What price security?

As the editor has written, there is no doubt that all of us will be affected by the global financial crisis. For some, this will mean an increase in work – with a rise in insolvencies, for example. For some it will come on top of a steady downturn in work brought about by sequential legislative changes over the last decade, a decline in litigation and a surge in alternative forms of dispute resolution in which solicitors and non-lawyers have taken part in many cases without recourse to the bar. This is, however, no time to despair. These sort of changes occurred throughout the 20th century. When I first came to the bar tenancy work, which had sustained many barristers' practices, was on the decline and many despaired. Before I arrived, when no-fault divorce was to be introduced, many thought this was the end of civilisation as they knew it. In each case the bar did not just survive; it thrived. New legislation brought with it new challenges, new causes of action and new conundrums for barristers to help solve. Although many of us were slow to take to the new forms of dispute resolution, particularly mediation, the bar has now embraced it and many barristers have become talented mediators. Most of us recognise the value of mediation for many cases and use our advocacy skills, albeit that they may need to be modified, to excellent effect during mediations. The institution of the bar is solid. The barrister's talent for persuasion is much sought after and not just in the traditional areas of practice. Change brings with it new opportunities. If there is a reduction in paid work, use the time to give back. Do some pro bono work. Put your name forward to do legal aid work. Offer your services as a lecturer or to a worthy cause. That may have a spin-off effect, too. It may introduce you to new areas of the law and new sources of work. It may broaden your mind. We should embrace the future, not fear it. As Lionel Murphy said of those who believed their professional lives were finished when the Family Law Act was introduced: 'The bar is like life – one door closes and another opens.' But as Neville Wran added, 'like Lionel Murphy, you always have to remember to turn the knob'.[1]

What price security?

In February 2008 the New South Wales Government opened a new ten-court facility in Parramatta to be known as The Sydney West Trial Court Complex. The new courts provide for glassed-in rooms, to be used as docks. With the exception of the largest court in the complex, currently being used for the trial of multiple accused on terrorist offences, each has two docks on the side of the courtroom. One is a conventional dock; the other is a secure, glassed-in room behind the conventional dock. The government describes this arrangement as a flexible dock. The purpose, we are told, is to give the judge the option of housing the accused in a secure facility if he or she poses a security risk. Such a risk may arise during the course of a trial or before it commences.

In August this year, before a trial in the largest courtroom in the complex commenced, a successful application was made to have the fixed glass screen removed. That application raised issues that arguably affect the so-called flexible docks as well and give rise to concerns about the extent to which fundamental human rights are compromised for the sake of expediency. Both would appear to interfere with the ability of a lawyer to take instructions and provide advice in confidence and both create an impression of danger. Neither permits face to face communication, for example, and anything the lawyer says can be heard by all accused who might be in the dock at the time. While the use of a glass cubicle is not too much of a problem in a magistrate's court or in a court where guilt is being assessed by a judge alone, it is a potential risk in any jury trial. Moreover, the presence of two docks in a courtroom – one closed, the other open – only serves to emphasise the prejudice to the trial of the accused consigned to the closed dock. It is one thing if the reason for the confinement was obvious to a jury, such as where there had been a violent outburst in the courtroom, but another if the jury is left to speculate about the reason why the conventional open dock has been left vacant. Such prejudice is unlikely to be curable by a direction from the judge; indeed, a direction could actually enhance it.

An English study of docks published over 40 years ago reported that simply having a dock undermines the presumption of innocence.[3] And in the US there have been a number of cases where the issue has arisen. In one, *Walker v Butterworth,* 599 F.2d 1074, 1080 (1st Cir.1979) the US Court of Appeals for the First Circuit said that:

> The practice of isolating the accused in a four foot high box very well may affect a juror's objectivity. Confinement in a prisoner dock focuses attention on the accused and may create the impression that he is somehow different or dangerous. By treating the accused in this distinctive manner, a juror may be influenced throughout the trial. The impression created may well erode the presumption of innocence that every person is to enjoy.

In another, *Young v Callahan,* 700 F.2d 32 (1st Cir. 1983), the same court described the use of a dock as 'a form of incarceration' and inconsistent with the presumption of innocence. It held that, absent security considerations, it was a violation of the accused's 14th Amendment rights to place him in a dock. The court endorsed a submission from the accused's counsel in the following terms:

While the use of a glass cubicle is not too much of a problem in a magistrate's court or in a court where guilt is being assessed by a judge alone, it is a potential risk in any jury trial.

> Any suggestion that [appellant] was a dangerous person, implanted in the minds of the jurors through observation of [appellant] confined in the dock day after day, may have tipped the scales of justice.... [A]ny implication that [appellant] was the type of person whom it was necessary to segregate from jurors, spectators, court personnel, and even his own counsel ... cannot fail to impact upon juror deliberation.

The presumption of innocence and the right to a fair trial are basic tenets of the common law and are incorporated in all human rights instruments. It should be zealously guarded. Hopefully, judges will make use of the secure dock sparingly and will resist the temptation to use it merely because the accused has a criminal record for offences of violence or as a punishment for misbehaviour where there are no security issues.

The Bail Act and the presumption of innocence

And speaking of the incursions into the presumption of innocence, the Hon Justice Harrison made some insightful observations on the subject in the context of the Bail Act in his after-dinner speech at the International Criminal Law Congress in Sydney on 11 October. After his customary dose of humour he reflected on the early days of the Act when the presumption in favour of bail was paramount and lamented the changes that have occurred since then which have seen increasing numbers of people incarcerated pending trials at which they are ultimately acquitted

As former Supreme Court justice the Hon Adrian Roden QC wrote in his forward to the late Brian Donovan's book *The Law of Bail,* published in 1981:

> The presumption in favour of bail, subject to stated exceptions, is now formally recognised as a natural concomitant of the presumption of innocence. The section 9 presumption can of course be displaced, and frequently is; but it serves as a valuable reminder that, subject only to the circumstances specified in section 32(2), refusal of bail is no longer available as a disguised form of preventive detention.

The current Bail Act bears only a passing resemblance to the initial 1978 version. Then there were only six exceptions to the presumption in favour of bail. Now the exceptions are numerous. Then there were no presumptions against bail. Now the presumptions against bail are multifarious. A 2002 parliamentary briefing paper explained that:

> Over time the exceptions proliferated, removing the presumption in favour of bail for certain domestic violence offenders in 1987, murder in 1993, manslaughter and a range of sexual crimes in 1998, possession of prohibited firearms in 2001, and so on. A presumption against bail was imposed in 1988 upon certain drug offences involving commercial quantities.

Since 2002 the Act has been amended several times to increase the number of offences where there is a presumption against bail.

As Justice Harrison pointed out in his speech to the delegates attending the International Criminal Law Congress, what these changes do is 'put pressure upon the courts and the prosecuting authorities to opt for the 'safe' course of refusing or opposing bail so that no newspaper can then say 'I told you so' if a person reoffends or absconds'. Justice Harrison described this approach as 'entirely cynical' and one which 'emasculates the principles which should always guide our thinking'.

Article 9(3) of the International Covenant on Civil and Political Rights provides that 'it shall not be the general rule that persons awaiting trial shall be detained in custody' although release may be subject to guarantees to appear for trial and, should the occasion arise, for execution of the judgment. Article 14(2) provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Both the ACT Human Rights Act and the Victorian Charter of Human Rights and Responsibilities have incorporated these matters into local law.

The European Convention on Human Rights had a significant impact on the operation of the United Kingdom bail laws. The English courts have interpreted the presumption against bail in a way that favours the accused's liberty in cases where the court is unsure whether to release the accused on bail, so that although there may be an evidentiary burden on an accused to point to or adduce evidence to show exceptional circumstances, the legal burden of proof remains with the prosecution.[4] In New South Wales the statute expressly provides that the accused bears the burden of proof that bail should not be refused.

In a very interesting paper delivered to the National Access to Justice and Pro Bono Conference in Melbourne in August 2006, entitled 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence' the late Justice Connolly of the ACT Supreme Court noted that the state with the highest number of remand prisoners (South Australia) had a Bail Act with a wide discretion and that Victoria, the state with the least number of remand prisoners, had a more prescriptive regime.[5] Justice Connolly also considered the potential impact of statutory bills of rights on bail law and practice in this country.

This year in Victoria, relying in part on the guarantees incorporated into the Charter of Rights and Responsibilities, Bongiorno J released a man who was in custody awaiting trial for a number of charges including aggravated burglary where, as in NSW, there is a presumption against bail. His Honour observed that 'having regard to the seriousness of the offence itself, the relatively minor injuries suffered by the victim and the antecedents of the applicant (even including his prior conviction for assault), it is by no means certain that the applicant will not have served more time in gaol on remand than he would be required to serve under any sentence imposed by the County Court if he is not granted bail.' This was a matter, not surprisingly, that caused him some disquiet:

> That a person may serve more time on remand than his ultimate sentence is a significant matter on any consideration of bail at common law. It is of even greater significance now in light of the existence of the Charter and the provisions to which I have referred. If the Charter in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the Charter must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its Charter obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail – at least the only remedy short of a permanent stay of proceedings.[6]

For far too long we have seen governments of all political persuasions respond to the latest cry from the tabloid press or the radio 'shock jock' with amendments to the criminal law, sentencing and/or procedure that have little to do with the administration of justice. A new set of rules and a new way of governing are long overdue.

Justice Harrison's contribution to the debate in this area is an important one. Let's hope it doesn't fall on deaf ears.

Ignorance of the law no excuse for government

A recent survey carried out by the Bureau of Crime Statistics and Research, which revealed that most people thought sentences were too lenient, also demonstrated high levels of ignorance in the community about the crime rate and the way the criminal justice system has responded to it.[7] The lowest levels of confidence in the system were demonstrated in those survey participants who knew less about the facts and whose principal sources of knowledge were the tabloid press, television or radio news, talk back radio or hearsay. The Bureau concluded that the results of the survey were 'consistent with the hypothesis that public ignorance about crime and criminal justice is at least partly to blame for lack of public confidence in the NSW criminal justice system' and that one way to improve public confidence was to improve public understanding of the basic facts.[8]

There can be no doubt that there is an urgent need for properly funded community education in this area. Equally, there can be no doubt that the journalists and their employers have a responsibility to get the facts right. Sensationalising individual cases distorts the facts and contributes to distorted public perceptions. Since so many times there has been a rush to legislate in response to these distorted perceptions, the role of the media can be a dangerous one. Responsible media proprietors should eschew sensationalism.

It is to be hoped that the government remembers the results of this survey before it moves, yet again, and without any sound reason, to increase sentences.

Submissions to government

Over the past twelve months the association has worked overtime to produce submissions to government on a range of subjects often at short notice. The Bar Council is extremely grateful to all those members of standing and ad hoc committees who have contributed to them. They include submissions on the following subjects:

- to Commonwealth and NSW attorneys-general concerning the review of Commonwealth and New South Wales counter-terrorism laws;
- to the state attorney general concerning the review of the law of vilification in New South Wales;
- to the attorney general on changes to the law of consent in relation to sexual offences incorporated in the *Crimes Amendment (Consent – Sexual Offences) Bill 2008;*
- to the attorney general on the NSWLRC report on jury selection;
- to the NSW Sentencing Council on reduction of penalties;
- to the Uniform Rules Committee proposing a Practice Note re unnecessary requests for particulars;
- to the attorney general on the question of under-representation of Indigenous people on juries;
- to the NSWLRC review of the law of complicity;
- to the minister for planning about the *Environmental Planning and Assessment Amendment Bill 2008;*
- to the ombudsman on the review of the Freedom of Information Act;
- to the NSWLRC on its review of the *Mental Health Act 1990* & *Mental Health (Criminal Procedures) Act 1990;*
- to the Ninth Review of the Functions of the MAA and MAC and First Review of the exercise of functions of the Lifetime Care and Support Authority (Law and Justice Committee, Legislative Council);
- to the attorney general regarding s50 of the *Civil Liability Act 2002* – intoxication and minors;
- to the attorney general concerning reform of the laws of vilification;
- to the attorney general in relation to the *Succession Amendment (Family Provision) Bill 2008;*
- to the attorney general with respect to the *Public Trustee Regulation 2008;* and
- to the Motor Accidents Authority regarding the MAA Claims Assessment & Medical Assessment Guidelines for 2008.

In addition I have written to the attorney general on numerous occasions and to a number of other government ministers about various aspects of government policy and action.

Reforms to tort law

Frustrated by our past inability to persuade either government or opposition about the need to wind back so-called tort law reform, particularly in the areas of industrial injuries and disease and motor accidents, the association has opted to focus on piecemeal reforms by targeting some of the more iniquitous provisions of the legislation. Aided by some excellent work from the Common Law Committee, I recently wrote to the responsible ministers about the operation of s151Z(2) of the Workers Compensation Act and the inequities arising from a finding of contributory negligence suggesting some changes to remove both unfairness and anomaly in the operation of the legislation. They are yet to reply.

Raising the profile of the bar

This year two important initiatives have been taken to raise and improve the profile of the bar. First, recognising that attitudes are generally moulded at a young age, the Working Party on the Bar in the Community chaired by Margaret Cunneen SC has prepared a curriculum for primary schools to bring the profile of the barrister and the barrister's work to young children. The director-general of education and the minister have approved the project which will be trialled during Law Week 2009 (11-17 May 2009).

The second initiative is due to the work of the ADR Committee under the leadership of Angela Bowne SC. It involves the partnership between Counsel's Chambers and the NSW Bar Association (at no cost to the association) in the New South Wales Bar Dispute Resolution Centre.

Oral history programme

The Bar Association is embarking on a programme to record the history of the bar through interviews with barristers which will be recorded for posterity. During the first six months of next year I anticipate being able to hold what I expect will be the first episode of the programme which

The Sydney West Trial Court Complex.

will feature some of our longest serving barristers and former barristers reflecting on their lives in the law. It promises to be an entertaining event for both the participants and the spectators. Details will be announced in *In Brief* in due course.

Making your opinion felt

As I did last year, next year, I will be attending all of the six CPD conferences. Please take the time to speak to me and let me know how you feel about what the association is doing well, what it isn't doing but should be doing and what it could do better. If, during the course of the year there are any issues that are bothering you take them up with the Bar Council, either by approaching a councillor and asking him or her to raise it for you or writing to me at president@nswbar.asn.au or to the executive director at executivedirector@nswbar.asn.au.

Compliments of the season. Have a happy and restful break.

Endnotes

1. NK Wran, 'Murphy the Reformer' in J Scutt (ed) *A Radical Judge,* McCulloch Publishing, 1987, p.21.
2. *R v Baladajam & ors* [No. 41], 26 August 2008, unreported.
3. L Rosen, 'The Dock: Should it be Abolished?' *Modern Law Review,* 1966, 29, 289-300.
4. See, e.g. *O(FC) v Crown Court at Harrow* [2006] UKHL 42.
5. That having been said, in 2006 the South Australian Parliament amended its Bail Act to introduce a presumption against bail for certain classes of offences. See *Bail Act 1985* s10A, incorporated by s13 of the *Statutes Amendment (Vehicle and Vessel Offences) Act 2005* (SA) (which, of course, is where you would expect to find it!) which commenced on 30 July 2006.
6. *Gray v DPP* [2008] VSC 4.
7. C Jones, D Weatherburn & K Mc Farlane, 'Public confidence in the New South Wales criminal justice system,' *Crime and Justice Bulletin,* August 2008.
8. Ibid., at p.14.