Bench & Bar Dinner 2001

Back left to right: Mark Papallo, David Dalton, Richard O'Keefe and William Walsh.
Front left to right: Geoff Gemmell, Sabine Thode, Campbell Bridge S.C., Erin Kennedy, Michelle Dolonec.

The 2001 Bench & Bar Dinner was held at The Westin Sydney on Friday 18 May 2001. The speakers were John West QC and Lee Aitken. The Guest of Honour was the Attorney General of New South Wales, The Hon. Bob Debus MP. A record 565 members and guest attended.

The Hon. Justice AM Gleeson AC and Ruth McColl S.C.

Back left to right: Karin Ottesen and Gordon McGrath.
Front left to right: Susan Phillips, Peter Taylor S.C.,
Her Honour Judge Judith Gibson.

Lee Aitken

John West QC

From left to right: Michael Slattery QC, Anna Katzmann S.C., Ian Harrison S.C., Ruth McColl S.C., Bret Walker S.C.

Back left to right: John Bowers, Sunil De Silva, Virginia Lydiard, Anna Seeto.
Front left to right: David Degnan, Richard Herps, Sara Bowers, Lloyd Babb.

Kate Traill and Lee Aitken

Bench & Bar Dinner

Speech by The Hon. Bob Debus MP, Attorney General of NSW, 18 May 2001.

Your Honours, Ruth McColl, John West, Lee Aitken, ladies and gentlemen. In preparation for this evening, Ruth McColl was kind enough to say that she would lend me a copy of a tape or two from the Bar's archives of previous such events.

The Hon. Bob Debus MP, Attorney General of NSW

I must say that I found it rather unnerving to learn even that there was in existence such an archive of tapes. In my admittedly cursory viewing, some of the participants over the years appear to have drawn their inspiration chiefly from old scripts from 'Sydney University Law School Revues' of the 1970s. At any moment I expected someone to break into one of those witty closing numbers the organisers of the Revues traditionally used to bring down the curtain at the end of the night.

You know the kind of thing. Parodies of Sex Pistols songs, incorporating zany quotes from the judgments of Lord Denning. Or wacky impersonations of the lectures of Roddy Meagher, set to the theme from 'Jesus Christ Superstar'.

At any rate, those video archives are a potential goldmine for someone. Some of you, as you rise to eminence in later years, face the prospect of being bled white by Philip Selth, who I fear is setting himself up for a very comfortable old age indeed.

With or without video evidence, it is incontrovertibly the case that my own career since law school - as various parties here have been kind enough to remind me even during the course of the evening - has been somewhat varied. Bearing great resemblance to a descent through the seven levels of *Dante's Inferno* - rather than the stately progress mapped out for us during first year legal institutions.

A lawyer, then a publisher, then a journalist, then a politician. I agree that it looks like a pretty single-minded quest through the list of professions most despised by the public. Then onwards - to become minister for corrective services.

That role is traditionally associated with the smashing of bullet proof glass, the wail of sirens and the smell of smoke billowing across the city from the walls of Long Bay, soon to be followed by smoke billowing from the career of the incumbent minister of the day. Having avoided this fate, I naturally looked around me for new challenges.

Fortunately my relentless pursuit of the most unpopular possible career path was halted by the fact that the most socially despised position of all - Director, HIH Insurance - abruptly ceased to exist before I could set my sights upon it.

Instead, when my esteemed colleague Jeff Shaw retired, I eagerly grasped at the next best thing; a position which combines the roles of politician and lawyer, thus satisfying all my most self-destructive urges - that of attorney general.

Its really proven to be brilliantly successful. Like a character out of *Alice in Wonderland*, I can have the privilege of defending six impossible propositions before breakfast.

The day begins with a bracing pre-dawn debate with a furious talkback host, who is attacking the decision of the DPP to no-bill a case. I defend in lofty terms the integrity of the DPP and the vital role of his independence in our system of government. The talkback host then reads out to me, live on-air, published pre-election undertakings by a colleague promising that the subject of the now defunct prosecution would perish in jail.

There's only one thing to do, and I do it. Fearlessly, I call for a report.

Next, the head of one of my departments calls to tell me that a civil jury has just awarded two million

dollars to a member of the public who fell off a building owned by the Department after consuming 43 drinks at a Christmas party. The Head of Department demands to know when I am going to implement a four year old government undertaking to curtail the role of civil juries.

Time to move up to option two. I sack the Head of Department and call for a report.

Refreshed, I open my *Sydney Morning Herald* to discover that apparently the entire Sydney Bar has declared itself bankrupt, moved offshore and is now operating via CB radio from a freighter somewhere in Bass Strait.

There's only one thing left to do, and I do it. I launch a full investigation, sack another departmental head - pretty much at random - and call for a report.

Of course, now and again an especially diligent public servant has the poor taste to complete one of these requested reports.

Generally not, thank God, one of the ones that *I* have requested. Usually one requested by one of my predecessors - which can, of course, be nearly as bad.

Only recently - and this *is* true - a report finally surfaced, which had been requested eight years ago by Peter Collins when he was attorney general. It contained recommendations about an aspect of law reform, the precise nature of which escapes me at the moment. To the naked eye the report seemed innocuous; but buried within it were recommendations which targeted, with pinpoint accuracy, the sensibilities of thousands of ordinary suburban people in 12 key marginal seats. It was like those Beatles records which, if played backwards, contain hidden messages invoking the demonic ritual which in fact incited the Manson family.

At any rate, all these otherwise apolitical souls started writing in abusive letters and confronting me in the street - almost before I knew that the report, which was clearly ghostwritten by Satan - even existed. Which just goes to prove that a report is never too old to be dangerous.

Any day now, I expect that a report commissioned by Sir Francis Bacon when he was attorney general to James I in 1613, will turn up in my office with a polite briefing note from the Department, explaining that by some arcane constitutional quirk it is the residual responsibility of the attorney general of NSW.

'the Sydney Bar has a degree of comfort with openly pugnacious behaviour as would intimidate nine-tenths of the inmates of the main yard at Goulburn Gaol'.

Sir Francis Bacon's career, of course, ended in disgrace when he was accused of taking payment for his services. He was the first - to my knowledge - to raise the defence that although he had *taken* payments, those payments had not influenced the exercise of his judgement in the particular cases under his consideration at the time.

An argument still in vogue today, and employed - I think I am right in saying - by Bret Walker S.C. only last year in his representations before the Australian Broadcasting Tribunal in the 'Cash for Comment' inquiry.

The quirks of the relationship between the law, the media and politics - the Devil's Triangle - were to an extent laid bare to the public in the ABT proceedings last year. As I have said earlier, I have over the years participated in each of those professions in turn. Whether that makes me uniquely insightful or completely blinkered in my approach is for others to judge.

In his speech at last years dinner Bret Walker spoke, in passing, of the 'honesty and aggression that is the mark of the best of the Sydney Bar'. In so speaking, he used his customary elegant understatement.

I can state that in my not inconsiderable experience the Sydney Bar has a degree of comfort with openly pugnacious behaviour as would intimidate nine-tenths of the inmates of the main yard at Goulburn Gaol.

Although I can say that, with the exception of a few particularly celebrated feuds, once the meeting or court case has been concluded the aggression is less likely to be perpetuated socially. This cannot be said of disputes which erupt in prison, where an argument over a carton of milk generally results in the manufacture of a shiv from the inmate's toothbrush and its subsequent deadly deployment in the shower block.

The latter practice is also commonplace in most major metropolitan newsrooms, but for some reason it is not widely reported.

In all three professions - law, journalism and politics - the participants are inclined to express their opinions in robust terms. In all three professions questions of nuance and shades of meaning are important in the highest degree. And this may in itself provoke suspicion and resentment from those who are 'outside the club'.

I do not wish to overstate the commonalities between these professions. There are massive

divergences and, indeed, structural antagonisms which separate them. But, historically speaking, a free press, an independent legal system and a democratic system of parliamentary government are rare and precious phenomena; and to have all three coexist at one time is rare indeed.

It is commonplace to point out that in recent times the courts and the judiciary have come under increasing public scrutiny from the media. But I'm not sure if this is actually true. A glance through the newspaper archives of the last half-century of *Sydney Morning Heralds* would show you that high profile criminal and civil matters have always attracted intense media scrutiny and that scrutiny has often been couched in sensational terms.

The Hon. Bob Debus MP:
'A lawyer, then a publisher, then a journalist, then a politician.'

Some things, however, *have* changed. The first is the nature of the media itself.

The predominance of the conventional print media has receded, and the electronic media, particularly radio, but also television and of course the Internet, has greatly increased. Rapidity of communication and the growth in the power of talkback in setting the news agenda means that the speed of a news cycle has accelerated.

Your morning newspaper reporting, for example, a sensational court case, is available at around midnight the night before on the relevant web site.

This means that by five past midnight the producers of morning radio shows may be ringing the Attorney General's Press Secretary seeking a comment. By ten past midnight the Attorney General's Press Secretary has either been driven to drink or has woken up a bureaucrat or the luckless Attorney General himself asking for advice about what to say.

Certainly, by five thirty or six the next morning, several telephone calls will have already been exchanged, news grabs will have been recorded, the comments of the Opposition will have been sought. And as Ruth McColl knows to her cost, keen journalists will be ringing the Bar Association and other bodies in search of a fresh angle.

In other words, before many of you have staggered out tomorrow morning to retrieve your copy of the S*ydney Morning Herald* or *Financial Review* from amongst your dew soaked roses, before you even read the front page, the story in media terms will be old and dated and the journalists will be looking for a new angle or controversial opinion to revive it.

By 8.00 or 8.30 in the morning, members of the public will have flooded ministerial offices with faxes, telephone messages and, particularly, e-mails, expressing their views, based on what they have learnt of the case from early morning radio.

The minister - let us say, the attorney general, to pull an example out of the air - ambling along to a previously scheduled 8:30 press conference or 9:00 o'clock conference opening will be door-stopped and asked for comment. Any divergence between what he says to the waiting media pack and the statement given by his media officer at five past midnight the night before will be instantly reported as a backdown, crackdown, change in direction, split or anything else to give the story the sense of drama it needs to keep up momentum as a story to survive until the six o'clock TV news.

The contrast could hardly be more marked with the days when Ben Chifley as prime minister could be asked a question as he got onto the train at Bathurst, think about it as it took the best part of two days to journey to Canberra and jot down a response in longhand for his arrival.

It *is* also the case that there has been a fundamental alteration - a marked increase - in the willingness of newspaper commentators and radio talkback hosts to comment belligerently upon individual decisions and indeed to provide running commentary upon proceedings that are underway.

In many - indeed in most cases - the high velocity of modern media reporting means that commentary will be based upon the accounts given to newsrooms by court reporters; some of whom, in the nature of things, are extremely seasoned and experienced, while others are mere neophytes and may have fundamentally misunderstood the nature of what has occurred.

It is important to bear in mind that for the 99 per cent of citizens, their only contact with the court system, other than what they learn from the radio and press reports, is through fictional representation. To those not immersed in the daily reality of the court system, the novels of John Grisham or television

dramas like 'The Practice' or even 'The Bill' teach some important and indelible lessons.

They teach that those charged by the police are generally guilty. They teach that police are generally hard working, morally motivated and insightful, whereas lawyers are clever, slippery and intent upon freeing the guilty through word play and the crafty exploitation of technicalities.

I'm not here making a moral judgement about fictional depictions of the criminal justice system. I'm inviting you to consider, as you have no doubt considered yourselves on many occasions, the basis upon which most people obtain their information about how the court system works. And the consequences that has for how people think about, and speak about, courts and the judiciary.

There is an invisible line between legitimate disagreement with a judicial decision and personal attack. And it is a line which in the great majority of cases is respected by the Australian public, press and by politicians.

I am not here tonight to argue that increased public scrutiny and comment upon judicial decisions is a bad thing. The justice system is an institution which goes to the very heart of our democracy, and as such must be strong enough to survive adverse criticism, including badly ill-informed criticism.

'it is my role to preserve and protect such pains in the neck so that they increase, multiply and thrive into the future. For all our sakes'.

However, the line between legitimate criticism and oppressive attack, which may have a tendency to undermine the authority of the legal system, is far from clear. It is my own view that it is the role of the attorney general to speak up in defence of the judiciary when criticism crosses a legitimate line.

I emphatically do not believe that it is for the attorney general to rush into print every time that a criticism is made. Media interventions are always a judgement call. In some cases a media intervention by the attorney general will give a story prominence and longevity it would never otherwise have, and result in the perpetuation of a controversy that would otherwise have died a rapid death.

Whether a response is made - or indeed, having been made, is put to air or printed - depends nevertheless more on the vicissitudes of the daily media cycle than is often recognised. I recently made what I modestly regarded as a few rather well chosen remarks defending the integrity of one of our State courts which had become mired in some unfair criticism, only to have them sink virtually without trace.

There is no point complaining when such a thing happens, and it is certainly not necessary to interpret such events in the light of a media conspiracy, as we used to do when I was a student radical in the late 1960s. It is more to do with the ebb and flow of news. If there is a lot of other news around, or news with more meat, conflict and colour in it, then that is what will be reported.

On another slower news day some innocuous and casual remarks can seize the front page and provoke a storm of interest; or an otherwise unremarkable court case or judgement can become the subject of feverish analysis and dissection.

It is also important for someone in my position to bear in mind that the media audience - the consumers, if you like, of my media product are to a considerable extent segmented and even ghettoised.

I may make a stately defence of the judicial system in a speech in the parliament, or an interview with the *Financial Review*; but 99 per cent of the population will neither know, nor care, what I have said.

Conversely - and this is certainly an experience that I have often had - a law and order issue may be bitterly fought out in the tabloid papers and on commercial radio with most of the legal community never becoming aware that the debate is going on at all.

I vividly recall an occasion on which in the course of a single day I participated in six or seven interviews on commercial radio defending the integrity and independence of a particular quasi-judicial body for which I was then responsible. These interviews were conducted at a level of heat and intensity which amounted to hand to hand combat.

The following day, somewhat exhausted and shell-shocked, I was wandering around the main street of Leura. I was approached by a lady of advanced years but profound civil libertarian views. She reproached me for my silence and my failure to defend this quasi-judicial body.

It transpired, of course, that her daily media diet consisted solely of Radio National, the ABC TV news at night, and the Blue Mountains *Gazette*. On days when she was feeling daring, or wanted a bit of rough trade in media terms, I imagine that she briefly twisted the dial to Radio 2BL.

It is worth bearing in mind that, even amidst the

cacophony of media messages and the saturation of information, media consumers are still highly selective and will take very different lessons from the stream of interviews, press releases and speeches churned out by the political process and from the millions of words of analysis and commentary upon the legal and political process.

It is clear that as media commentators become more willing to criticise the conduct of individual judges, the tensions inherent in the dual role of attorney general as first law officer and as a politician - can become more acute.

And the question as to whether the attorney general should intervene in public defence of the judiciary will inevitably arise.

'I can have the privilege of defending six impossible propositions before breakfast.'

While there will be disagreement on any particular instance as to whether the attorney-general should comment and what form that comment should take, I have made no secret of the fact that I take the view that it is in fact part of the role of the attorney general to speak out in defence of the judiciary - and indeed of associated institutions such as the Director of Public Prosecutions.

Recent comments by my friend Justice Michael Kirby - comments in defence of the public school system of which he is a most illustrious product - have provoked some recent debate, even prime ministerial rebuke. I am not the first to point out that more politically conservative comments by other judges have provoked no such rebuke.

Tonight is not the occasion for partisanship. But I place on record my own view that if political leaders and attorneys general wish judges to remain silent on legal and social issues, then it places all the higher obligation on attorneys general to speak out on their behalf.

It is customary, I think, to see the person who is for the time being the attorney general as the guardian of the administration of justice. The attorney general is able to play a significant role in maintaining public confidence in the integrity of the justice system and in protecting the rule of law.

In defending the judiciary, the attorney general is not defending the decisions or the reasoning of the judiciary but the institution, its integrity and hence, the rule of law.

The attorney general is in a position to be the voice within government and to the public which articulates and insists on observance of the enduring principles of legal justice and on respect for the judicial and other legal institutions through which they are applied.

It is *not* my contention that the courts are incapable of defending themselves from attack or, for that matter, as I said earlier, that it is the duty of an attorney to weigh into public debate every time any adverse comment concerning a judicial decision comes to light.

It is not an understatement to say that our very system of government and the fundamental freedoms enjoyed by all citizens are at stake if the role of the judiciary is not properly protected. The international stage provides plentiful instances of the erosion of the power and independence of the courts by unrelenting political attacks.

Justice Kirby himself has noted that,

> when you take the independence of the judges away, all that is left is the power of guns or of money or of populist leaders or of other self interested groups.

Charles Hughes, who was president of the American Bar Association during the 1920s said, 'an honest, high minded, able and fearless judge is the most valuable servant of democracy.'

Speaking as a politician, I can say that at the height of a law and order scare, or in the white heat of an election campaign, an honest, high minded, able and fearless judge is an unmitigated annoyance and a pain in the neck.

Speaking as the Attorney General, I can say that it is my role to preserve and protect such pains in the neck so that they increase, multiply and thrive into the future. For all our sakes.