteen years after the introduction of responsible government, New South Wales illustrated a very different approach to anti-terrorist legislation. It is not much remembered now, but a major terrorist attack took place in Sydney on 12 March 1868. On that day an alleged Fenian, Henry O'Farrell, shot and wounded Prince Alfred, Duke of Edinburgh and the son of Queen Victoria at Clontarf in Sydney. The prince survived. Though perhaps more mad than Fenian, O'Farrell was quickly tried, convicted and executed on 21 April. The young responsible government of New South Wales reacted to this incident by passing a piece of legislation, *The Treason-Felony Act 1868*, which was the nineteenth century equivalent of our

Calvert, Samuel, 1828-1913. Attempted assassination of the Duke of Edinburgh at Clontarf, NSW.
Photo: National Library of Australia

2005 anti-terrorist legislation. With a sunset clause of two years it streamlined trial procedures for treason and added to local sedition laws (including the introduction of the rather quaint seditious offence of failing to stand during the loyal toast). This legislation was widely regarded as an over-reaction and was not renewed after the expiry of its sunset clause.

Most importantly though and in the face of an actual local terrorist attack in 1868, it did not occur to the mid-nineteenth century mind to legislate for the detention of citizens without trial for any purpose, even the protection of the Crown and state officials. There was good reason for this. In 1868 the horrors of the French Revolution and the detentions of the Jacobin terror of the 1790s were still within living memory. The legislators of the time had a real appreciation of the potential dangers of an executive power of detention without trial and they did not authorise it. Perhaps our modern day legislators will need to experience the actual misuse of the power conferred by the *Anti-Terrorism Act 2005* before it will be confined or repealed.

New barristers

Andrew Bell and the Bar News Committee are to be congratulated for presenting this edition with a special focus on the very Junior Bar. Bar Council has authorised the publication in this edition of the data gathered by the New Barristers Committee on early practice at the Bar better to inform those now starting at the Bar. I wish to thank the New Barristers Committee for all their work in collating and analyzing this information.

The articles here by Maragaret Holz, Hugh Stowe, Chris Wood, Kylie Day, Louise Byrne, David Ash, Paul Daley and Geoff Hull give excellent practical advice and convey some of the fear and excitement of starting an independent practice of one's own at the Bar.

It should be encouraging to our most junior members to know that the uncertainties and personal demands of life at the very Junior Bar still seem very close to what they were when I commenced practice in 1978. Creating a successful practice is as attainable now as it was then. Whatever the challenges, it should also be reassuring to know that the Bar is a community of scholars, a community of competitors and, most importantly, a community of friends.