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# **Bench and Bar Dinner**

*Barry Toomey QC introduces the Attorney-General at the 1986 Bench and Bar dinner:*

Today is 27 June. Few of you would know that it is the nineteen hundred and twentieth anniversary of a day in the year 66AD when the Emperor Nero, sitting in the Coliseum watching one of the weekly Christian versus lions games, saw brought out into the arena an Angle named Fred. When I say an Angle I mean someone from Anglia you understand and this Angle named Fred was also, as it happens, extremely angular — in fact it was said that the widest part of Fred was his feet.

The lion was released into the arena — a ravenous lion, ravenous, hadn't been fed for a couple of weeks. In fact he was so ravenous and Fred was so angular that when he leapt to Fred he missed him and he rolled in the dust and Fred did a bit of leaping himself, jumped to the lion's side, whispered something in the lion's ear and this ravening beast got to its feet, stuck its tail firmly between its buttocks and slunk out of the arena.

Nero turned to one of the chaps beside him and he said (he was an Italian chap Nero) and he said: "Bringa thata man here." So Fred was brought up before Nero, front and centre, and Nero said to him, he said: "Whata you saya to my lion" and Fred said: "I told him: 'You realise that after the dinner you would be expected to say a few words'."

Now, the man who told me that I would, after the meal, be expected to say a few words, was that Honorary Secretary of the Bar Association since the memory of man runneth not — that man with his past in front of him, Dennis Wheelahan. (I told him to take a note so that the Statement of Claim is accurate). So when Wheelahan told me that, asked me, I suppose, although it sounded like a summons rather than a request, would I propose the toast to the Attorney-General I had some apprehension because I remembered the last two dinners I had attended within these hallowed walls at which the guest of honour was a senior politician.

The first of those dinners was one in 1972 when Kenneth McCaw, then Attorney-General of New South Wales, was the guest of honour. The second was in 1973 when Gough Whitlam was guest of honour.

Dealing with the latter first, that was a splendid occasion when the New South Wales Bar celebrated the fact that one of its own, the first of its own since William Morris Hughes, was Prime Minister of Australia and celebrated too a tradition which I don't need to tell you goes back to the first Prime Minister of Australia, Edmund Barton, a New South Wales Silk.

It happened that Glass, who was then of Queens Counsel and the President of the Bar Association, wrote to invite not only, of course, the Prime Minister, but

also the Chief Justice of New South Wales, Sir John Kerr. Sir John Kerr, who was then acting Governor, communicated with Glass and told him that he would come on condition that he should be seated on the right hand of the chair because he said as the Queen's representative he must take precedence over any other person present.

Glass had to face the terrible dilemma of getting onto Whitlam and saying that you are the guest of honour but you're going to have to sit on the left of the chair. Anyway, he told me at the time he heard with immense relief the words of Whitlam which, in retrospect, lean down the years with the purest knell of sibylline prophecy. Whitlam said: "I don't care where Kerr sits, ever since I met him he's been moving farther and farther to the right."

Now the second occasion, the first in time, was when Ken McCaw was the guest of honour and the junior on that night was Mary Gaudron. I don't suppose she would like to be called Mrs Junior or Miss Junior so I suppose we will have to call her Ms Junior. Mary's speech which in retrospect was obviously meant to be funny and I guess was funny in retrospect took the form of a highly critical examination of the legislation which had been passed by the Government under the aegis of the then Attorney-General. The silence deepened and dismay grew darker. It might have been meant to be funny but it went over as if all the lead from all the mines in Broken Hill had been tied to the string of a balloon.

After she had been going for about five minutes, Reynolds JA, whom I suppose one could describe as a sort of judicial minder for the Attorney-General, got to his feet, said: "I'm not going to take any more of this", and walked out whereupon the Attorney-General said:

"Come back, come back." Gaudron said: "I'm sorry", and sat down. To say it created a sensation is an understatement and bearing in mind as I say that those were the last two dinners I attended at which senior politicians were the guests of honour I firmly determined tonight that I would make no remarks whatsoever which could be taken as being critical of placing large sums of money on racehorses or for that matter even small bets of say a couple of thousand dollars.

Well now, turning to the Attorney-General. Terrance William Sheahan comes as some of you will know from the Irish clan, the O'Sheahan, whose borough was in Canello in County Limerick near I might say the lands of the O'Toolma from whom I spring and it's nice to think that over a couple of thousand years perhaps the Sheahans stole a cow or two from the O'Toolma and the O'Toolma stole a black-eyed dark haired maiden or two from the O'Sheahans.

Anyway, one has one's priorities. But I ought to tell you that in the fact that the Attorney belongs to the O'Sheahans is to be found a clue to the logical and orderly mind which he displays because the O'Sheahans spell their name, I swear, in the following manner although it is pronounced in the Irish Gaelic as it is pronounced in English. The O'Sheahans spell their name Osiodhachain and that is pronounced O'Sheahan.

Now this logical and orderly mind can be found, of course, in the conduct of the Attorney's Department. That Department, as you know, is very large and has a very large budget and it is sort of an elephant you might think among the Public Service Departments and in fact I heard just the other day this great Department of State and the manner in which it is conducted is compared to the sex life of an elephant. It was said that it resembled

"... AND BEARING IN MIND THAT PRIOR TO THE RHYZOLYSIS PROCEDURE YOU, SIR, WERE COMPLETELY UNABLE WITHOUT CONSTANT AND UNREMITTING PAIN TO PURSUE THE CONTEMPLATIVE JOYS OF SITTING AND STRAINING AT TOILET, I WOULD LIKE TO ASCERTAIN WHEN IT WAS THAT YOU WERE ABLE TO TIGHTEN YOUR DIAPHRAGM FOR THE FOREGOING PURPOSES WITHOUT THE CONCERN OF THE ACCOMPANYING AND FORMERLY CRIPPLING AGONY ASSOCIATED WITH SUCH STRAINING, FOR THE STATED PURPOSE...?"

"... I DON'T UNDERSTAND DE KVESCHUN."

BENCH: "WHEN DID YOU LEARN YOU COULD FART WITHOUT FEAR"

"... JUST NOW.."

BENCH: "ADJOURN THE COURT.."



an elephant's sex life because first, all action took place at a very high level. Secondly, any movement forward was accompanied by loud trumpeting noises and third, it took absolutely years before any developments occurred.

Well now, I don't want it to be thought that I am being unkind to the Attorney and I must tell you that I regard him as a man who is not, as some Attorneys-General in the past have been, unworldly. For instance, it is recorded of Sir Thomas Inscape that when he was the Attorney-General he rose before the House of Lords to argue a gaming case and he opened the case to their Lordships as follows:

*"Me Lords, this is a case concerning the game of roulette — unlawful at common law — which as your Lordships know is a game played with cards."*

There was a ruminative silence before the Lord Chancellor delivered what Lord McMillan has since described as a shattering monosyllabic correction. The Lord Chancellor said: "Balls".

Now, as I say, the Attorney is not unworldly like Sir Thomas Inscape but I wouldn't want you to think that he is a cynical and uncompassionate man. He and I were walking down Darlinghurst Road the other night, about 3am, and as we came to the corner of Darlinghurst Road and William Street there were these two women, one dressed in orange hot pants and the other in leopard skin tights and one said to the other: "Now where are you living now Daisy?" The other said: "Oh, I've got a new flat", and she said, "You know", she said, "if I've

been up them stairs once tonight, I've been up thirty times". Anyway, the Attorney and I walked on and after a few minutes he turned and he said: "Toomey, did you hear that poor woman". I said: "Yes, Mr Attorney I did". He said: "Look, up the stairs thirty times in the one night. Her poor feet".

Well now, it is the fact, of course, the Attorney-General, Terrance William Sheahan is the son of a famous father whom you will find is Patrick Sheahan who was Attorney-General of New South Wales between 1953 and 1956. And it is an extraordinary thing that within a generation, almost precisely within a generation, father and son should be Attorney-General of this State and so far as I know it's unprecedented.

It is an office of great honour which dates back to 1399 when it is said William Delottington was the First Attorney-General as opposed to the King's Attorneys who were appointed for specific purposes and may I say briefly that one hopes that in his deliberation about the future of the Bar the Attorney-General will remember some words of that great constitutional lawyer Dicey. Dicey said in lecturing the students of the law Faculty of Harvard in 1908:

*"You must remember that there are ancient truths as well as ancient prejudices."*

*The Attorney-General responded to Toomey's toast in kind. Unfortunately his humorous remarks were off the cuff and, as a result, were not recorded for posterity. He then turned his attention to the serious question of the reform of the Bar.*

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*The Hon. T.W. Sheahan, Attorney-General.*

The recommendations made by the Law Reform Commission regarding the so-called reform of the legal profession have been the subject of continuing consultation between my department and the governing bodies of the profession, often involving me personally.

In this exercise we commence with acceptance of the fundamental principle that an independent profession is a cornerstone of our legal system. Therefore, I do not propose that its regulation should be dominated by either government or the public in general.

Rather, I see it as desirable that a balance be achieved between the broad concepts of self-regulation and the requirements of public accountability without compromising the interests of the profession or the interests of the community.

This requires the continuance of a major role for the Bar Association, and the Bar Council in particular. My own view is that certain statutory functions should be vested in the Bar Council for the purposes of regulating practising barristers. These powers would be similar to those currently vested in the Council of the Law Society, and would include the issue of practising certificates, a function I regard as being of fundamental importance.

An associated question is the need for some form of practical training for members of the profession who intend to practise as barristers and this issue requires further consideration and consultation.

The Government would continue to rely on the Bar Council to regulate the day to day practice and conduct of practitioners, and to fulfil its traditional role of providing one source of advice and assistance to the Government on matters affecting the profession.

The Government cannot overlook expressions of community concern as to the delivery of legal services at all levels. I am convinced that there is a legitimate need for community involvement remedying these concerns. I therefore support lay representation on committees of the Bar Council and the Law Society.

The Attorney-General and government of the day need, and should have access to, an advisory body capable of presenting a broad response to modern demands on the legal profession. For this reason it is highly desirable that such a body consist of community as well as Bar Association and Law Society representatives. I envisage it would tender advice to the Government on the regulation of the legal profession and the delivery of legal services.

Other areas examined by the Law Reform Commission, namely complaints, discipline and professional standards, stand out as overdue for reform despite the good work of the Ethics Committee of the Bar Council and the Law Society's Professional Conduct Division.

The problem remains that the only remedy currently available in cases of improper conduct (other than any civil rights a client may be able to pursue) is to seek removal from the Roll of Practitioners.

While this is appropriate for cases where the person is unfit to continue as a member of the profession, there is no effective remedy for other failings, falling short of professional misconduct, such as delay, improper attention to a particular case, poor advice and so on.

The profession tends to dismiss such concerns as relatively minor and trivial, but they are certainly not so regarded by the clients who suffer them or those, such as MPs, to whom they turn for assistance.

I am therefore convinced of the need to develop substantive proposals for the investigation of complaints and, where necessary, the discipline of erring lawyers.

Here again I believe that the primary responsibility rightly rests with the professional bodies to investigate complaints and take action where required. Further, there must be substantial input from the profession in the Government's consideration of disciplinary tribunal proposals.

The Law Reform Commission recommended a two-tier disciplinary system comprising a Professional Standards Board, which would make rulings in cases of unsatisfactory conduct — or what the Commission calls "bad professional work" — and a Disciplinary Tribunal, headed by a Supreme Court Judge, which would deal with the more serious cases of conduct, demonstrative of unfitness to practice.

These recommendations have much to commend them. In some ways they are similar to the present arrangements (the Bar Council takes major matters to the Supreme Court but deals with minor matters itself), but they ensure that the investigative and disciplinary bodies will have full power to deal adequately with a broad range of complaints and poor conduct.

Hopefully, the disciplinary systems will never have to be used to any great extent, but we do not live in a perfect world, and appropriate responses must be available if required.

The response does not have to be particularly onerous in each case. I would envisage the lower tier, for example, having a broad range of positive remedies designed to assist the practitioner to reach a higher level of professional standard.

The penalty does not have to be a reprimand, fine or suspension of a Practising Certificate. Some cases call rather for expert advice, counselling, assistance in the management of a practice, requiring the person to undertake a course of continuing legal education, or even to work under the supervision of a senior member of the profession.

In this way, the competence of the practitioner will be enhanced, the standard of the profession lifted and the community as a whole better served.

I also see the need for public participation in the disciplinary system, just as there is in the procedures for the general regulation of the profession.

In this way, additional experience and wisdom will be available to the disciplinary bodies, and the profession should thereby become more responsive to the needs of the general community.

My consideration of these issues on behalf of the Government is not, and should not be portrayed as, lawyer bashing.

There has been and must be a close relationship between the Government and the profession, and I intend to continue to involve the professional bodies in the matters before me.

So far as changes in the regulation of the legal profession are concerned, I believe the proposals I have mentioned will:

- modernise the legislative framework under which practitioners operate,
- enable the profession to more readily respond to the changing needs of the community,
- provide for a more efficient and accountable profession, and (with continued reliance on self-regulation) ensure the profession remains a strong and independent feature of our society.