

The barrister class is alive and well

By Anna Katzmann SC



In his lecture at the conclusion of the rhetoric series last year Michael McHugh AC QC lamented what he described as the fall of 'the barrister class' and mourned the end of what he called the 'Golden Age' of the Bar. In an article soon to be published with the other lectures in that series, Justice Michael Kirby AC CMG takes issue with his former colleague.¹ Justice Kirby is right to do so. Much as some may yearn for a return to the past, things were not always better in the past. The so-called 'Golden Age' was not only elitist but, like other class or caste systems, it was exclusive. Women did not belong, and generally speaking (well known exceptions like Barwick and McHugh himself aside) neither did men from humble backgrounds. Those who did were often derided. Blackstone complained about the increasing numbers of barristers drawn from the middle classes in the middle of the eighteenth century, predicting that the practising Bar was in danger of being dominated by 'obscure or illiterate men'.² As late as the twentieth century Ada Evans (and many women before and after her) was blackballed, unable to practise, despite her literacy and capacity, for no other reason than her sex.

Yet, who would now argue that women should not be barristers or that the profession should be open only to those from privileged backgrounds? Who would not accept that the profession has been enhanced by diversity?

The methods of persuasion have also expanded. So too have the forums in which the barristers' skills are required. These facts do not herald the demise of the barrister 'class', merely its redeployment. Barristers now appear for clients, not only in courts, but also before tribunals and in arbitrations

and mediations. They also act as mediators. The art of persuasion, which is the art in which barristers are most practised, lies at the heart of the mediation process. The changing face of the Bar reflects not its passing, but its reinvigoration.

Most importantly, there remains a pressing need for a group of independent advocates, call it a class of persuaders if you like, free of the constraints of employment, partnership or corporate responsibility, upon whom both the client and the judiciary can depend – a class of persuaders for whom the duty to the court remains paramount, unconcerned about the interests of anyone but the client, and ready and able to act for anyone, no matter how unattractive his or her cause, and how unpalatable his or her conduct may be.

Michael McHugh asserted that there has been a decline in the status of the Bar in recent decades. He attributes that decline to two factors: the rise of film, television, radio, singing and sporting stars; and the decline in barristers' incomes relative to other occupations. It is quite true, as McHugh pointed out, that relative to sports' and movie stars (at least international sports' and movie stars), barristers enjoy inferior incomes. That disparity, however, does not bespeak the decline of the Bar. It merely reflects the rise of the mass media, the power of advertising and, in particular, the advertising dollar and the international appeal of the celebrity entertainers. Barristers with celebrated international practices also command high incomes. Jonathan Sumption QC is a notable example. There are just a few of them around and their fees are generally not advertised. It is true that increasing regulation of the profession has seen an increase in control over fees. But the same is true of the medical profession. In any case, even if it is true that barristers' fees have declined in real terms, if that is the price we must pay for improving access to justice, then it is a price worth paying.

In its Edinburgh declaration, the inaugural conference of the International Council of Advocates and Barristers, held in 2002, noted that 'the independence of courts is essential to the functioning of democracies, and that the independence of the legal profession in turn is essential to the independence of the

courts'. The conference also stressed that referral Bars, together with their professional organisations, 'have a particularly important role to play in defending the independence of the courts and in affording access by the public to them'. Recently, the president of the Victorian Bar was castigated by the attorney-general in his state for daring to criticise the preferment of a magistrate as an acting judge. Whatever the merits of that particular appointment, standing up for the principle of the independence of the judiciary is an important function of the independent Bar.

There is no doubt that Australia continues to enjoy a strong, vibrant and independent bench and Bar but we must always be vigilant.

Others are usurping the roles barristers traditionally fulfilled. Competition is all very well but the barrister's advocacy skills and experience, and the independence that a barrister enjoys, gives a barrister the edge in many areas into which solicitors are now expanding.

As the former chief justice of Zimbabwe, Hon Anthony Gubbay pointed out at the Edinburgh World Bar Conference, it is generally accepted that 'a society in which the rule of law is meticulously observed is one in which a climate of legitimacy and a strong, vibrant and independent judiciary and Bar, are evident'.³ He reminded us that an independent Bar acts as a bulwark against oppression. He went on to say that: 'a Bar which is loath to challenge before the courts enactments and actions viewed as in conflict with the rule of law, because of political pressure, an unwillingness to attract criticism from the government or the public, or from fear of an adverse impact upon livelihood, fails in its allied duty and function to ensure that the rights of the individual are respected and enforced.' Fortunately, there have been barristers in Zimbabwe⁴ prepared to take on the government, sometimes at great personal cost. The same is true of Pakistan where the Bar played a leading role in the opposition to General Musharraf's attacks on the independence of the judiciary and several prominent barristers were arrested and held in custody.

Closer to home Australian barristers travelled to South East Asia to argue against the death

penalty for Australian citizens. Others have spent their vacations in the poorest of countries like Bangladesh and Tonga teaching advocacy, or trying to establish or re-establish the rule of law in nations torn apart by war, like East Timor. Since 2006, the Regional Assistance Mission to the Solomon Islands (RAMSI) has engaged 10 barristers from jurisdictions around Australia to help rebuild the legal system in that country. Recently, Bar councillors Nye Perram SC and Rachel Pepper were engaged by the ousted prime minister of Fiji, Laisenia Qarase to appear in Fiji before its High Court to challenge his removal and his replacement by the coup leader and self-appointed interim prime minister, Frank Bainimarama. The case was broadcast on Fiji television. The assistance Perram SC and Pepper provided was acknowledged as 'yet another inspiring example of how the great engine of the law can be enlisted to give hope to victims of injustice in our region of the Pacific and of military oppression in Fiji in particular' – 'advocates prepared to devote [their] skills and learning to overcoming tyranny' – 'in the finest traditions of the profession'.

These experiences suggest that the barrister class is alive and well, doing what it does best.

Endnotes

1. The Hon Justice Michael Kirby, 'Rediscovering Rhetoric: Rhetoric in Law – A case for optimism?'
2. David Lemmings *Gentlemen and Barristers, The Inns of Court and the English Bar 1680-1730*, Oxford Historical Monographs, Clarendon Press, 1990, pp 71-2; Blackstone *Commentaries*, i, 33.
3. 'The Challenge of Independence', A paper delivered at the inaugural World Bar Conference, Edinburgh, 28 June 2002
4. There is a fused profession in Zimbabwe these days but a small de facto independent Bar continues to operate there.



This issue of *Bar News* highlights the diversity of issues and interests which engage the Bar.

An annual feature of *Bar News* is the publication of the Maurice Byers Address, this year delivered by the Right Hon Dame Sian Elias, chief justice of New Zealand, on the topic of 'Judicial Review Today'. The paper tracks the developments in judicial review over the last 50 years and, of particular interest, engages in an extended comparative law analysis and reflection.

Feature articles in this issue focus on environmental law and climate change with papers by Clifford Ireland, a new member of the Bar, and Dr Jane Macadam of the University of New South Wales whose paper was originally delivered as part of the continuing legal education programme. That programme has proved to be one of the great innovations in the corporate life of the NSW Bar in the last five years. The quality of the papers is invariably high, and the breadth of topics covered impressively diverse. The seminars also represent an excellent opportunity for members of the Bar to interact in a collegial atmosphere.

Richard Beasley follows up his interview with Stephen Kiem, featured in the last issue, with an interview with David McLeod, the lawyer for David Hicks. This makes for quite compelling reading, and McLeod does not hold back in his views as to the former government's consideration for the rule of law in the context of that case.

There is also a wide-ranging interview with the new Commonwealth attorney-general, the Hon Robert McClelland whose views as to the role of the attorney-general vis-à-vis the judiciary will be viewed by many as a welcome return to orthodoxy.

A spotlight is also shone upon a small but dedicated band of barristers who have an active engagement as reservists with the armed services. Gregory Nell SC has contributed a piece in relation to the navy legal panel, whilst recent recruit, Kate Traill, recounts her personal experiences at Jervis Bay. These articles coincide with the establishment of a new Australian military court, the details of which are set forth in a piece by Cristy Symington. It is to be hoped that this new body debunks the view, variously attributed to Georges Clemenceau and Groucho Marx, that 'military justice is to justice as military music is to music'. As a counterpoint to Kate Traill's travails, and taking advantage of the lapse of copyright, I have also reproduced the account by that famous barrister, W S Gilbert, as to how Sir Joseph Porter KBE rose to the rank of First Lord of the Admiralty without ever going to sea.

Outstanding commitment to public service is exemplified in the careers of the recently retired Keith Mason and the late Kim Santow. The recording of the details of such careers in a journal such as *Bar News* is important not simply for the historical record but also because their contributions speak volumes for the great contributions which public spirited lawyers can and routinely do make to the wider community. As Chief Justice Spigelman observed, on the former's retirement, 'Today marks the culmination of 23 years of public-spirited service to the legal system of this state that has rarely been surpassed.' If his retirement address (partly reproduced) was anything to go by, the future observations of the former president on the development and course of Australian law will be eagerly awaited.