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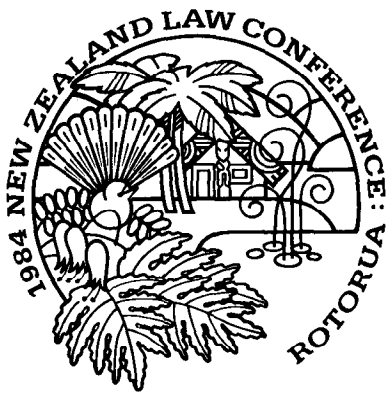


Law Conference 1984 — Closing Address

By The Chief Justice the Right Hon Sir Ronald Davison GBE, CMG

Mr Chairman, distinguished guests, ladies and gentlemen, I do not propose this morning to deliver any learned address but rather to give you the benefit of one or two reflections upon the theme of the Conference which of course is change, and to make brief reference to several matters that have been discussed during the Conference.

Questions

Let me first begin by asking several rhetorical questions. Why is it that in this country there has of recent times been increased criticism of Judges and public debate about the right of public figures and private figures to criticise Judges and their decisions? Why has there been strong agitation for changes in our rape laws, changes in the treatment of rape victims throughout both the investigative and the trial procedures? Why are we becoming a society in conflict; with various minority groups pressing this way and that? Why is the commercial community expressing concern about delays in the resolution of commercial disputes and the need for speedier procedures to be available in such cases? Why has the question of a Bill of Rights for this country become a live issue in the political field, and why is there public disquiet at the increase of executive power? And finally, why is it that, just this week, in the main editorial of a leading New Zealand newspaper there was expressed strong opinion on what was referred to as a "stand-off" between our Court of Appeal and Parliament involving sentencing policy? These happenings, to name but a few, are all matters of concern to Judges.

Why are they arising in this country? I think the reason is plain. We are indeed living in times of change, of rapid change when the performance of all organs of society and of government, including the Judiciary, are coming more and more under public scrutiny. No longer is the public prepared to accept without question the traditional forms of practice and the practices of lawyers, the methods of administration of our law and the performance of our legal institutions.

There are some who would say that such is all part of an anti-establishment trend in this country but the cause lies deeper than that. I believe that current attitudes indicate that the public seeks that the law, the practice of the law, and the administration of the law be more relevant to the current day and age; and that they all three reflect the responsible concerns and aspirations of the community. The changes that we see taking place do, as has been evident throughout this Conference, have serious implications for lawyers.

Social attitudes

They have too, serious implications for Judges. Let me look briefly at several of these areas of change. First dealing with the attitudes of society. It is the responsibility of Judges to administer justice in accordance with the law; but in carrying out such functions there are areas within which Judges may exercise varying degrees of discretion, and in exercising discretion the Judge in this current age cannot ignore the current climate of responsible public opinion. He should not attempt to lead public opinion; rather he should reflect it, but he cannot ignore it because the law belongs to society. It is the body of rules by which society has agreed to be bound and to ignore the responsible opinions of society will rapidly lead to disrespect for the law and those who administer it.

What in any particular area the responsible public opinion may be is not always easy to determine but in the more voluble, questioning and assertive society in which we now live, both those who frame and those who administer the law cannot afford to be unaware of it. Increasing interest and involvement of the public in all aspects of the social structure is no doubt the cause of the questioning and the criticism of judicial decisions and of Judges in recent years. Judges cannot avoid criticism of their judgments by both public and private persons. This they must accept, and the very fact that such criticisms are made should make us more aware that this is indeed a changing society and that we must be aware of it and reflect those changes in our opinions and in our attitudes.

Judges cannot avoid dealing with legal issues having political implications or political matter where the core issue is a legal one. To do otherwise in present society would be to fail to fulfil their duty as Judges. Judges must accept that. They must accept that the greater the exercise of executive power, the closer judicial decisions move towards the source of that power. Such decisions, however, must not cross the dividing line between legal issues involving the exercise of executive power and political issues for which that power was exercised.

Neither, too, can we fail to recognise that we are seeing in New Zealand the rise of a multi-cultural society. We cannot fail to recognise the impact of such minority groups on our society, and the administration of the law must adapt to protect the legitimate rights of such groups and to reflect their different ethnic origins, their customs, their attitudes and their way of life. As in the past Judges stood to protect the rights of the individual citizen from the power of the Crown, then from the power of the state, so too will they protect the legitimate rights of minority groups.

It was suggested by some speakers yesterday that if a Bill of Rights were introduced into this country the Judges by their interpretation and application of it might muck it up. I am bold enough to say that nothing would be further from the truth.

CER

Second, I want to refer briefly to CER. The full implications of CER are not yet readily apparent. One thing however is clear and that is that there will develop a need for a speedy means of dispute resolution. Those means may need to be bold and innovative. I do not know what form they will take. There has been discussion of separate judicial tribunals, arbitration tribunals and the use of our own Courts in both New Zealand and Australia; but if it turns out to be that we use our own Courts then we must look to the adaptation of our practices in this country so as to ensure that our practices and procedures are as rapid and efficient as possible. Such would involve the co-operation of the profession and innovation; and greater and earlier involvement in cases by the Judges.

Court delays

Third, I want to mention the Commercial Court. It is undoubtedly true that litigants are on the whole critical of Court delays. At least those who are plaintiffs are critical; but more often it is the defendants, who have got to pay in the end, who have some vested interest in delaying the decision as long as possible. But it should not be overlooked that there are, in my view, three factors involved in Court delays and they are, first, the delaying tactics of the defendants; second, the time taken by the members of the legal profession to get a case ready to the point where it can and is set down for trial; and, third, the minimum times that are necessary under our current rules for the completion of the various preliminary steps and the interlocutory matters.

Reduction of delays to a minimum and the provision of a rapid system of adjudication in commercial cases will involve three things. First, the Judge taking control of the proceedings almost from the outset and directing the course of the various interlocutory steps prior to trial. Second, it will involve the co-operation of legal practitioners because they can make or break any system by their unwillingness to promptly and speedily comply with the various procedural requirements that must be carried through. And, third, there must be adequate facilities both judicial and administrative to enable the Courts to allocate speedy hearing dates.

In Wellington, and particularly in the administrative division, we endeavour to work in just that way and very speedy hearings indeed can be arranged when all parties are prepared to co-operate toward that end. We have had cases which have been filed, set down, tried, disposed of all well within the period of one month; and there is no reason why, if we adapt those procedures more and more to other cases, we shouldn't be able to substantially reduce the delays in some of the other areas which I acknowledge are longer than is the case in Wellington.

I am prepared, with the co-operation of the profession, to take all such steps as are possible to reduce the delays to a minimum. We are already working on the question of delays. We have that as a topic on the agenda for our Judges meeting this afternoon and we will be following it up in the months after the meeting. I have already given serious consideration to the establishment of a commercial list and to the nomination of commercial Judges. Let me say that I am not unsympathetic towards that possibility. But whether it is better to establish a separate list, or whether it is preferable to leave the cases on the ordinary list and on application to grant them urgency ad hoc as the occasion arises, I am not convinced at this stage. I am open to representations upon this matter and the question of a commercial list or a commercial Court is also an item on the agenda for discussion this afternoon.

Conclusion

And so in this changing society it is quite apparent that whilst there are arising areas of considerable change facing legal practitioners, there are also areas of considerable change facing Judges. The Judges are not resistant to change.

I want now just to reflect very briefly on what this Conference has achieved. It has, I suggest, left us in no doubt that the practice and administration of law must adapt to our changing society. It has made us aware of some of the areas of change in our society which will require our attention as lawyers. We have identified some of the problems and some of the problem areas with possible options for change, and we've been motivated in various ways to act in different spheres to give effect to change which has occurred and changes which are occurring in our society. But those factors alone will not achieve a revitalised legal profession or a more sympathetic and efficient administration of justice. As lawyers we must act now. Words must be translated into deeds whilst the power to do so still remains in our hands. If we do not so act, then the power of action along lines which we consider best and most acceptable to us may be exercised for us in ways not as acceptable as we may wish.

To all lawyers I say we are part of the one profession. We are partners in the administration of the law and we must co-operate to ensure that both the practice and administration of that law satisfies the demands of clients, satisfies the social aspirations of society and results in the achievement of justice for all. If the members of the legal profession play their part, I can assure you the Judges will play theirs. □

Law Conference 1984 — Minority rights

By Fali Nariman, Senior Advocate, Supreme Court Bar of India

The speaker was introduced by the Chairman of the session, Sian Elias. She said: Fali Nariman in his published paper suggests that a minority is any distinct disadvantaged group and applying that definition it is quite clear that his theme, while he draws on examples from other countries, is of immediate relevance to us in New Zealand. As was pointed out in the session this morning, New Zealand is a pluralistic society and we ignore that fact at our peril.

Our first speaker is Fali Nariman whose paper has already been distributed. He is a senior Advocate, which is the equivalent of our Queen's Counsel, in India. He is, himself, a member of a tiny minority group, being a Parsee, which is actually more than I will be able to say in respect to the other panelists today. Although Mr Nariman, himself, is very quick to point out that the minority group to which he belongs is not at all a disadvantaged group. He has had a distinguished career in public law and has written widely on Constitutional matters. He is a member of the Delhi Aid and Advice Board and the Press Commission of India. He has also been involved in law reform in the areas of company law, monopolies and restrictive trade practices laws. He has been actively involved in a number of international organisations. He is Vice President of LAWASIA and in fact in the time available it is quite impossible to tell you all the facets of his quite remarkable career. I would refer you to the summary which is contained in the New Zealand Law Journal *of November 1983 if you would like to learn more about him.*

But for present purposes Mr Nariman is a practitioner who has been actively involved in the great constitutional issues of India especially as they affect the rights of minority groups. India being a country of minorities of enormous complexity. He is a man of great personal conviction, he is an activist in the very best sense of the word. At the time the civil emergency powers were introduced in India in 1975, Mr Nariman was Assistant Solicitor-General of India and he resigned from that position in protest at the Government action. He is a man held in very great honour in his own country and internationally and we are very privileged to have him to address us on a topic on which he is so well qualified to speak.

Thank you Sian, ladies and gentlemen. It is a little embarrassing to be introduced at such length and I only have one thing to tell you that she is right when our Chairman says that the Senior Advocate is the equivalent of a QC, but for reasons too obvious to be stated we don't add after our names — SA.

It is a trifle boring actually for a speaker, and for the listener, to present highlights of a paper which has already been printed and circulated and therefore read and/or taken as read because my friend Tom Eichelbaum assures me that more than 90 percent of the delegates present have read very assiduously — the entire list of Conference delegates! So the point of presenting the highlights of your own paper are pretty useless to a person who has read them, and if you haven't read them well you are too late. So I propose to speak a little outside the paper, but within the topic, on attitudes, because I believe that attitudes are far more important than all the laws that you can assimilate to protect human rights and this is particularly important to third world countries like ours. Of what forms of government in the third world the great powers encourage or are seen to encourage. Because believe me it is their attitudes that determine as nothing else does, the attitudes of politicians in various parts of the world to their own peoples, majority and minority.

Now there are two different approaches to the problems of protecting minorities. One which is concerned about understanding, appreciating and trying to find a solution to them. The other is trying to politicise them or getting mileage out of them.

The Queen's Christmas speech

The first was amply reflected in the Queen's speech last Christmas. The Queen had just visited my country and some others in Asia. Her speech was a compassionate one. Realising the growing intolerance of peoples and of faiths towards those different from their own she voiced concern about immigrant minorities and expressed an understanding of the miriad problems faced by countries in the third world. There was an instant reaction to this speech. It was typified in the words of an English Member of Parliament, Mr Enoch Powell, not a typical reaction I agree, but not a solitary one either. He said and I quote — "She, [the Queen,] is more concerned about the prejudices of vociferous minorities of newcomers than the great mass of her loyal people." Witness how cleverly the jingoistic sentiment is played up. Newcomers versus the great mass of her loyal people.

It is almost reminiscent of a cartoon in *Punch* which we used to read in the pre-war days — *Punch* was much better pre-war, that's my own view if you'll pardon my saying so — there was a scruffy looking English bloke telling another scruffy looking English bloke on seeing a very well dressed gentleman from the Continent "Who's 'im bloke Bill?" He says " 'im.' E's a foreigner." "Eave half a brick at him". That's the typical

approach to problems like these. What Mr Powell says I know is not the view of Her Majesty's Government but I cannot forget that the party to which he belongs supports that government in Parliament and Her Majesty's Government counts on that support.

A plural society

In a plural society, as Lord Scarman reminded us in his paper and this morning, and incidentally he is sitting very unobtrusively in the third row on this side today, and if I may venture to say that when one heard him this morning I was convinced that the days of purple prose are over, (and I knew that long since), you witnessed how one of the most brilliant Law Lords of his time expresses thoughts about the law in such simple terms. That's the essence I think of the law. It's not a complicated thing if you hear the right person tell you about it.

Well as he reminded you, in a plural society minorities must look for protection to the judicial system, that is a judicial system operating in conditions where laws and not men are rulers. But there is a feeling in many third world countries, my country included, that dictatorships are sometimes, often I believe, preferred by western democracies, that to get support from great powers the government of a third world country must show it can control its own people, majority and minority. Effectively control them even by suppressing essential liberties.

This feeling, I am afraid, is helped along by comments such as this – I will give you one typical comment, it is both revealing and the comment on that comment is also amusing. Mrs Jean Kirkpatrick, Professor of Georgetown University better known as the US Ambassador to the United Nations for some time, said in a public speech last year, and I quote "If we are confronted with the choice between offering assistance to a moderately repressive autocratic government (mark the words moderately repressive autocratic government) which is so friendly to the United States and permitting it to be over-run by Cuban trained, Cuban armed, Cuban sponsored insurgencies, we would, I believe, assist the moderate autocracy."

There was a comment on this speech. Not by a third world journalist. The comment was by a famous American one, Art Buchwall, (I think that is what he is called) a humorous, but hurtingly shrewd commentator on public figures and public affairs. He took as his theme Mrs Kirkpatrick's speech as being disussed by any imaginery though not unreal military Council of Colonels in an unnamed country. The Chairman, the dictator, tells his colleagues "They are finally making sense in Washington. As I see it gentlemen as long as we torture our opponents in moderation, repress our people for their own good and only shoot those who deserve it we can again have good relations with the United States. Colonels, he concludes, I don't know about the rest of you but as Head of the moderately repressive junta I recommend we give human rights a try."

Yes humorous, but also painfully so. How is this attitude different from the Union of Soviet Socialist Republic which also professes to be democratic? When someone spoke to Marshall Stalin many years ago of the persuasive powers of the Pope as head of all the Catholics of the world, you remember his famous remark. He said contemptuously, "The Pope, how many legions has the Pope".

Big power attitudes

The problem of human rights, the problem of minority rights, I believe, is greatly aggravated by attitudes of the big powers towards civil and military dictatorships in the third world. The so-called strong governments who are supposed to be popular because no one is permitted to say they are not, until they in turn are overthrown by another set of persons who in turn qualify for being regarded as strong governments, and so on. It is this myth of military self-sufficiency which has propelled many of the third world countries where people are poor, to expend on arms one and a half times more than their gross national product. Which is true. Under such regimes it is not the rule of law but the whim of the ruler that protects minorities.

It was a refreshing breath of fresh air to read an address given last year by the then Prime Minister of Australia, Mr Malcolm Fraser, if the Attorney-General [of Australia] doesn't mind I will quote him. It was an address to a university in the United States. He said that the beginning of wisdom in dealing with nations of the third world was to recognise that the essential, ideological coherence in political terms of the third world, he said, is a state of mind, a matter of shared memories, frustrations, aspirations and a sense of what is equitable and just. Like the working classes of the industrial revolution in the west they want to have full citizenship rights in the world, to be subjects who act rather than objects who are acted upon. And then referring to that quip of Stalin's, he said "Just as Stalin was foolish in over-looking the spiritual power of the Pope, so it would be foolish to underestimate the binding and motivating force of this aspiration in the third world".

If you substitute the word minorities for the third world you will find Mr Fraser's sentiment equally applicable and of even greater validity. It was Djilas, (you remember that great Yugoslav freedom fighter who was a compatriot of Tito and was put in gaol, not by western powers but by his own leader, Tito himself, leader of the third world, because he was so outspoken), said in despair – I want our leaders to understand, and he was speaking of his own third world leaders, I want our leaders to understand that literally as well as symbolically it pays to be free. It pays to be free. I wish that in my lifetime I would hear the President of the world's largest democracy respect this sentiment and act on it. I assure you it would make a great difference to the treatment of disadvantaged groups and communities throughout the world.

There is one other aspect of this matter which I would like to deal with. In one rash moment I had assured Bruce Slane that I would give some conclusions to a paper which had no conclusions at all. I always hesitate to suggest conclusions because you remember what Plato tells us about the Spartans. When a courageous citizen of a city state had a suggestion on public affairs he ventilated it at a meeting of the people. This was the first concept of democracy. He stood on a platform with a noose around his neck. If the populance accepted the suggestion the noose was removed. If the people rejected it, they removed the platform. Now I would therefore hesitate in giving firm conclusions because there are no firm conclusions. There are only tentative suggestions for ensuring as well as one can protection to minorities in a civilised society and I would ennumerate six of them.

First the need for constitutional and institutional safeguards so eloquently and yet so simply mentioned by Lord Scarman in his address this morning. They are needed particularly to protect disadvantaged ethnic and religious minorities, or minorities who consider themselves to be disadvantaged, because small groups must be insulated against the fleeting whims and prejudices of majorities. To say that changes in attitudes cannot come with mere words is, I believe, to underestimate the power of words, of the ideas that words convey especially when expressed in documents which are beyond the reach of ordinary law. But such safeguards are only effective if they are capable of being enforced and there are Judges not afraid of enforcing them. In other words minorities are best protected not only with a written constitution with a Bill of Rights, but under a system of government which recognises the supremacy of laws, not the supremacy of men or large numbers of them.

Public opinion

Second, the importance of continuing to influence public opinion in one's own country, to acceding to and ratifying international conventions relating to human rights. They don't add up to much I agree but they help, albeit indirectly, to create a climate of toleration to shape attitudes, to provide a legal framework for municipal laws. They give support to those in every country who wish to support the rights of the disadvantaged few but otherwise feel social pressure not to do so.

Change of attitudes

Third, the realisation that the chief purpose of all human rights legislation, including laws for protecting minorities, laws for race and sex discrimination is not punitive. It is not to bring offenders to Court but to provide basically a legal framework which will facilitate and encourage a fundamental change of attitudes and, hopefully, stop discriminatory practice.

Pushing too hard

Fourth, and this perhaps is relevant in the New Zealand context, to realise the risk of pushing too fast or pushing too hard. Integration, even benign and beneficial integration of minorities, even gentle persuasion of minorities to join the main stream of national life, must be undertaken with great caution. All cultures whether sophisticated, oriental or indigenous, react sharply to alien interference. Racial, religious and ethnic communities, especially the original indigenous ones, desire to or, as I believe has taken place in New Zealand, rediscover a desire to establish their own separate identity. You must let them change in their own time and perhaps on their terms. To push them too soon leads to what we have sometimes experienced in our part of the world what, for want of a better expression, is known as cultural aggression. A very experienced civil servant who – I have put it in the paper – Mr Rustomji who had a lot of experience amongst the hill tribes of North-eastern India, says "Nothing gives rise to so much anger, hostility and even hatred as the apprehension of cultural aggression".

It is better to let a minority experiment along the lines of a consensus of ideas amongst the more enlightened of them, than to compel its members to undertake what the majority feels – even genuinely feels – to be best suited for the minority. Being disadvantaged a minority feels more easily offended, is more easily prone to look for motives in majority measures designed for their benefit unless there is a wide acceptance of such measures by right thinking members of the minority community itself.

Condemnation and publicity

Fifth, to condemn unhesitatingly and to widely publicise such condemnation of the forcible suppression of minorities wherever it occurs in any country, whatever the system of government that country professes to follow. Such condemnation and its wide publicity helps, not in the short term, but in the long run as most governments chafe and ultimately react to world opinion. Here I would offer to you the example of perhaps the finest non-governmental institution there is in the world today which is performing such good work, and I refer of course to Amnesty International. No government in the world likes them. That itself speaks volumes for what they do, and I was very happy to read certain cryptic comments and critical comments they made about my government, the government of my country, about certain measures that had been taken. But I was even happier to read that they gave our Supreme Court very recently a very clean bill of health. In fact they mentioned particularly the Supreme Court of India as helping human rights to survive in India.

Non-governmental organisations

Sixth, to realise that constitution and laws and their enforcement are not the only means of protecting human rights. Human rights movements and indigenous and local non-governmental organisations are effectively able to mould public opinion in the concerned country. Minority rights are often better protected by timely social responses of the conscious few in every country.

Orwell or Einstein

But after these six suggestions, tentative suggestions, there is a Catch 22 situation. How do you deal with what the writer William Golding calls "The darkness of your heart". You can't deal with situations like that by legislation. You can't abolish the darkness in your heart, the darkness in people's hearts by mere legislation. We have found it impossible to do. Untouchability under our constitution is abolished. Its practice in all its forms is constitutionally abolished. There are laws which provide for the punishment of people who practice untouchability and yet, regrettably, it continues. To a lesser extent of course than what it was in the past but it continues.

It perhaps takes a long, long time to do it and I find that there are two responses to this. It is either the Orwellian response, you must have read his essays called "Inside the Whale". It is a beautiful set of essays, where at a time when he was darkly pessimistic he writes that it is all useless fighting against these things, get inside the whale, stop fighting against it, stop pretending you can control it, simply accept it, endure it and record it. That's the Orwellian theory. On the other hand, that great humanist, Einstein, I don't call him the great scientist which he is always acknowledged to be but he is a greater humanist, he believed that if 3 percent of the world's population were against war and worked against war there would not be a war again. I believe that we as lawyers owe it to humanity to stand up and be counted with Einstein rather than with Orwell. □

Law Conference 1984 — Discrimination legislation

By Senator Gareth Evans, Attorney-General of Australia

The Chairman of this session, Miss Sian Elias, introduced the speaker. She said: Senator Gareth Evans, who is our next speaker, is Attorney-General of Australia. That title alone, I am sure is sufficient justification for your close attention to everything that he says and he probably needs no further introduction from me. However he is also extremely well qualified to speak in his own right, as it were, on the topic for discussion today. He's had a distinguished academic career at both Melbourne University and Oxford University, he taught law at Melbourne University and he has practised at the Bar before entering Parliament in 1978. He was shadow Attorney-General from 1980 and became Attorney-General on election of the Labour Government in March 1983. He is a Member of the Cabinet. Though horrifyingly youthful, I was really going to avoid saying that because I am sure that the Senator gets fed up with people making reference to that but it is such a riveting fact in his case, he has managed to pack a staggering amount into a short time. He was an inaugural Commissioner on the Australian Law Reform Commission and was largely responsible for the Commission's Report on criminal investigation. He was a consultant for the Labour Government between 1972 and 1975 and took a major part in drafting the Racial Discrimination Act and the Murphy Human Rights Bill which of course wasn't proceeded with. He was deeply involved in the constitutional crisis in 1975 and has had, I don't think ever since then, probably before then, but he has an abiding interest in constitutional reform and civil liberties. He has worked on freedom of information and has produced books and articles on public law, civil liberties, law and politics. He is currently grappling with proposals for a Bill of Rights. He speaks to us today on the topic of legislating to protect minorities.

Well, my riveted Chairman Elias, my Lord Scarman with whom I'm delighted to have the prospect of continuing our joust commenced this morning, [see [1984] NZLJ 186] distinguished guests, ladies and gentlemen. Mr Nariman's paper prompted me to ask a series of six questions around the general theme of legislating to protect minorities. Why protect minorities at all? Secondly, why legislation? Thirdly, whose legislation? Fourth, what kind of legislation – general or specific? Fifth, the appropriate limits if any to legislative enforcement in this area. Sixth, I expect that I'm not going to get time to get to it, affirmative action for minority rights.

Why then protect minorities.

Minority rights and majority rule

Let us begin at the beginning. One of the many virtues of Fali Nariman's paper is that it does acknowledge right at the outset the apparent tension between minority rights and the democratic principle of majority rule but tension is more apparent than real. It doesn't hurt from time to time to stop and consider why. The short answer, as Mr Nariman points out is that theories of individual rights and in particular of the inalienability of basic human rights have been central in the formulation of modern democratic theory. It is true these days among democratic theorists indeed among almost everyone else with the possible exception this morning I gather of Mr O'Neill, the traditional natural law under-pinning for human rights is in both its theological and secular forms rather less fashionable than it once was. The trouble of course with the concept of natural law to be used as a foundation for legislating in this area as indeed anywhere else, is that, as the Scandinavian Jurist Olf Ross once put it, that like a harlot the concept of natural law is at the disposal of everyone.

But it is very broadly accepted nonetheless that democracy is about more than crude majority rule. What a genuinely democratic system requires in this broader view is not just accountability through ballot box majoritarian democracy; but rather a fair decision method in which the rights and interests of minorities are protected against unfair or unreasonable majority attack. And on this approach of course the law and the Courts become quite indispensable components of the working machinery of democracy. I'd take the point further and say that the real test of an effectively working democracy is not just how it protects minorities as such but how it protects unpopular minorities. Just as the best test of a true civil libertarian is a willingness to tolerate views with which one profoundly disagrees, so the best test of a civilised society is its capacity to deal tolerantly with those whom Churchill used to describe as "squalid nuisances", the scruffy, the vulgar, the strident, the criminally suspect, those whose views or attitudes or status or behaviour put them outside the majority mainstream.

The minority problems we have to deal with in countries like Australia

and New Zealand are much less acute and far reaching from the point of view of both the minority concerned and the society itself than some of those touched upon by Mr Nariman in his paper. For example problems of the untouchables of India or the Baha'is of Iran. But there are nonetheless very real kinds of discrimination being practised against racial, sexual, linguistic and other minorities in our various respective countries. Sometimes officially sanctioned, more often than not a product of private prejudice, and it is important for the sake not only of the individuals concerned but the preservation of our democracies in good working order that we respond sensitively and effectively.

Legal rights and liabilities

Why legislation? There are many ways of responding sensitively to minority concerns and grievances and they don't all involve equality guaranteeing, or anti-discrimination legislation creating legal rights and liabilities. Higher education has always been the best solvent of prejudice and discrimination based on ignorance. As so much prejudice and discrimination is. And there is much that can be done by community education and human rights promotion campaigns to get the basic message across about the common humanity of us all. Similarly in dealing with particular problems that arise in the work place, with landlords or hotel keepers, soft glove conciliation procedures have been in the experience of most anti-discrimination workers in the field, a rather better way than iron fist legislative sanctions of achieving solutions to practical problems in all of these but the most intractable cases.

But there is nonetheless a place for legislation directed specifically to establishing the rights of minorities of one kind or another to share equally in various community goods and creating duties on the rest of us to behave fairly and even handedly. The approach we have adopted in Australia and this very much mirrors the experiences I understand of comparable countries elsewhere including New Zealand, is a multi-faceted one creating legal rights and duties and giving an ultimate enforcement role to the Courts. But also creating non-judicial conciliation machinery and emphasising throughout the conciliation, investigation, research, report, education and promotion functions of the right enforcing machinery rather than its litigious ones.

Federal problems

Third question – whose legislation? Within countries like Australia having to live for better or worse with a Federal system the question as to which government in the system can or should legislate is a very real one. It can be a source in itself of very real problems. In Australia most of the experimentation with legislation in this area so far has been until very recently at the State level. Three States have anti-discrimination legislation, New South Wales, Victoria and South Australia. Although their statutes differ substantially in matters of detail there are many similarities in approach. They all deal basically with race and sex discrimination though with various different additions and different jurisdictions. The emphasis throughout all of them is on the settlement of complaints by conciliation. All do provide recourse to a Court or Tribunal when the conciliation process is not successful and all empower the Court or Tribunal to grant enforcable remedies such as damages or injunctive relief.

The Commonwealth role in Australia was initially confined to the Racial Discrimination Act 1975, a pace setter certainly in its time, but now very much in need of significant overhaul, and the creation in 1981 of a National Human Rights Commission. A cosmetic enterprise intended by its begetter, Mr Malcolm Fraser, to have little bark and even little less bite. But the Australian Parliament has now passed the Sex Discrimination Act in recent months and seen the advent of course of a Labour Government committed to further far reaching new human rights legislation at a national level designed, among other things, to provide the rights, to protect the rights in those States which have been slow to create law and machinery of their own.

My country is now a very lively and complicated one with consequential problems flowing from it. There is the need to co-ordinate and streamline the available remedies and machinery so that the whole area does not become a bewildering morass from the point of view of the people we are trying to help. Commonwealth Government's longer term aim in this respect is to develop essentially a system of what I keep describing as one-stop shopping both at the national level and between the Commonwealth and States whereby persons seeking advice and redress in problems of discrimination, or for that matter any other violation of human rights, need only go to a single jointly operated human rights commission office in the nearest capital city or regional area for the assistance needed.

Treaty obligations

Of course it is not only by a country's domestic law however simple or complicated that law is, that rights and remedies affecting minorities can be created. Mr Nariman's paper emphasises the international law and machinery presently available to assist with minority rights problems. We are certainly very conscious of that body of treaty law in Australia. Not so much because anybody has ever been able to rely directly on it, but because it is immediately relevant as most of you probably appreciate, to the Commonwealth Government's constitutional capacity to in fact legislate at all in the human rights area. Unlike the situation under the Canadian Federal Constitution or under the infinitely more flexible, much to be preferred, English and New Zealand unitary systems, the national government in Australia has no general capacity at all to legislate on human rights matters. It has to acquire that capacity through our constitutional power of legislate in respect to, would you believe, external affairs.

In this context that means that power to legislate domestically for the implementation of international treaty obligations. It was under that power, for example, and pursuant in particular to Australia's obligations under the UNESCO Convention, Protection of the World Cultural and Natural Heritage, that we are able to legislate nationally to stop the construction of the dam in south-west Tasmania. It was primarily by virtue of our ratification of the International Convention on the Elimination of all Forms of Discrimination Against Women that we were able to enact the Sex Discrimination Act of this year. And it will be by virtue of our ratification of the International Covenant on Civil and Political Rights that we will

be able to legislate for a National Bill of Rights in Australia.

I agree with Mr Nariman that the real utility of the UN Declarations and Conventions and Covenants on Human Rights lies less in their inherent force as international law or as a source of redress for aggrieved individuals than in the way in which they have operated to set trends for national legislation and for establishing norms of civilised behaviour. There is however I should say much more that Australia in common with most other nations of the world including New Zealand, could be doing to make the body of international law work better in its own terms.

We could in Australia, and I hope we very soon will, ratify the optional protocol to the International Covenant about which Geoff Palmer spoke this morning. We could also, and I hope we soon will, follow New Zealand's example and make a declaration under Article 41 of that Covenant whereby we can participate in that system where a nation which is a party to the Covenant can lodge a claim with the Human Rights Committee of the UN when another party nation is not fulfilling its obligations under the Covenant. An enterprise which exposes you of course as a nation to that same treatment.

Nature of legislation

Fourth question – What kind of legislation? General principles or specific rules? This is an important threshold question for human rights legislators in any country. Do you go for some kind of over-arching Bill of Rights stating in necessarily fairly general terms those rights which are to be recognised and declared in providing some mechanism for their enforcement, or do you rather take the view that rights are likely to be better preserved by comprehensively dealing with various specific subject areas like race and sex where problems are most acute.

Most of the running in Australia so far as in Britain and New Zealand has been made by those for one reason or another have been sceptical (if I can use that word again) of the utility of Bills of Rights or suspicious of their implications and who prefer to see the law develop in a time honoured Anglo-Saxon fashion in a gradual and piecemeal fashion. Now however it is becoming to be much more widely recognised and accepted that an enforceable Bill of Rights could become a very useful instrument indeed for the protection of human rights in individual cases as well as setting general standards for legislative and administrative action and having a major educative role in its own right.

I think that the answer to the question of whether you need general or specific legislation is that you need both. The Bill of Rights to keep alight the basic principles to set the general directions and to give hope of a remedy in novel or unforeseen situations. The specific anti-discrimination Acts in our present context to be the work-horses, setting out the ground rules for the application of general principles to the great mass of recurring and foreseeable day-to-day problems.

Bill of Rights

In Australia, in addition to gauging a whole set of other initiatives in the human rights area including a reconstructed Human Rights Commission and revamped racial discrimination legislation and privacy legislation and goodness knows what else, we are committed quite explicitly to the concept of a legislative Bill of Rights. Unentrenched in the first instance but with a view ultimately after the teething problems have been resolved, of putting it into the Constitution if we can pass it through a referendum in entrenched form.

Let me just say one thing about the drafting of a Bill of Rights because it perhaps gets down to specifics in an area where we are all too prone to simply swap generalities. It is very difficult to get the drafting right, to get the language right and if a Bill of Rights is to be of any use to minority groups in particular, it has to get right its guarantees of equality. This is a notoriously difficult area of drafting interpretation. It is one about which all sorts of people have made very heavy weather.

I think that drafting options reduce in essence to two distinct principles, albeit that they are more often than not totally confused with each other by draftsmen legislators, commentators and dare I say, on occasion, by Judges alike. They may be described respectively as the equality before the law principle on the one hand, quite different from the equal protection of the law principle. The essence of the equality before the law principle, which is essentially just our old friend the rule of law, is that people should be treated alike except where the law says otherwise. No one is above or outside the law. Everyone is entitled to its impartial application. That is all worth saying but it is not necessarily saying very much specially from the point of view of minorities who may be discriminated against very often by law.

The essence on the other hand of equal protection of the law is rather more substantial. It is that everyone should be treated in the same way by the law, not merely that everyone should be equally subject to the operation of the law however discriminatory or unfair the content of that law might be. It is a guarantee really of equality not merely of the rule of law. That guarantee has never been and should never be properly regarded as absolute.

It's usual interpretation when the Courts end up getting it right as they finally did in Canada after about 15 years, is that everyone should be treated alike except where discrimination has a rational basis. Thus equal protection of the law has traditionally been regarded as consistent with and even requiring a measure of affirmative action or so called benign discrimination. That is measures which are unequal in their immediate application and which are designed to redress past equalities or to ensure future equality.

Each has its own particular function to serve and no Bill of Rights would cover the field properly without both kinds of equality guarantees.

Enforcement

Fifthly, the limits to legislative enforcement. Deciding what's the proper ambit of anti-discrimination legislation often involves a consideration of competing rights and the striking of a balance between those competing rights. An obvious statement but one that has to be made.

One traditional problem area which I not sure that we have solved in Australia any better than legislators anywhere else is that of private clubs. These may often be central, quite central to the social life of particular communities and have quite often been bastions of real and hurtful discrimination. If they can plausibly claim protection from interference on the principle of freedom of

association and there will be an arbitrary quality about almost any legislative attempt to pick and choose between clubs which can discriminate and those which can't.

But the most acutely difficult conflict of rights to resolve is that between freedom from discrimination and freedom of speech. We are again asking ourselves in Australia, as almost every comparably country has had to in recent years, and I gather that this debate has started again in New Zealand, is it appropriate in the context of racial discrimination legislation for the law to outlaw race hatred propaganda? If so how and to what extent? Such material can be and often is sickeningly offensive. It can be not only deeply hurtful to the members of the groups it attacks but dangerous to the extent that it can cause simmering prejudice and resentment to ignite into actual violence.

There has been a recent resurgence of such material in Australia, especially in the context of Vietnamese refugees and Asian immigration generally. We are worried about it. A serious argument against the prohibition of such propaganda comes of course not from those who are in any way sympathetic to the substance of the material in issue but rather from those who are concerned with the vulnerability of the principle of freedom of expression. This particular concern is that controversial scientific literature on racial differences such as the work of Eyesenck and Jensen might come within the scope of any such ban, and concern, in any event, that opinions however crudely or offensively they may be expressed shouldn't be stifled simply because of their unpalatability.

Two alternative approaches suggest themselves, and then I've finished with this substantive bundle of thoughts.

The first would be a legislative prohibition supported by appropriate sanctions. Any such prohibition to be defensible at all would I believe need to be very carefully couched so as to oblige the prosecution to satisfy not just one or two but a whole series of successive conditions, namely that the character of the material be of a particular kind – for example threatening, abusive or insulting – that it be published with an actual offensive intent – for example to excite hostility or ill will against or bring into contempt or ridicule the target group – and that the objective effect of the publication be offensive or potentially offensive. For example to be likely to excite hostility or ill will against or bring into contempt or ridicule the target group. Those of you who know your New Zealand law will immediately recognise that within that list there lies the constituent elements of the prohibitions in 9A and 25 of the Race Relations Act of 1971 in this country. It's to New Zealand's credit I believe that this legislation which is satisfying all the necessary formal criteria of defensible race hatred legislation, has been in place for 13 years while we in Australia still are wrestling with a solution to this problem.

However even with such a collection of safeguards a quite formidable argument can still be mounted against the desire, ability, utility or both of legislating in this way. The elements of this argument I think fall into three parts. First the difficulty which may be soluble, and I think New Zealand has probably got it just about right except for matters of detail round the edges, of drafting laws to prohibit incitement without seriously infringing freedom of speech. Secondly, and perhaps more importantly, the difficulty making a conviction stick when laws to suppress incitement to race prejudice are drafted in that sort of manner which acknowledges residual minimum commitment to freedom of speech. Thirdly, and perhaps most importantly of all, the real danger that failed prosecutions would simply provide publicity and a false legitimisation for the advocates of racial discrimination and disharmony.

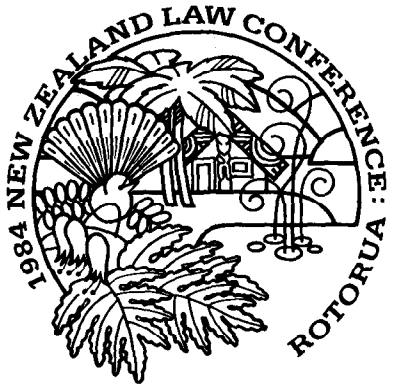
An alternative to penal laws which I believe deserves further consideration would be an amendment to the law of defamation to make it easier for racial slurs to be actionable. Even at the instance of a numerically large community group. Such an amendment might allow a member of the impugned group to obtain a correction or a declaration of falsity, an injunction against repetition but not damages. Once an action had been brought by one member no further action would be allowed thus overcoming the problem of multiplicity of actions. This suggestion has attracted a degree of support from ethnic groups in Australia and is one that we are actively pursuing as part of our own legislative examination.

I won't try and deal with the difficult question of affirmative action – I am happy to of course in question and discussion time. Let me just finally say this. As a former academic-cum-Law Reform Commissioner-cum-Barrister now turned politician and administrator, I am acutely conscious of how much easier it is to talk and write about principles or argue points of law than it is to write workable law and to put those principles into practice. But it is discussions like this and occasions like this when talents are gathered and experiences can be compared round the world that do help to ensure that legislators keep their bearings.

I quoted Scott Fitzgerald at a lunch speech a couple of days ago and in effect I think it is worth doing again. He said no grand idea was ever born in a conference but a lot of foolish ideas have died there. Whether one is talking about legislation to protect minority rights or anything else there is nothing worse, even if there is nothing more politically common, then *ad hoc* reflex responses to particular political pressures without attention to or guidance from some framework of basic principles. And at this session if Mr Nariman's paper in particular, has encouraged any of us to think in these terms, even just to start exploring some of these issues of basic principles, then it will have been very worth while. □

Law Conference 1984 —

Weighing the scales: balancing the rights of individuals



By Hon Mr Justice Wallace, Chairman, Human Rights Commission.

The speaker was introduced as follows: The third speaker today is Mr Justice Wallace. I don't propose to introduce him at length to this audience because he is so well known to most of you. He had a distinguished career at the Bar in Auckland until his appointment to the High Court in 1982. His contribution to law reform in New Zealand has been substantial especially by reason of his membership of the Contracts and Commercial Law Reform Committee and the Royal Commission on Court Structure. His qualifications to speak on the topic of balancing the rights of individuals is impeccable. He was Chairman of the Equal Opportunities Tribunal from 1978 to 1982 and most importantly of all he has been since February 1984 the Chairman of the Human Rights Commission which is of course a statutory body concerned with eliminating discrimination and charged with wide responsibilities to educate, monitor, report and recommend changes to legislation to bring the laws of New Zealand into conformity with the great International Conventions. His topic today is entitled Weighing the Scales and while it is quite clear, I think, that the question of human rights does involve very much a question of balance it may be that our Human Rights Commissioner might consider that a more appropriate topic would have been walking the tightrope. That might have better conveyed the sense of agility required and the danger involved.

Madam Chair, ladies and gentlemen, having received that caution I think I should immediately inject a lighter note into the very serious discussion that we are having and so may I say that when endeavouring to provide answers to the problems of discrimination I often wish I could make the sort of response given by an undergraduate who was at Oxford University about my time there. He was studying divinity but his days at the University had been much more distinguished by his success in the Oxford Cricket Eleven than by any attention to his studies. At all events he was asked in his final divinity examination to name the major and minor prophets of Israel. In answer to which, after due consideration,he wrote: who am I to make invidious comparisons. And I would that our Commission could deal as readily with problems of discrimination and minority groups.

Mr Nariman has in masterly fashion, reviewed the rights of minorities from an international view point. With only limited time I propose to restrict myself to the New Zealand scene. I would however offer one comment on Mr Nariman's reference in his paper, not in his oral reference today, to the Reverend Sidney Smith's remark that it would be an entertaining change in human affairs to determine everything by minorities for they are almost always in the right. That statement reflects a view I have long entertained which is that democracies are greatly in need of minority viewpoints because those viewpoints are frequently a catalyst for change and progress in society. I would suggest that in a democracy the minority view is generally in the right provided the minority can ultimately carry the majority with it. In the New Zealand context one example of this is found in the composition of our national rugby team where an initially small minority convinced the majority that it was wrong to exclude Maori or Pacific Island people from teams competing with South Africa.

Human Rights legislation

To turn to the topic upon which I have been asked to speak to you, whether we have in the human rights field achieved the proper balance between the rights of individuals in our society. One must begin by looking at the legislation under which our Human Rights Commission operates. The legislation has now been in force for some six years and the Commission can already look back on a significant body of work achieved under the chairmanship of Mr P J Downey.

In relation to the functions of the Commission it is important to stress that the concept of human rights is not a vague and woolly one. Human rights can mean all things to all people so that individuals may regard every adverse action against them as a breach of their human rights. I am however satisfied that if the concept of human rights is to have credibility,

the term must be restricted to fundamental rights such as rights to life, liberty and work, freedom from torture or unusual punishment, freedom of speech, thought, religion and movement, freedom from discrimination, privacy and equality before the law, and it is not in my paper but in view of Senator Evan's remark about Judges misunderstanding that phrase I hastily add that it includes equal protection by the law.

Common law traditions

In New Zealand many of those rights and freedoms are recognised as the result of our common law traditions inherited from England though our protection in the main lies in the fact that we have no or few laws which impinge upon our fundamental rights and freedoms rather than positive laws protecting them. While I fully accept the need to foster and develop the international concept of human rights I believe that from an internal point of view the functions of our Human Rights Commission might have been better understood if our legislation had made greater use of our traditional terminology of civil rights and civil liberties or at least made it clear that that is what principles of human rights are all about. I believe this would have bought the concept of human rights into the main-stream of our great traditions to which we would have been seen as adding anti-discrimination legislation in order to enhance the rights of women and minorities, racial or otherwise.

I would like to be clear on that. I am not suggesting any downgrading of human rights concepts. I am saying that that approach might have strengthened the concept of human rights. That might also have prevented our citizens from regarding the Human Rights Commission as a place of last resort. A sort of reservoir into which can be poured every problem which the system has elsewhere failed to resolve no matter how small.

Incidentally, I would say that even three months as Chairman of the Commission has reinforced in my mind how much we need to develop neighourhood dispute centres. Although a few of these are now being established on a trial basis the Commission at present has nowhere to send people whom it cannot help who approach the Commission with what are in reality neighbourhood problems which beset all those who dwell in large communities.

Although I believe we might have been wiser to place more accent on civil rights and freedoms, I also believe that our Human Rights and Race Relation Acts are soundly based placing as they do, emphasis on conciliation but also providing some teeth in case of recalcitrants. The basic scheme of the Acts is to give major emphasis to the prevention of discrimination upon the truly fundamental grounds of race, sex, religious belief or lack of it and marital status. I would emphasise that in dealing with discrimination there is nothing in our law which requires any move towards a mono-cultural or unisex society. Both Acts are best described as directed towards establishing equal opportunity.

Furthermore the Human Rights Commission Act gives the Commission, of which the Race Relations Conciliator is a member, a number of important powers. First there is a wide ranging educational function. Secondly, there is the obligation to scrutinise and report upon all legislation to ensure that it meets appropriate standards. Thirdly, there is the power to report to the Prime Minister on any matter affecting Human Rights and finally, there is a separate section of the Act concerning privacy with the obligation to enquire into and report to the Prime Minister on matters affecting privacy.

I doubt whether it is yet realised how important all those powers are and what an enormous range of issues they embrace. One could spend a lifetime in the field of privacy let alone on all the other issues people wish to place before the Commission. Hence our need to determine priorities and decide which issues can appropriately be dealt with by the Commission.

I would add that the recommendatory powers provide what seems to me to be a sensible compromise. Clearly in our system we cannot have a body making law when that body is neither elected or a Court. On the other hand the public recommendatory role if wisely used can create a real watch dog for our community. So in answer to the question whether our human rights legislation achieves the proper balance between the rights of individuals in society, I say that we have two sound and effective Acts which deal only with the major issues and then in a restrained manner. I am certainly satisfied that our present legislation does not go too far. To my mind the only serious argument is whether the legislation should go further.

There is no doubt that in the field of discrimination changes in attitudes are not easy to make with any rapidity. Perhaps changes could more readily be achieved if a requirement for affirmative action was introduced in relation to discrimination on grounds of race or sex. There is certainly room to argue that our anti-discrimination laws, even if coupled with good education and publicity programmes, do not go far enough and will not sufficiently change our attitudes. Yet the climate has changed in the years since the Race Relations and Human Rights Commission Acts were introduced.

A sensitive area

No doubt the changes are not fast enough for some but it needs to be kept in mind that the Commission has to date had very limited resources. Moreover a fine judgment has to be made between the need to force the pace and the risk of creating a counter-productive backlash. My present view, though as yet based on an inadequate perspective in terms of experience, is that working as we are in such a sensitive area and one which has already roused hackles in New Zealand, we should continue yet awhile with the present structure of the legislation with some relatively small modifications to increase its efficiency. I would however like to see this coupled with as much attention as possible to the educative and publicity role of the Commission which in itself will require a real expenditure of funds and effort.

I am also certain that changing attitudes to the rights of women and minorities will in coming years significantly alter our society. It is for example intensely interesting to speculate upon what changes there would be in government policy if women were elected to half our parliamentary seats. While I doubt whether it is as yet desirable to change the thrust of our equal opportunity legislation, I am sure that we constantly need to be alert to see that it remains adequate particularly in relation to the areas of discrimination which it covers. Legislation protecting

fundamental human rights is not only a safeguard to the individual but is also a protection to the state and the way of bringing about constructive social change.

Far from being a threat to our society or our democratic way of life, human rights legislation is an essential protection against forces which may otherwise destroy our society. If we fail to address the problems, if we fail to keep our laws adequate to protect our fundamental rights we render it certain that there will be a build up of tensions and antagonisms. It is therefore vital to remember that there are many areas of discrimination which our present law does not touch at all.

Current problems

To take but a selection of the more important issues I believe we must in coming years face and find solutions to our problems in the following areas. First, the right to work, unless our economy dramatically improves I see this as being a major area of dispute and difficulty for the future with frightening potential for conflicts between young and old, married and single, and grave consequences for our society if we do not solve the problem. Secondly, a multitude of racial issues including the need to resolve the problems which surround the Treaty of Waitangi. Thirdly, equality of opportunity for women. Despite the progress made to date, there is a long way to go before women can be said to have achieved equality of treatment.

Fourthly, access to the Courts and the cost of litigation. This has been fully covered in Mr Justice Eichelbaum's paper earlier in the Conference, but the point I wish to make is that it is a major human rights issue. Although we have equality before the law for those who get to Court there is not true equality if some cannot obtain access to Courts because of cost factors. Fifthly, I would mention privacy which is, as I have already mentioned, an enormous field. And sixthly, discrimination by reason of physical and mental impairment.

There is some debate about whether questions of physical and mental impairment fall into the category of fundamental human rights. They present however serious problems for resolution. Depending on who is counted as disabled between 10 percent and 30 percent of our population may fall into the category of persons suffering from mental or physical impairment.

Those matters merely represents a selection of the major items. To them can be added such issues as discrimination on grounds of political belief, age, criminal behaviour for example the desirability of expunging some criminal convictions after a period of time, and the rights of adopted children or children who have been conceived by modern methods involving donor parents. Finally, while looking to the future I touch in my paper upon the possibility of a Bill of Rights in New Zealand. In the interest of time, however, and in view of the fascinating and valuable discussion which we had this morning I omit any further reference to that topic.

Pace of change

I would end by remarking on the pace of change in our society forced upon us mainly by technological developments. We now live in a complex society facing problems our forebears never dreamed about and requiring solutions which are urgent and difficult but that serves only to emphasise the need for us to protect our own fundamental freedoms and the rights of others. In doing so there is always a balance to be sought. Inevitably the protection of one person's rights impinges on another's freedoms. For that reason and also because there is frequently a considerable monetary cost involved we need to take care to ensure that our legislation goes no further than is essential. On the other hand it must fearlessly go as far as is essential and what is sufficient for today may be inadequate for tomorrow. □

Butterworths Anniversary Cup

As was announced in [1984] NZLJ 123 Butterworths have again donated a Cup to be played for in the Golf Tournament held in conjunction with the Law Conference. The Cup was awarded for the best net score out of the two days set aside for golf. The Cup was won by Lynne McKechnie of Rotorua. She was not available to collect the Cup as she was away white-water rafting at the time, so it was presented to her husband Murray McKechnie who is the senior partner in McKechnie Morrison Shand, on her behalf.

Mr McKechnie has answered the question asked in the *Law Journal* about the cubic capacity of the Cup. He gives an assurance that it does hold a magnum of champagne – although presumably not for very long. Understandably Rotorua practitioners are delighted, as hosts for the Conference, that the Cup will remain in Rotorua for the next three years as a tangible reminder of the days of the Friendly Conference.

This is the man – Murray McKechnie – who did not win the Cup, but got to collect it on behalf of his wife Lynne.

Law Conference 1984 — Discussion on rights of minorities

Chairman Miss Sian Elias of Auckland

Geoffrey Palmer: I would just like to ask Gareth Evans to tell us slightly what he didn't say about affirmative action that he was going to say.

Senator Gareth Evans: Well that turns out to be about ten minutes of my paper so I won't bore you with that. What I was going to say was this. It is probably the most difficult issue when you are talking about protection of minorities and legislating for minorities. You get worries both from committed egalitarians that there is something uneasily wrong about singling out anyone for differential treatment. Those worries can I think be satisfied on basic philosophical principles which I can talk about if you want but I won't now.

The more significant worries you have to deal with of course are those from the non-egalitarians in the community either on the basis of personal prejudice or whatever, but more particularly those who are at the margin in terms of how they are going to be affected by affirmative action. Those who are going to miss out on jobs if women, or blacks, or migrants as the case may be are preferred at the margin for jobs. And these are very difficult questions to resolve.

I think you have to take forward the debate at a number of different levels. You have to get first of all the principles right, then establish clearly how it is not just by invoking the authority of an International Covenant as an instrument, but how invoking again basic philosophical principles you can justify affirmative action in certain respects provided you can articulate legitimate criteria for differentiation; and I think essentially those legitimate criteria boil down to need, to merit or deserve compensation. What is appropriate to satisfy those criteria in a balancing act situation in any given case is obviously a matter for further argument in the context of each particular case. But what I've been concerned to do in this paper generally and in all the contributions I've been trying to make to public debate in Australia on these issues over the years is to say there is a principled foundation on which you can move forward.

Then you get to the practicalities — Aboriginal land rights legislations in our country. Affirmative action for women in areas particularly of employment. How do you translate those principles into the real world environment where there are going to be back-lashes and those back-lashes are going to possibly be counter-productive to the very minority groups you are trying to assist? Particularly so in our country for Aboriginal affirmative action. And I think here the message the practical political message has to be one of hastening fairly slowly. Taking and being willing to take the crunch decisions, the hard decisions, the unpopular decisions if all other methods of subtler persuasion fail. That may be what we have to ultimately come to in Australia so far as some recalcitrant States are concerned, again on land right sorts of issues.

When you are talking about the other great issue in our respective countries of affirmative action for racial, sexual minorities, one has to call women a minority in this respect even though statistically we all know that they are slightly in the majority, but in terms of traditional disadvantage they satisfy every classic definition of a minority, I think in this area you have to really operate very much more carefully than some of the more enthusiastic supporters of these concepts would be inclined to. Particularly I think you would have to take account of the American experience and the very real alarm that has been generated by strict numerical quotas as an approach to dealing with traditional areas of employment, or study, university entrance say.

There is a hard and a soft level at which you can approach these things. The softer level involves not so much the setting of strict numerical quotas but rather the setting of targets and goals, and strategies and programmes may be creating a legislative framework within which that target setting that programme establishing takes place. The key debate in Australia that is going on at the moment about this is very specifically in the context of affirmative action for women, focusing in particular on employment for women and we are just about to issue I think next week, a green paper which is a bit slower than some of the rapid fire legislation people are expecting from us.

We are going more cautiously. We are going to issue a green paper in which we articulate all the basic issues of principle we identify obviously the problems and identify a strategy for dealing with it in terms of really goal-setting, target-setting rather than any quota demanding I think on balance, designed as this strategy is to get the enthusiastic co-operation of large employers, rather than at this stage anyway talking in terms of sanctions down the road if there isn't that co-operation. There's a fair chance that we will be able to move fairly rapidly towards redressing some of these really rather terrible historical and quite unjustifiable inequalities that have occurred.

All I was really wanting to do was not wrap up what is a very big issue on which I have written about at nauseous length in the 1974 Federal Law Review for anyone who wants to go into some of these issues of

principle. I didn't really want to go into any of the detail but simply to raise the issues to generate some further debate if possible about that; and to identify for you, as I have tried to do all the way through this the importance to me – and I think Fali Nariman is trying to do this too – of really getting your basic principles right, rather than just responding in an *ad hoc* way to this or that pressure as politicians are so often prone to do.

Miss Sian Elias: Can I just ask you how – talking about goal settings, I appreciate the difficulties with the American cases, but how do you set goals except in terms of numbers? What are the goals you set?

Senator Gareth Evans: Well, it is a question of devising a plan or whatever for each particular enterprise I guess, and what we are proposing in the green paper is to take businesses with 100 or more employees to try and work out a system whereby in co-operation with the Sex Discrimination Commissioner and his or her staff that we will be establishing shortly, particular programmes are worked out, targets are set – which do have a numerical dimension clearly – to try and get people into the work place if they haven't been there before, and to do that in a way that gets the active co-operation of the management. This is on the basis of what you are doing in management is not engaging in acts of charity, but what you are being asked to do is to hire people who are the best qualified for the job, and to put aside some of the stereotypes about the incapacity of women to be long term effective performers because they are going to break off and have kids and all the rest of those things. To get people thinking in terms of the right criteria to be applied and the kind of balance they should ultimately be striving to get in the work force to reflect the application of those criteria.

And the target numerically for any given enterprise might be very different from some other enterprise. That wholly depends on a combination of historical factors, the real needs of that particular management or whatever. It is rather then – when I talk about strict numerical quotas I mean we are familiar from the American example that since Chicanos or American Indians or blacks represent X percent of the population as a whole, then there should be X percent of places in this or that publically funded institutions for that particular minority group.

I just don't think, we don't think that in Australia; having had a pretty lively debate on this already. It is something which politicians shrink from tackling because it creates a phenomenal degree of neurosis particularly in the business community. We just want to, right from the outset I think, scotch what is often a caricatured appreciation of the American experience but which nonetheless has had a real impact on the thinking, and the very apprehensive thinking, of Australian business. So that is what we are talking about in the green paper which we are happy to make available to anyone who asks me about it later on.

Dorothy Winstone (Auckland): Madam Chairman, as the question of affirmative action has come up I would like to direct a question that may be might have been more applicable in this morning's session but I will ask it now. Australia, I understand, has ratified the UN Convention on the elimination of all forms of discrimination against women. New Zealand has not done so. There has been considerable debate centring around a concern that a UN Committee would have the right to interfere, investigate, conditions in a ratifying country. Would you comment on that in light of the comment on affirmative action.

Mr Fali Nariman: The UN Committee, the Human Rights Committee would not be entitled to comment unless New Zealand also ratified and acceded to the optional protocol of the political Covenant and so far as the United Nations Declaration is concerned unfortunately you see most of these declarations have no teeth in them. That is to say nobody can be pulled up, and the Human Rights Committee only supervises the political Covenant and not the other Conventions, and least of all the prevention of discrimination against women.

But there is one little side light which may be of some interest to you here that even though (I will be very interested in the comment of Gareth) that in Australia, for instance, in societies which have been used to equality which have started with equality it is very difficult to impress upon them conditions which may amount to inequality even though that inequality is necessary for bringing a certain class of people up to standard. We don't find it so difficult because we started with inequality, so that equality is a constitutional concept which we enforce so that we don't find any difficulty in implementing it.

But at the same time prejudices are the same all over. I appeared recently in a case which concerned the air hostesses; I appeared for management. The air hostesses insisted that the male pursers (in some air lines they are known as male hostesses, they do the same sort of work!) and the hostesses should retire at the same age. Their retirement age was fixed at only 35 whereas the male purser would retire at 58, and they said this was grossly discriminatory. Surely the hostesses should be permitted to stay on. Of course there was the usual talk and in the affidavits about a large percentage of the hostesses went away and got married and so on, bearing children and so on and so forth. But ultimately the Supreme Court resolved it by saying very well not 35 but 45, but even that was quite an *ad hoc* decision and they should have gone the whole hog and decided really totally against me instead of half against me. Still that is the sort of prejudice which appertains even in communities which have the constitutional safeguards as we have. That is to say a law for the better protection of women and children is an exception to the equality clause.

Senator Gareth Evans: Could I just add quickly to that by saying that under the Convention for the elimination of discrimination against women there is provision for a particular committee to be established internationally under that Convention, and states parties to that Convention are required to report I think first a year after the implementation. But the point still holds there's no capacity to investigate. All that the committee does as with so many of these UN Conventions and Declarations that Fali Nariman talks about in his paper, the most that body can do is receive the report and pass on its own report

to the UN General Assembly, something of this kind. There is an element of international disfavour sanction that possibly flows from that, but the notion that the sovereignty of a nation like New Zealand would somehow be put at risk by the all-pervasive probing operations of committees constituted by Colonel Gadafi of Libya and miscellaneous other nasties around the place is a canard that ought to be treated as such, and I hope Jim McLay is listening very carefully to that particular proposition.

Fali Nariman: The best thing probably is to agitate and throw the men out of power!

Chairman: I would like to ask Mr Justice Wallace to comment on the question of affirmative action under the Human Rights Commission Act because he had some comments to make in the paper a few weeks ago about implemention of programmes for affirmative action.

Hon Mr Justice Wallace: I think the thing that I would say in the New Zealand context is that that it is really very difficult to make rapid progress especially in the field of equality of treatment for women without some form of affirmative action. It is a very time consuming and patience stressing exercise. The sort of problem that one encounters is that the Commission in conjunction with the Employers' Federation persuaded the Federation to adopt a positive action policy for promulgation to its members which the Federation did about the end of '82, and we discovered recently that not one single employer had done anything to adopt that policy. So an enormous amount of work had just come to nothing so far. That is a little unfair to the employers as many individual employers have moved without that sort of probing, but it really does in the end become a very slow moving exercise without affirmative action.

Hon Mr Justice Jeffries (Wellington): When I was younger I could have stood over there and you would have all heard me, but I'm now afraid that I must approach a microphone. My comment, I'm now going to make I hope, is not considered beneath this paper in this session. It is really a practical one but I do wish to draw it to your attention. I am speaking this afternoon not really as a lawyer on one side, but as a person who has been working for a minority group in society for some years now. One of the problems facing those involved in working for such groups is how to achieve a remedy through legislation. That is, how does one convince the government to act?

Now I illustrate that by an example. As I say I have worked with a Society for three to four years actively engaged in trying to achieve legislation for a significant minority group and that is intellectually handicapped people. There is a great need, as we know in New Zealand, for legislation for intellectually handicapped adults and I am not going to go into the need here because it is acknowledged and agreed by everybody. The problem is who will make the selection of the vast number of alternatives from what was described so aptly this morning as the smorgasbord, who will select from the alternatives? Now we have had great difficulty, the Society has put its submissions up but clearly the Society itself is not the ideal group to propose to a government how it should legislate because legislation is the government's business.

What are the other alternatives? I will just mention a few very shortly. There is the Royal Commission or some sort of Commission. Now that might be called the Rolls Royce way of doing it and obviously every problem cannot be put to a group like that. Perhaps a single Commissioner is another way of doing it but again that has its drawbacks. It was done, if I might say so, brilliantly in South Australia with the Honourable Mr Justice Bright, who brought down an excellent report and South Australia may now be said to be in the forefront of countries that are all facing this problem.

I was in Australia on this issue this year. My hope is that in the future the government will see some method of getting a group actively involved so that groups like ours can focus upon. Perhaps it could be the Human Rights Commission, I just make this as a suggestion, with widened powers so that it could take up the putting into legislative form an ultimate delivery of the remedy to those who need it. Perhaps it could be a Law Reform Committee so that that Committee could concentrate and be the focus of groups such as mine — such as the one I'm working with — but of course there are many others.

Senator Gareth Evans: Can I just say that that is an interesting question about rights of physically and mentally disabled people because it is right at the intersection of what the law can do on the one hand and to what amounts to the kind of problem to which law as such is no real solution. You're talking about a combination of strategies to deal with that particular minority problem. One set of strategies are really in the bag that we tend to label as social and economic rights. The kinds of rights that to be satisfied don't so much need legislative attention as government action. The expenditure of money, the establishment of programmes through Social Welfare sorts of departments.

But equally for those sort of groups there are many kinds of discrimination which are suffered that bear no rational relationship to the particular disabilities that are being experienced by the people themselves but are the product of prejudice, and prejudicial attitudes, in exactly the same way as attitudes flow against women or racial minorities of one kind or another. I think there is a very real case for having quite specific anti-discrimination legislation to deal with non-rationally founded discrimination against handicapped groups in the same way. If you are talking about an enforcement mechanism or a target agency with which interest groups in the community can co-operate in implementing these strategies, what we're doing in Australia I think is trying to avoid a bewildering miscellany of different agencies in the legal redress area dealing with particular sorts of problems, because it is very hard to get a focused government response if that occurs. What we are trying to do is bring all these sorts of operations, to the extent that they are capable of legal type remedy, under the single umbrella of a national Human Rights Commission. I think that is the sort of thing you ought to be, with respect, lobbying for here, as well as the package of remedies that are never going to be capable of legislative redress but only through government action. It is a mistake I think to think in terms of some single catch-all solution to all these problems. It is an on-going strategy of pressure that has

to be applied to keep governments honest, effective and active here as everywhere else.

Chairman: I would have thought myself that the sensible way to continue this monitoring function is to build on the basis of the Human Rights Commission and extend its powers but that leads you up against the constraint that Mr Justice Wallace mentioned, without stressing, and that is the resources of the Commission. I would like him to comment about that because it seems to me that the scope, particularly the monitoring function, of the Human Rights Commission cannot really effectively be done at the moment given present funding.

Hon Mr Justice Wallace: I could cover that very briefly. I recently made an enquiry about the funding of the Australian Federal Commission and the State Commissions and when I received the information I reeled backwards green with jealousy. The Federal funding in particular is relatively generous and with every sign of increasing. I think the Australian Commission is very fortunate. It is a problem in New Zealand that the funds for the Commission are limited but we do have a power such as Mr Justice Jeffries referred to because in section 6 of the Act the Commission has the function of reporting to the Prime Minister on any matter affecting Human Rights including the desirability of legislative action to give better protection to any disadvantaged group in broad terms. So the power's there, the facility's there, the raft of issues that we are having to deal with stretches our resources beyond the limits.

Miss Pamela Ringwood (Auckland): I have a special interest in this as an academic and a derided minority there quite often, and as an Australian resident in New Zealand which takes quite a lot of stamina sometimes. But I really applaud the placing of a serious topic like this in the Conference and on the truly superb way in which it is being treated. The talks have touched both my mind and my heart. I haven't really got together what I want to say in a very polished way, but I would just like to take a minor practical point which goes to the question of affirmative action, and also goes to the point which Mr Nariman made so well of the terrific catalytic power of minorities for promoting growth not only by tolerating their differences but understanding them and enlarging one's perception and understanding and deepening one's wisdom as against one's knowledge or information only.

I am a little wrought up about this because as the adoptive mother of three Polynesians I have been struck as never before by the viciousness and insensitivity of a subtle education system towards obliterating the catalytic contribution of people of other minorities. I am very glad that the subject has been therefore treated so very openly today, and I would like to suggest that in a minor way there could be some affirmative action and I mention this in no way as a criticism because the Conference has been superb. But I wonder if future organisers might consider the more prominent appearance of minorities such as women, even Australians although they have been here in force, Chinese – our Chinese graduates, our Polynesian graduates. Also whether they might not consider not simply incorporating them, and women of course, into what is substantially a programme which has been organised along one major cultural and sexual line but as having them as something more than token people in influencing not only maybe the topics to be presented but the way in which some topics are presented. Perhaps taking more concepts, perhaps of the Maori method of discussion, in even just one afternoon. I would like to make this suggestion to the organisers at the same time as I would like to say I have deeply admired and respected the way in which this Conference has made a contribution to understanding.

Mr John O'Neill (Dunedin): I take my cue from Gareth Evans' comment about the importance of getting the principles right in attempting to draft these Bills of Rights and so on, and the point I want to make is that in most of the International Conventions the words describing the human person are "everyone". I think in the Declaration the Rights of the Child it is "every child without exception" and there are other all embracing terms describing the human subjects of those particular Conventions. We have had practice of that from the time of the Universal Declaration of Human Rights in the late 1940s down until about 15 years ago where that did include the unborn child. There is one clause that usually turns up in most of those Conventions about the question of capital punishment, that this will not be imposed in the case of a woman who is pregnant. Speaking off the top of my head that provision under the common law applied from the stage of quickening but under the fair interpretation I think of those Conventions it applies from conception. That is a strong indication to me that those words "everyone and every person" and so on, everyone without exception and every child without exception, in those Conventions include human beings from conception. Now of course there is division about this in society we know. There has been over recent years but if we are going to get principles right should we not just simply grasp the nettle and face up to this one. I would be interested to hear the comments of the panel about that.

Chairman: I was rather under the impression Mr O'Neill that that point had been answered by Lord Scarman this morning but I will ask Mr Nariman if he agrees with your interpretation.

[Mr Nariman indicated that he did not wish to comment.]

Senator Gareth Evans: If you scour the International Conventions and domestic Human Rights instruments around the place you can occasionally find, I seem to recall, provisions which do give some weight and comfort to the point of view you are espousing, which are in a sense anomalous provisions about non-execution of pregnant women and so on. But overwhelmingly the language of the Covenants and certainly the Covenants of political rights and ones like European Convention and so on that are used as the touchstone for most serious discussion about Bills of Rights do talk, as Lord Scarman said this morning, simply in terms of "person", "everyone", and the traditional interpretation of that has been and squarely accepted by the international bodies which debated this language and put it on the record because the issue certainly did arise in those debates. It's been squarely accepted that all those references are to be taken as referring to lives in being and so you've got provisions

like no person should be deprived of life without due process or whatever. The reference is and always has been subsequently interpreted in that way. This is obviously a matter which if this language were to reappear in the kind of Bill of Rights which we are contemplating in Australia or that in New Zealand it would be a matter for the Courts to make up their own mind here in interpreting this language as to what the proper construction would be and no doubt this is an issue on which there will be a keen difference of community opinion. We all know that. But I think that it's a, with respect, somewhat misconceived enterprise to try and find authority in some of the more exotic bits and pieces of international documentation on this because overwhelmingly the force of the law, as it's been written and interpreted internationally, has been such as, for better or worse, to exclude the unborn from the lists of those who are to enjoy the rights in question.

Mr Fali Nariman: One little right – I know that the United Nations is considering the rights of the child as a separate documentation and I think in that there is going to be consideration of this. As to what it purports to be I don't know because I am not on that committee or any such thing. There is a committee appointed to go into the rights of the child in order to see whether they can't have a covenant about the rights of children and this is one of the problems that they are grappling with.

Mrs Nadja Tollemache (Auckland Law School): The first question I was going to ask has already been partially answered. I was going to invite our Human Rights Commissioner and perhaps any of the other speakers to elaborate on discrimination by reason of physical or mental impairment because it is one of the discriminations we have heard very little about, but perhaps we have already had a partial answer to that. But the other point concerns the right to work and affirmative programmes.

Now, one of the aspects of affirmative programmes hasn't really been thought about very much, is the right of women to part-time or job sharing work which is an attempt to compromise between their feelings that they want to share in the upbringing of their children without losing their work skills, and their contact with a career which they may have put an enormous amount of investment and time and effort into having qualified for. I know that at the moment we have just heard that a scheme, which was put forward by the Health Department by which medical women who wished to have a part-time input while they were bringing up their children, that this scheme has been cut down in its funding. I would very much like to hear the panels' views on the concept of job sharing or the right to part-time work as a form of affirmative action.

Senator Gareth Evans: If I can say just quickly, I think that that's one of the *sine qua nons* of effective affirmative action particularly for women in the employment context. If you are looking for realistic ways of creating opportunities for women in the work force you are talking about part-time working, you are talking about job sharing, you are talking about a whole series of interrelated strategies of that kind. I don't believe that is something you can easily legislate for, for the obvious reason that the diversity of work place circumstances makes it impossible to lay down rules of general application. This is classically the kind of thing that can be addressed in the context of working it out.

(At this point there was an unfortunate break in the recording of the discussion on the tapes supplied. A young Maori lawyer Mr Whaimutu Dewes of Wellington responded to an enquiry from the Chair if anyone would like to comment on the issue of Maoris and education. He spoke quietly but with feeling about the difficulties of the education of Maoris and the preservation of their culture and the acquiring of professional qualifications. He spoke of the language nests, the kohanga reo, and the need for separate Maori education to enable Maoris to preserve their culture.)

Hon Mr Justice Wallace: I personally would agree that there's a great deal which can be done inside the legal profession without State intervention, both at law school and in terms of entry to the profession to encourage all minority groups to enter the profession. Until that happens and until those people are seen as coming through into partnerships and, one would hope, the positions of governance in the profession and the law societies and in the Judiciary, we will not be seen as having a fair society.

Mr Fali Nariman: May I just add a word of friendly but completely unsolicited advice to my friend also, that I don't think the remedy of separate schools is going to help you because the remedy – that's precisely why I mentioned this as a question – the remedy has to be within the system. You have to subsist as one nation and not do something which the Americans regretted they did and ultimately has led to a de-segregation era. So that I would ask you to seriously consider what alternatives you have within the system before you decide on a complete separateness because that is going to be far more difficult for you than for the people from whom you separate.

Chairman: But Fali some of the cases that you mention in your paper involved schools to foster separate languages and separate cultures. You don't see a validity in that?

Mr Fali Nariman: That all depends on the context in which it is done. If it is done as an affront to a particular racial minority and it is done as a protest then obviously that particular minority is going to close up into its own cocoon and only bother about its own culture and not about anything else, and it will certainly not fit into New Zealand society as we know it in 2000 AD or when the times comes. So I am a little wary as to whether this is the right solution. Of course if no one is listening to you that is a separate problem; but if you have to be listened to then you should raise your voice and ask that certain measures should be taken like reservations of seats in schools, or special curriculum of a particular type. But a mere breaking away I think is something which has to be very well thought out. This is only a very tentative and as I said totally unsolicited piece of advice and I know nothing about your conditions. **(Chairman:** What a disclaimer) But I do know something about conditions in my own country so I do beseech you to before you think of something like that – and I don't think your people are unresponsive, your Ministers and so on, you should not at least be unresponsive to some suggestions of doing something from within.

Chairman: Does anyone want to follow up this particular aspect of the discussion?

Mr W Dewes (Wellington): At the risk of dominating this discussion on the unlikely topic of Maori language in schools the proposal is that the medium of instruction be in the Maori language and perhaps there would be more orientation towards a New Zealand/Aotearoa history as opposed to the War of the Roses and other less directly relevant items of history. But it is not to isolate little cocoons of Maori culture. The idea of it is to ensure the survival of Maori cultural values through the medium of the Maori language. It is an initiative which the Maori communities who are proposing it have taken upon themselves rather than pushing and pushing and pushing at the Government, trying to get the Government to come up with a remedy which we have recognised is essentially reliant on our own resources. No one can teach my children to speak Maori if I don't do it myself, and the same with my nephews and my other relations. That is something in which the Government can assist and my private opinion is should do more, but it is a phenomena which the Maori community is starting to be a little bit more robust about and it's not an isolationist proposal. It is merely an assertion of its identity.

Ruth Charters (Wellington): I would like to pick up on a point made by Senator Evans when he referred to the prohibition in New Zealand against the incitement of racial hatred under our Race Relations Act. I agree with him that that is a very important recognition that one social group can be threatened and suffer actual harm by the spread of organised invective and propaganda. It is also a key area of distinction between the Race Relations Act in New Zealand and the Human Rights Commission Act in New Zealand. There is no similar protection or resource available to women.

I also applaud Senator Evans exploration of the possibility of exploring the law of defamation in this area because I think that is actually the appropriate legal area and a very clear analogy can be drawn. We are already quite willing to accede to limitations on our freedom of speech when we see that an individual's reputation or economic wellbeing may be at stake; but we seem far less ready, at this stage any way, to see what I see as the natural extension of that protection to a group of people who might be equally at risk.

And so I would like to ask him during his deliberations to give full and serious thought to including the defamation of women as an actionable wrong in any such reform and to provide if not for general damages at least for exemplary damages as part of a claim. In that way women might finally be armed with their own defence against the tirades of sexist advertising and against the psychologically and physically damaging results of explicit pornography. And I include in that everything from page 3 of the tabloid newspapers through *Playboy* and *Penthouse* magazines to the videos which record the mutilation and murder of women for entertainment of those men who make or choose to view those films and material. All this material creates and reinforces a savage lie about the nature and the variety of women's sexuality and about our purpose in the world. As such it is a major impediment to the freedom of women and to the prospect of social harmony between the sexes. I invite Senator Evans to consider those points and I would also invite Mr Justice Wallace to indicate whether the Commission would be prepared to receive further submissions on the point.

Chairman: I think the Commission's obliged to receive any submissions.

Hon Mr Justice Wallace: That rescued me from a bad spot didn't it Sian. We have got to accept them. If you want to make submissions, your're entitled to.

Senator Gareth Evans: We've been looking for a growth area for lawyers! In Australia with accident compensation Compensation legislation I hope on its way courtesy of Sir Owen Woodhouse's legacy, clearly the concept of group defamation actions on behalf of women would be a spectacular growth area; (**Chairman:** I like the idea of exemplary damages – I think we'd be wealthy.) but let me just say that you've raised a very real issue when you raise in particular the question of pornography and exploitation and degradation of women and so on in that context. It's a debate that's been going on at an increasingly lively pace in Australia just over the last few months in the context of proposals I've been trying to introduce for some rational basis for video censorship. I've been very alarmed, I must say, at the new puritanism which has emerged through this combination of radical feminism on the one hand and the rabid right on the other.

I think it is very important that we don't throw out the window a lot of very hard fought for libertarian values in the area of censorship freedom of speech in the course of advancing the entirely understandable concerns that you very well articulate. I think we've just got to get the lines right and I'm sure one of the places to properly draw a prohibitary line is with the extreme sexual violence kind of material, particularly video cassette stuff which is infinitely more powerful in its impact, and infinitely more damaging I suspect in its impact, than the traditional published glossy magazine stuff.

I think that's probably right; but when you start moving to page 3 of the average tabloid and all the rest of the billboards and advertising material around the place that can be construed as sexist, nasty, you really are getting into a pretty draconian sort of field and one that can all too quickly get us back to the bad old days of prohibition of information about contraception under the guise of protecting matters of public taste, matters about which a few people – certain people – feel passionately. I just enter a particular caveat against all those around the place who might be minded to hiccough that particular theme and respond emotionally to it, that for God's sake don't forget the battles we all fought during 50's, 60's and onwards on matters of censorship – literary and otherwise – and don't let's get ourselves in a situation where we have to fight them all over again with a very different set of allies than those we traditionally relied upon in the past.

Hon Mr Justice Wallace: Can I just add a comment to that. It would indeed be a growth industry and people here might be interested to know that at the present time 50 percent of our complaints under the Race Relations Act, sometimes in a given year more than 50 percent, come under the Racial Disharmony Section 9A of the Act. It is by far the

greatest source of complaint in New Zealand about race matters. It's interesting in that context to find that there have in fact been only two cases taken to Court under the relevant sections – one under 9A and one under 25. That may say something for the Race Relations Conciliator's ability to conciliate. It probably also says something about what a difficult area it is in which to secure convictions, or successful proceedings in the civil section. Can I also add a comment about the question of racial defamation and not necessarily using the criminal approach. Our Act does in fact do both in its separate sections and I would commend to Senator Evans the possibility that Australia might do likewise. I think the criminal sanction is always going to be incredibly difficult to impose. It's pretty difficult to get home on the civil one.

Bevan Greenslade (Wellington): My question is very short and simple. In this morning's session on the Bill of Rights and again today, this afternoon, attitudes seem to be the key factor. Not unnaturally as lawyers perhaps we've been looking at adult attitudes. In my family I have two teenagers and a third child just moving into the teens. I have been impressed by the way these kids have been able to, quite intuitively and with much sharp logic, discuss matters of politics and of economics and sociology. I have been impressed in the way that their school has allowed them to develop opinions which have found a great deal of favour with me. They are not reflections of my opinions at all – in fact I think they are much better opinions than I hold. I think that there is perhaps room [for something] which hasn't yet been discussed by the folk, who have addressed us. To look to the schools as a discussion point for the sort of change in attitudes that we would like, all of us, to see. It may be that our salvation that we're looking for from the Bill of Rights might be intuited, not better than but at least as well as, from this teenage group of children. They don't carry the same legacy of well-intentioned mistakes that all of us as adults have lived with.

Hon Mr Justice Wallace: Could I just make a comment on that. That, I am sure, is very true. It's a slow process of course to do it that way. It may be the best in the long run. You may be interested to know that the Race Relations Conciliator with the approval of the Education Department has introduced into schools, or is in the process of introducing, a teaching kit for teachers on race relations. In Australia a massive enterprise is being undertaken to do the same for human rights. We're looking at whether we have the resources to do likewise in New Zealand in co-operation with the Education Department. It is a major area. It's difficult because it passes out of your control once you start it if the material gets into the hands of a racist or sexist teacher it is capable of great distortion. But nevertheless it is one which is very valuable to explore at least I think, in the New Zealand context.

Mr Fali Nariman: Madam Chairman, may I just say one thing. I find in modern societies particularly television ridden societies, that, which unfortunately we are also picking up in our country, that problem of exposure in schools is very important but then what about the rubbing off of that very useful exposure with violence on television. It is violence which I think the young very easily adapt to and that's one of the problems which I think we all have to face whilst at the same time not trying to impose censorship – some persuasion to prevent such a degree of violence at an impressionable age. It seems to suggest that everything is achieved by bashing someone in.

Senator Gareth Evans: Can I just say I think there is a very direct link between the Bill of Rights concept and educating people about human rights in schools. It is one that can be very well advanced if the Bill of Rights, itself, is drafted in such a way as to be appropriately a school room wall charter. Indeed that is one of my instructions to the team that has been working with me in drafting the Australian Bill of Rights, to get at least the key articles – forget about all the procedure, all the mechanical stuff and some of the qualifications and so on, they can be as complex, as lawyerly language as you like, and they can go on a separate part of the Bill – but let's at least get ourselves drafting a Bill of Rights which pulls out and articulates the basic concepts in as clean and uncluttered and intelligible and understandable a fashion as possible. So that you do have a Bill of Rights that does have a capacity to perform this declaratory, this educative role as well as being purely a tool for the use of Commissions and by litigants and their lawyers in the Courts. One of the problems about the succession of colonial Bills of Rights that have been drafted, as Lord Scarman said earlier today, in the basement of the Foreign and Colonial Office over the last few decades in London, is that almost all of them are highly technical – extravagantly technical – documents full of elaborate qualifications attached to each one of the rights in question. As a result their declaratory educative force is totally diluted. There is something to be said – albeit that gives nightmares to those of us who have to contemplate what the Judges might do with it – there is some real force behind the rather robust traditional American approach to the ten articles of the US Bill of Rights. I think the Canadians are getting very close to the ideal solution in their Charter with a relatively clean, stripped down version of the basic rights. Rather than qualifying everything in sight over and over again in the same sort of qualifying language they've just got a simple qualifying formula. Now that's what we're trying to do in Australia and I would recommend it to anyone else who is contemplating that sort of strategy because if a Bill of Rights is going to be worth a row of beans as a supplement to all the piecemeal specific and anti-discrimination and other legislation that I've argued is necessary as well, it's got to, I think, have a genuine educative force for future generations as well.

Hon Mr Justice Wallace: Can I add just a little postscript to that. I'm not sure whether Senator Evans knows of it, but no doubt under his encouragement, the Australian Human Rights Commission's pack to schools encourages the pupils to negotiate with their teachers for children's human rights. And you would be very surprised at what good results are reached thereby.

Chairman: Well the optimist who briefed the Chairpeople for the sessions suggested that we ended up by summing up, which I don't propose to do although I was very interested to see how the Chairman at the morning session managed to wriggle out of that and I had thought of applying it if we had time but as we have run out of time I won't pass it on to any of the panelists either. □

Law Conference 1984 —

Bioethics: experimental medicine.

By Russell Scott, Deputy Chairman of the New South Wales Law Reform Commission.

How fortunate we are to have Sir Shridath Ramphal directing the affairs of the Commonwealth. Yesterday his experience enabled him to communicate to us two visions of particular significance. His first message was that all of us, including those of us who live in our South Pacific paradises, have lost the option of ignoring the rest of the world. Nations are more inter-dependent than ever. No one country will be able to maintain without great change an ordered prosperous society in this disordered world. His second message was that we must understand the changes that have happened and will happen and get the best from them. Of all the skills that are needed for our task none is greater than the skill of communication and Sir Shridath Ramphal exhibited that skill yesterday.

I will now turn to my paper, I know that you have all read it and therefore I need only speak of a few salient matters. I will speak first about the end of life and some bioethical dilemmas that present unprecedented problems and then I will turn to the beginning of life which is a more joyous subject although quite liable to lead to shouting matches when bioethics are involved.

Brain death

Death is not what it used to be. Two small medical machines, the ventilator and the respirator, have found us in recent years unable to stick to our previous perception of death and have highlighted our inability to say unequivocally what death is and conversely what life is. The reason is that the ventilator and the respirator can keep the heart beating and the blood circulating in a dead body. That is in a body that has totally lost all brain function. However, the body in which these things are happening is incapable of spontaneous breathing and heart beat. At times over the past 20 years the public debate on brain death was as acrimonious as we are constantly witnessing in current times with test tube babies. However we have now reached the point where the diagnosis of death by reference to cessation of brain function is acceptable to churches, to moralists and philosophers and in many countries to the law.

The bioethical problems posed by brain death are illustrated by cases discussed in my paper in which eminent medical men were embroiled in murder and homicide cases because the law did not give specific recognition to the concept of brain death. In these cases it was claimed that the doctor who turned off the switch of a ventilator and caused a patient's heart to stop beating was responsible for the patient's death and the most recent were in England only two years ago.

In some countries there have been strong moves to reform the law by a clear statutory statement that death may be diagnosed by reference to cessation of brain function and these countries include the United States, Canada and Australia. On the other hand England and New Zealand have as yet taken no initiative to introduce such a law; but I do not presume to advise New Zealand, or any other country, what it should do on this subject. However, as for Australia, let me say without hesitation that the statutory recognition of brain death has saved lives. I also know that lives have been needlessly lost in Australia because of legal doubts and fears on the part of the medical profession before the advent of the brain death statutes. Heart transplants were cancelled for legal reasons.

The statutory recognition of brain death is now in the law of all but one of the Australian mainland States and Territories. They have all enacted also the new transplant code which we prepared at the Australian Law Reform Commission in 1977. New South Wales, my own State, passed these measures only four months ago and in the last four weeks we have already seen three lives saved by heart transplants carried out in a climate of new confidence by the medical profession.

Let me conclude my reference to this part of my paper by drawing your attention to some other difficult bioethical questions concerning the termination of life. These include the dilemma of the patient who is not brain dead but is in permanent coma, like Karen Quinlan in the United States, who has been unconscious for nearly nine years there. What should we do about such patients? What should we do about the very old whose lives and deaths are sometimes dragged out with great indignity over long periods by the use of machines?

What should we do about the baby born with horrifying defects who, a few years ago, would have died but now can be kept alive by the new medicine? On pages 28 to 30 of the printed book containing my paper there is a discussion of these matters.

Human artificial conception

Turning now to the beginning of life and the subject of artificial conception of human beings. First, I think it is vital when talking of artificial insemination and test tube babies to remember that we are dealing with a major human problem often a tragedy for those involved, and that is infertility. The processes of *in vitro* fertilisation and artificial insemination were called into existence by human infertility. They are not some kind of conspiracy against mankind by doctors and scientists at all. Conventional scientific wisdom is that a very large proportion of the world's population is infertile, some 15 percent, between 10 and 15 percent of all married couples. In a country such as Britain infertility on that basis could effect 4-5 million people. In New Zealand on my rapid calculation last night, 200,000 people.

Now the world's first test tube baby, as we have read in all our papers, was born in England five years ago. Three more were born in the succeeding year. The leading exponents of the art have been the English pioneers, Steptoe and Edwards, and two teams in Melbourne in Australia and even as late as a year ago the estimates of babies born by the process was around 150. Today perhaps between 400 and 500 so you might say well that's not much to be concerned about in the world where there are more than 4,000 million human beings. Even so the first five years of the IVF era have presented us with three developments of incalculable future effect.

Techniques

The first is the technique itself – conception outside the human body – separation of the reproduction of a human embryo from sexual intercourse, from the mating game as it has been put in some of the journals. As one writer put it, IVF closes a circle. Oral contraceptives effectively separated sex from having children, IVF separates having children from sex.

Second development of incalculable future effect was the perfection in Melbourne in 1981 of the technology whereby a fertilised human egg may be frozen, stored, indefinitely as far as we know at this stage, thawed and thus resuscitated and implanted with the expectation of being born normally. And the third development of incalculable future effect is that the fertilised egg or embryo may be implanted in any woman with a normal uterus and not just the woman from whom the egg came. Despite the predominance of the English and the Australian pioneers, other countries realising the historic nature of these developments have been active and developments never stop. I will summarise just a few.

In the United States, which was a late entrant in the IVF field there were no more than five or six pregnancies achieved until a year or two ago. The first IVF clinic in the US was established in 1979. I was recently informed by a physiologist who visited America a few months ago, that by the end of this year it is anticipated that there could be 200-250 IVF clinics operating in the United States. At an IVF Conference in Vienna a few months ago there was a strong Russian representation and, incidentally, it was reported at that conference that the world's best IVF pregnancy rates for 1983 were being obtained in Vienna.

IVF clinics now exist in Japan, Singapore, Canada, South America, throughout Europe, throughout Australasia, Africa, Britain and elsewhere. The Kenyans and the Nigerians are talking about entering the field. South Africa had its first test tube baby in January this year. Every State in Australia has its clinics. When the first test tube baby was born in New South Wales, my own State, a year ago, the number of couples waiting to join the IVF programme of the hospital involved jumped in a matter of weeks from 300 couples to 1,300 couples and the waiting list at that hospital, the Royal North Shore in Sydney, is now 2,000 couples. The Yugoslavian Government had a physiologist working with the New South Wales team until recently. The Brazilians are in Victoria learning the art.

Technology changes

The rapidity of development of the technology is extreme. So much so that those who seek to oppose the use of IVF on moral or philosophical grounds should in their own and everybody's interests be very clear about the true basis of their opposition. The reason is that the technology itself is continually changing and can have the potential to nullify objections and I will give you two examples.

It was announced in July last year that a medical group in California at UCLA, had successfullly transferred two embryos to two women after flushing out the uteruses of two host mothers. The host mothers had been fertilised by artificial insemination, the fertilised eggs were rescued from them by this flushing process and they were implanted in the infertile recipients. Both those babies were born early this year. Now some medical men see this as a means of assisting those who may have moral objections to the aspects or some aspects, of the IVF technique. It could avoid the use of freezing and even avoid the use of IVF itself. In the past five months we have seen in Australia the birth of the first baby born from a donated egg, the birth of the first baby born from a frozen and thawed embryo, and the birth of test tube quadruplets from a previously infertile mother. The IVF technique can now enable a woman, who has been through menopause, to give birth to a child.

Second, the remarkable technique of laparascopy is right now in the course of replacement. Under laparascopy a woman is given a general anaesthetic and the doctor inserts a needle through the abdomen into the ovary. He looks into the ovary through fibre optics in the needle and sucks eggs by vacuum into a receptable. Objections to this process have been levelled on the grounds of risk and discomfort.

In 1983 the Scandanavians announced an entirely new technique for removing human eggs using no more than a local anaesthetic and a CAT scanner to put ultrasound images of the ovary on a video screen. They insert a needle painlessly into the ovary withdrawing eggs while watching the screen. The Scandanavians announced over 1,000 successful harvestings of human eggs by this method last year and it is entirely safe. It is now being used in New South Wales and the most objectionable aspect of it to me is its

name. It is called transverse cycle oocyte asperation. Ever heard anything like it?

Guidelines for IVF practice

Now what about developments in other areas than technology. Well at long last governments and official organisations have begun to act. In my paper I drew attention to the National Australian guidelines produced in August 1982. These were the first oficial attempts anywhere to provide rules for the practice of IVF. They give rules for the practice itself, for the freezing techniques, for the control or the dominion over the fertilised egg, for the much debated donation of ova and for other aspects.

Later in 1982 and in 1983, three of the four committees set up in Britain also reported. Their approach is broadly similar to the Australian approach, that is approval of the process with certain restrictions. 1982 and 1983 were vintage years for IVF with activity in three Australian States, in Canada and in other parts of the world – that is official activity.

Legislation

As for legislation suddenly much is happening in Australia. The Federal Government, under the leadership of the Attorney-General, Senator Evans, who is present at this Conference, introduced a clarification of the status of AID children into Australian Divorce Law last November. In February this year the New South Wales Government enacted the first general statute on the status of AID children. That provides that when a husband consents to his wife being inseminated with donor sperm he is deemed to be the father of resulting child and the donor is deemed not to be the father. This Act, the New South Wales Act, also deals with the IVF child in the same way. That is when a wife's egg is fertilised in the laboratory by donor sperm, there is the same consquence, that the consenting husband is deemed to be the father and the donor deemed not to be the father.

Now in Victoria, legislation was introduced a few weeks later, that is last month, following the New South Wales initiative. However the Victorian legislation goes much further and seeks to regulate a large part of the IVF process by means of some novel law making. The Victorian Bill controls the donation of human eggs as well as human sperm and establishes a Government register aimed to keep a genealogical track of children born as a result of these processes. The Victorian legislation also imposes some heavy penalties. A subject which I discuss in principle in my paper on page 35.

My latest information is that this new Victorian legislation has ground to a halt in the Upper House of the Parliament and that it is likely to stay there for some considerable time at least until the end of this year. It will therefore be interesting to watch the progress of the Bill because it exhibits a more authoritarian approach than the New South Wales legislation and the uniform transplant laws that I mentioned earlier. It could even be counter-productive.

The reason why I say this is that there is strong evidence now that the Australian public approves both of IVF and of AID as practices. This evidence has been provided by a succession of public surveys in the past two years. There is also evidence that the donation of sperm and eggs in Victoria has drastically diminished since the announcement of the Government donor register some months ago. What may be emerging is a case where a Bill may be too responsive to the pressures of minority groups and thus unacceptable to the community. I also discuss this question in my paper. But I must say that it is much too early at this stage to give any balanced assessment of the reasons why that legislation has come to a halt.

Legislative perils

The perils of law making in this field are not always obvious to those who are involved in the process. An example is a South African measure of the middle of last year which brought both the Government and its apartheid policy into ridicule. The Human Tissue Act of 1983 of South Africa appears to be, if you look at it, an up-to-date piece of legislation to regulate the transplantation of South African body parts including the organs of reproduction such as testicles and ovaries.

The Act, however, apparently – well it did not occur to the modern legislators in South Africa that a black testicle can be happily placed in a white body or a white ovary happily placed in a black body. So after the shiny new Act was passed the enormity of its liberality and of the possibilities apparently occurred to the Minsiter of Health and he saw that at one stroke by a new Regulation in June last year that the recipients of transplanted sexual organs may only use the organs for two reasons. The first reason is pleasure and if not to be used for pleasure the organ can only be used with Ministerial permission. A person who fails to obtain the Minister's consent to the serious use of his or her newly acquired gonad will commit an offence punishable by imprisonment or a heavy fine. My authority for this valuable intelligence is the *Sydney Morning Herald* of the 14 June 1983 – page 1, as you might imagine!

Monitoring approach

I conclude my paper by suggesting not a prohibitory approach but a monitoring approach. We should think in terms of sensible regulation aimed to secure for our communities, if we can, the benefits offered to mankind by this remarkable new knowledge while restraining if we can excess and abuse. Prohibition would, in today's world, accomplish little – that is my view – except to gratify those who enjoy authoritarianism. If IVF technology is stopped in Australia or delayed in England, or New Zealand, what effect will that have in the many other nations that now possess it. The knowledge is out. We cannot unknow it. We must control it.

Finally I can see little prospect of satisfactory solution to the dilemmas and issues raised by IVF and AI – human AI – unless tackled on a national basis as opposed to a provincial or state basis. You won't really have that problem in New Zealand I must say. At the risk of being a little impractical, international regulation is plainly the best solution of all.

Let us remember that these techniques offer great benefits to mankind. They will benefit the very people we will need most for stability in our society. Those who wish to create households and raise families – just remember that – and who are prepared to go to enormous lengths to suffer expense, embarrassment and pain to do. The techniques will improve the health and strength of embryos from their earliest formation. We need balance, courage and compassion and we also need enlightened law makers. □

Law Conference 1984 —

The Legislature and bioethical problems

By Hon J McLay, Attorney-General of New Zealand and Minister of Justice.

One almost feels inadequate rising to address this gathering after such an address from Mr Scott. I believe you showed your views of that in the response to his comments. What I am about to say is essentially a shortened version of a paper that I have distributed, shortened because the organisers are concerned that we should all restrict ourselves to the 20 minutes allocated.

I should preface my comments immediately with a caveat. As Mr Scott has said events and technology are moving with great speed. Some of the matters that I had originally referred to in my typed script as proposals have now become a reality and so too will that inevitably be with this new technology. The second preparatory comment that I should make, being aware particularly of Mr Robert Jones' concerns about over-regulation in our society, is to give you an absolute assurance that there will be no Ministerial approval required in this country for the use, pleasurable or otherwise of organs.

Role of the legislature

I have been asked to concentrate on questions arising from artificial insemination and *in vitro* fertilisation with particular emphasis on the role of the legislature. Inevitably there will be some overlapping between the comments that I make this morning and those in Mr Scott's paper particularly those that follow from page 33. The issues that we are talking about are difficult and complex because at the same time as these procedures might seem to give new hope to countless childless couples they also raise sensitive spiritual, moral, medical, ethical and legal questions.

Because these new medical procedures are not widely understood it is, I think, useful to start with some definitions. In the process of artificial insemination, the semen used may be that of the women's husband, in which case the procedure is known as AIH or artificial insemination by husband. If the semen used is that of a donor the process is described as AID – artificial insemination by donor. AIC involves the impregnation of the woman with the combined semen of her husband and a donor. *In vitro* fertilisation literally means fertilisation in glass – a reference to the fact that the fertilisation of the egg by the sperm takes place in a laboratory glass dish. A distinction should be made between ER that is the replacement of the embryo in the uterus of the woman who provided the mature egg and ET not what you might think, but the transfer of the embryo from the laboratory dish to the uterus of a woman other than the one who provided the egg. We come also then to the definition of a surrogate mother.

Traditionally a surrogate mother is one who has been impregnated with a man's semen either naturally or by artificial insemination, bears the child and then hands it over to the man and his wife to raise. However with the advent of embryo replacement the definition can now be extended to include a woman who carries in her womb a child for which she has not provided the egg and intends, usually by prior agreement, to hand it over to a childless couple immediately on birth.

The last situation that I've outlined indicates the complexity of the relationships made possible by these new reproductive techniques and why it is that we as lawyers must be taking an interest in them. For instance it is possible to envisage a situation of a donated sperm, a donated egg, carriage by a surrogate mother and a child eventually raised by a couple who made no physical contribution to its creation whatsoever. A variety of other possible permeations can easily be imagined. Some have in fact occurred. The world's first baby conceived of a donated ovum was born in Melbourne recently.

New Zealand experience

So far as I am aware none of these more complicated arrangements has yet arisen in New Zealand. Furthermore our Adoption Act which makes it an offence for any person to give or receive a payment in consideration of the adoption of a child should effectively prevent the development of a baby market in this country. What is in fact happening in New Zealand is the use of both artificial insemination and *in vitro* fertilisation as a means of assisting childless couples who cannot otherwise conceive a child.

In the past a great deal of secrecy has surrounded the topic of artificial insemination. However a survey carried out by Dr K R Daniels of Canterbury University revealed that in the year to March 1983 there were at least 60 AID births in New Zealand. In addition we know that some general practitioners, the University Medical Departments and the Auckland Hospital Board also provide the service. All of which suggests that there could now be some hundreds of AID children alive in New Zealand today. IVF births have so far only taken place in New Zealand within the last year as a result

of procedures that were actually carried out in Melbourne. However recently National Women's Hospital has begun to use IVF and the first baby born as a result of that technique is expected later this year. The possibility of an IVF unit in Christchurch is being investigated.

Community reaction

These events are taking place in our community and how has that community reacted? There is of course one group, childless couples, who undoubtedly benefit from such procedures and they quite understandably are in whole-hearted support. On the other hand there are those who do not accept alternative techniques for reproduction. For instance, although the Roman Catholic Church has not yet finalised its views on IVF it is treating the issue with great caution as recent statements have indicated.

A paper issued by the Inter-Church Council representing all major Churches in New Zealand – Catholic and Protestant – indicates that Christian Churches other than Roman Catholic, recognise AIH as a legitimate process to achieve conception. AID however raises more difficult questions and the implications of this procedure are still under discussion. The Council orginally sought a moratorium on IVF. However since it became known that the technique was being used in Auckland the Churches commenced a re-examination of the issue.

There is also concern among lawyers. Very recently, 13 April, in fact, the Law Society called for a study of the legal implications of both AID and IVF. Medical practitioners are obviously vitally concerned with these developments. Like the Churches and the legal profession the NZMA has still to define its position. But in the meantime the medical profession is relying on guidelines published by the British College of Obstetricians and Gynaecologists which support the use of artificial insemination and *in vitro* fertilisation under certain conditions.

It is not my intention in presenting this paper to a law conference to examine these particular issues but it must be emphasised, and emphasised strongly that they are all significant and certainly cannot be ignored. It is clear that community awareness of these new methods of reproduction has lagged behind scientific progress. Now that the public is entering the debate we have started to hear calls for Parliament to step in, to regulate, control and even ban the use of these techniques.

Because most of the techniques, not all but most, are new legislators and lawyers have the opportunity early in the public debate to consider all the factors relevant to a decision as to the proper basis for legislative intervention if any. As a starting point I must observe that there is doubtful utility in paying too much attention to monstrous futuristic scenarios that postulate the breeding of the entire human race or even a species of super human in laboratories. We certainly cannot ignore the potential for misuse of the new techniques but we shouldn't assume that such potential will necessarily be realised. The motivation for developing both AID and IVF was not to facilitate a world of clones but to meet the deeply felt need for children by childless couples. One would always hope that human need will remain as the guiding spirit of medical research in this area.

Certainly it would be most unwise for legislators to be led into attempts to predict the worst possible future and then to take action against events that may never occur. Instead we should concentrate on the issues that actually confront us today. In doing so it is I think, important that we should be fully aware of the effective means of control that might already exist. Despite misgivings on the part of some of those who are not doctors, the ethical guidelines that bind medical practitioners and researchers, while perhaps somewhat wide, do provide an excellent example of such controls. They have been worked out by practitioners with expertise in the particular field; they can be adapted to reflect changing public attitudes and most importantly they have a moral force which is all the more important because they are voluntarily assumed.

Open public discussion of the issues contributes to the formulation of community consensus on the correct limits to scientific experiment. The Head of the Perth IVF team, Professor Yovich, recently suggested that scientists should be able to experiment on human embryos with the aim of improving the chances of successful implantation. The law does not prevent that, at the moment. Dr Yovich was not seeking legal permission he was seeking social permission.

Regulation?

Bearing these considerations in mind we can then examine areas where legislative action might be called for. In the first place there is the work itself and the people who carry it out. Here a whole barrage of regulatory mechanisms could be put in place. Registration of practitioners, licencing of premises and inspection of their work. But that immediately raises questions. Who, for instance, would conduct the inspections? Other similarly qualified persons? The real question though is whether such regulations would serve any useful purpose. Both hospitals and medical practitioners are already the subject of legal regulation. No one, whether from the profession or the public would welcome controls imposed merely to give the appearance of some sort of official action.

Another possible area of regulation could relate to the types of procedure that might be carried out and the avenues of research that might be pursued. Such a proposal raises serious questions as to the propriety of a government attempting to control scientific research.

But a more practical point is that such a law would rapidly become outdated. Generally the capacity of the law to react to change is considerably slower than the pace of new biological developments and Mr Scott made that clear. The law usually lags significantly behind scientific discovery. Take for example the freezing of embryos. The first successfull implantation of a thawed embryo apparently took authorities in Victoria by surprise. They simply had not realised how quickly the research was proceeding.

The second point at which controls might be suggested is over participants in the process. The people eligible for treatment. Theoretically at least Parliament could legislate to provide that techniques would only be available to couples and not to single women and then to specify the circumstances under which they might be available.

In determining whether that sort of control is necessary it is perhaps useful to look at the present controls that are applied to the Auckland IVF programme. Patients are accepted for the programme only if their infertility

is caused by tubal disease which cannot be remedied by surgery. Women at the age of 40 are accepted and priority is given to couples without children. The couple must have a stable and long standing relationship, must be emotionally and physically capable of going ahead with the treatment and then with the pregnancy, birth and rearing of the child. Similar, but obviously modified guidelines apply for artificial insemination at both Auckland and Wellington.

The doctors involved in the Danniels survey that I referred to a moment ago, carry out their own screening of couples and in that survey were almost overwhelmingly opposed to any official monitoring of AID. The Royal College of Obstetricians and Gynaecologists is however compiling a report which will make recommendations about both donor and recipient screening and the number of times a donor should be used. In short I think that we can anticipate that the medical profession would argue that while that sort of self regulation exists it is hard to make a case for legislative control. Others I know would argue to the contrary. That is the essence of the dilemma presented to the legislator.

Another possible aspect which might require legislative intervention involves the children born as a result of these new techniques. There have already been calls for legislation to make it clear that an AID child is legally the child of its social father and not the child of the donor. Similar questions will arise if donated sperm or ova are used in future IVF programmes.

To the traditional legal question who is this baby's father could be added a novel one. Who is this baby's mother? We have only to look at the legal consequences attendant on the parent child relationship to see that Parliament may well have to act on this area. Our system of birth registration is principally designed to record blood relationship, thus a man who registers the birth of an AID child as his own might commit an offence under the Births and Deaths Registration Act. Both the children and father of a child have certain rights in respect of a child. For example they may consent to adoption, change of name or marriage. The social father of an AID child may well have no legal standing in respect of these matters. If the social parents dispute guardianship, custody or access it may seem that the non-biological father might be in no better position than a stranger to the child. On questions of inheritance an AID child is probably in the same position as an illegitimate child prior to the passing of the Status of Children Act 1969, that is the child could not claim against an estate as a descendant for the purposes of will, intestacy or family protection even though the child was always regarded by the deceased as his child. This is a matter of proper concern to legislators.

Overseas developments

Mr Scott dealt with some of the developments overseas. The legal status of AID children has been under study by the Standing Committee of Attorneys-General, which New Zealand participates in, in Australia since 1977. New South Wales has recently enacted legislation which effectively dissolves all legal links between the donors of sperm and children produced through AID or IVF techniques. Victoria as we have heard is considering similar legislation.

Furthermore in 1982 the Victorian Government appointed a committee under the chairmanship of Professor P L Waller to consider the social, ethical and legal issues arising from IVF. That Committee initially recommended against the use of donor ova and donor sperm in the IVF programme. This led to a Government moritorium on donor use but after a further report from the Committee in August 1983 reversing its original recommendation the moritorium was lifted. The Committee is expected to report this year on the use of frozen embryos and surrogate motherhood.

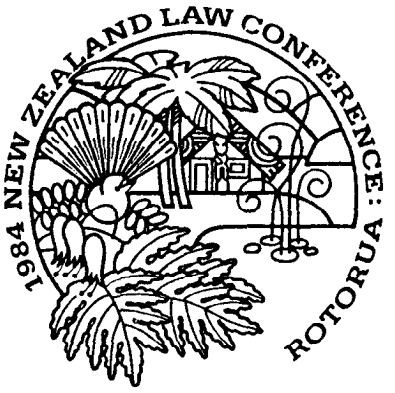
In Britain AID status legislation has been advocated among others by the BMA. Progress may well depend on the work of the Committee of Enquiry into Human Fertilisation under the Chairmanshp of Mrs Mary Warnock which is expected to report later this year.

Predictably it is in America that the most progress has been made. Twenty-four States already have legislation dealing with the legal status of AID children, the earliest dating back to 1964. A 1979 report by the Ethics Advisory Board to the Department of Health, Education and Welfare recommended a model law on the status of children conceived using donated genetic material.

Clear trends

Mr Chairman, ladies and gentlemen, clear trends emerge from this brief survey of progress in other jurisdictions. Legislation is seen as necessary to deal with the immediate problems of the legal status of the AID and IVF child. But on other issues rather than regulate or control, governments have tended to monitor developments through both governmental and non-governmental groups. It may well be that the same approach is appropriate for this country that having faced the status question Parliament's role is then to monitor scientific progress and to encourage full public debate. In this area a responsible legislature may well be the one that takes time to inform itself of the facts and then to deliberate very carefully on its response. □

Law Conference 1984 — In Vitro fertilisation: a brave new world?



By Dr John France, Associate Professor in Steroid Biochemistry, National Women's Hospital, Auckland.

The birth of Louise Brown in Oldham, England, on 25 July, 1978, was an event of profound significance which history in time may show to be comparable to the discovery of how to split the atom or the launching of Sputnik I. This normal, healthy, female baby was born of a pregnancy in which fertilisation had taken place outside the body of the mother – a woman who could not become pregnant because of blocked fallopian tubes. Louise's life began in a laboratory following the mixing of an oocyte, the egg, from her mother with sperm from her father in a glass petrie dish. Hence the term *in vitro* fertilisation or IVF. Two and a half days later as an 8-cell embryo she was transferred into her mother's uterus where the pregnancy successfully continued. The success marked IVF as a technique of practical application in human reproduction.

As we heard from Mr Russell Scott, *in vitro* fertilisation is now carried out in numerous centres throughout the world as one of the means of assisting infertile couples in their desire to achieve a pregnancy. In the past year it has been introduced into New Zealand at National Women's Hospital where currently it is used in the treatment of infertility caused by irreparable damage to the fallopian tubes.

IVF steps

In brief outline IVF usually involves the following steps. First, stimulation of the woman's ovaries by fertility drugs such as Clomophene to produce several rather than the normal one mature egg for ovulation. During the maturation process of the egg this is carefully monitored by specific hormone measurements, at daily or more frequent intervals, and by ultrasound visualisation of the ovaries. The egg is collected from the ovaries by a suction technique, by a laparascope. That technique was outlined very clearly by Mr Scott so I will not dwell any further on that. This suction collection is carried out about 36 hours after the ovulation mechanism has been initiated either by giving the patient a hormone called chorionic gonadotrophin which will initiate that process or by the natural endogenous hormonal processes.

The objective is to obtain a mature egg immediately before it would otherwise be expelled from the ovary. The collected eggs are then suspended in a special culture medium and sperm freshly provided by the husband by masturbation is added to effect fertilisation. The fertilised egg in culture medium is held in the laboratory under controlled conditions in an incubator for about 48 hours. During this time a microscopic examination is carried out to observe that fertilisation has occurred and the resulting embryo is developing normally. After the 48-hour period, the embryo which is usually at a 2-cell or 4-cell stage is replaced in the patient's uterus with the help of a fine catheter. Highly sensitive laboratory tests for pregnancy are then carried out on day 7, 10, and 14 after fertilisation to determine if the embryo has implanted and the pregnancy established.

Depending on the method used to hyperstimulate the ovaries, three, four, five or more eggs may be collected at the time of laparoscopic pick-up. Some or all of the eggs are exposed to fertilisation since there is an improved chance of establishing pregnancy with multiple embryo replacement. With four, for example there is three times the chance of a pregnancy than if one embryo is replaced. There is of course on the other hand an associated risk of multiple pregnancy. The twin pregnancy rate with a four-embryo transfer is 30 times that for dizygotic twins that is for non-identical twins in the general population where the frequency there is 1 percent.

The proportion of patients who become clinically pregnant after embryo transfer has been reported as high as 30 percent in one of the more successful programmes. The incidence of miscarriage in these pregnancies also averaged about 30 percent giving an overall success rate in terms of live births of about 21 percent.

In vitro fertilisation offers obvious benefits to couples who otherwise would be unable to have a child. However in completely detaching reproduction from the sexual act and with its associated practices of superovulation and multiple embryos, IVF has raised a number of serious ethical, moral and legal issues.

At one extreme there are people who object to the technique itself *in toto*, believing that fertilisation outside the human body and not arising from normal intercourse is unnatural and morally wrong. The majority of people, I believe, accept use of the technique under certain conditions. These may differ from individual to individual and some would then consider some applications and practices to be ethically and morally acceptable and some of them unacceptable. There are, I expect, on the other extreme some people who believe IVF should be used to its fullest potential. Let's

look at some of these controversial areas.

The spare embryo

Superovulation and the production of embryos in numbers exceeding the numbers intended to be transferred to the patient's uterus raises the question of what becomes of the spare embryo. To those of us who believe human life begins at fertilisation and from that moment this new human being is entitled to respect and status, the question is one of great importance.

IVF programmes in various centres handle this question according to different guidelines. In some centres the extra embryos are simply discarded. Others use the embryos for the purpose of quality control, for assessing the culture medium and establishing and maintaining optimum conditions for embryonic development. The spare embryo is seen by some investigators as a subject for experimentation and research. All of these practices I personally consider to be unacceptable, though I must point out they are approved under the ethical guidelines for IVF recommended by the British Medical Research Council and the Royal College of Obstetricians and Gynaecologists.

A further approach followed in Melbourne is to freeze and store the extra embryos. I will discuss that shortly. In our IVF programme at National Women's Hospital we get around the question of the spare embryo by literally not creating it. Under our present guidelines we fertilise only up to three oocytes — three eggs — at one time, the maximum number of embryos we will replace per treatment cycle.

Now let us consider two areas concerning the spare embryo. That of freezing embryos and experimentation. A procedure for freezing and storing excess embryos has been developed by Dr Alan Trounson at the Queen Victoria Medical Centre in Melbourne. At least three pregnancies have apparently already resulted from the use of stored frozen embryos and one of these to date has ended in a live birth. Storage of the surplus embryos from one treatment cycle provides, if pregnancy fails to occur, the embryos for replacement in a subsequent menstrual cycle.

Furthermore since it appears that frozen embryos will remain viable for at least two years and probably much longer, they would be available for an attempted second pregnancy even if the first treatment is successful. The availability of the embryos avoids the risk to the health and life of the patient associated with the laparoscopy for egg pick-up.

The freezing and storage of embryos, however, raises its own ethical and legal considerations. Perhaps the obvious one is what happens to the embryos if the patient changes her mind and declines a further treatment cycle? Who decides what to do with the embryos under those sort of circumstances. Furthermore, who is ultimately responsible for the embryos in storage? What is the legal status of the embryo?

The simplest solution to these problems may again be not to create them. Storage of surplus unfertilised eggs would cause no ethical or moral guidelines. However there is a difficulty with this solution. The technique has not yet been developed for freezing eggs, they are far more fragile than embryos, but I believe it is not beyond our capability to develop and devise such a suitable freezing procedure.

Research into human life

Now looking at experimentation with embryos. *In vitro* fertilisation provides an opportunity using spare embryos, or embryos especially created for the purpose, for research into human life in its earliest days. Such research might investigate the effects of toxic substances and various drugs on embryonic development, or might explore genetic modification with the hope of preventing genetically determined disease.

Research on embryos has received the approval of the British Medical Council and the Ethics Committee of the Royal College of Obstetricians and Gynaecologists. The question must be asked however if this approval is acceptable to society at large. While indeed the long term aims of the research may be good, for example correction of some inheritable disease, the future benefit to affected individuals would be achieved by the exploitation of others at their most vulnerable stage of life.

Now I would like to move to the question of donor gametes and embryos and the surrogate mother. Since the reproductive process initiated by IVF circumvents the coming together of a man and woman in sexual intercourse, several options of gamete interaction are possible. The source of sperm and oocyte may be either spousal or non-spousal. Hence, we might have sperm from the husband and the egg from the wife, or donor sperm, or donor oocyte, or even a donor embryo. There is also the possibility of using another woman, appropriately synchronised with regard to her menstrual cycle, as a recipient for the embryo to act as a surrogate mother for the pregnancy.

When we move from fertilisation involving the gametes of husband and wife to fertilisation involving donor gametes, one or other, or both, we run into moral, ethical and legal questions concerning parenthood and the integrity of the marriage relationship. Some of these issues also relate to artificial insemination by donor and have been extensively debated in the past though perhaps not resolved.

While I personally find AID unacceptable because it means the intrusion of a third person into the marriage relationship, it would appear that the majority of New Zealanders would hold the contrary view. AID has been carried out in this country for at least 20 years. The use of donor sperm or donor oocytes in IVF may be seen as an extension of AID and on this basis could receive public acceptance.

Nevertheless, there are differences, and the mode of conception coupled with the donor factor may compound to have serious adverse influences on the future psychological development of the child. Such influences centring on confusion of genetic descent and one's parents would be even more marked in the situation of the donor embryo. The biologist-philosopher Leon Kass in his submission to the Ethics Advisory Board of the US Department of Health, Education and Welfare, expresses his grave concern on this IVF application, suggesting that "clarity about who your parents are, clarity in the lines of generation, clarity about who is whose, are the indispensable foundations of a sound family life, itself the sound foundation of civilised community. Clarity about your origins is crucial for self-identity, itself important for self-respect. It would be in my view, deplorable public policy further to erode such fundamental beliefs, values institutions and practice."

Despite concerns about donor

gametes and embryos some IVF programmes currently include their use. Committees reviewing IVF practices have approved their use under certain conditions. On the other hand, the use of a woman to act as a surrogate or substitute mother for pregnancy has been universally opposed by various committees.

Manipulation of reproduction

Perhaps the aspect of *in vitro* fertilisation that has most stirred the imagination and fears of the public lies in the realm of further possible applications and developments. For in these applications it presents the possible manipulation of reproduction through such things as cloning, ectogenesis, and genetic modification or engineering. Such manipulations obviously could have far reaching and bizarre consequences, some in the realms of science fiction and will no doubt remain there. The procedures have yet to be attempted in man.

Cloning

Let us first just briefly look at cloning. Cloning is a process of introducing identical genetic constitutions into a number of oocytes to produce genetically identical individuals called clones. In nature this occasionally happens spontaneously and results in identical twins. Artificial cloning can be achieved using biochemical and microsurgical techniques by two methods.

Embryo fission – the first method – is one in which cells from an embryo at an early stage of development are separately transferred to eggs from which the nucleus has been removed. So we take eggs, take the nucleus out of these eggs and replace it with cells from an embryo that has already started to develop. For example, we could transfer from an embryo at a 4-cell stage each of those cells to give us four clones and so on. Technically this cloning process could probably be successfully carried out at the present time with human embryos and has been successfully carried out with for example animals as complex as cows.

The second technique is nuclear transplantation, in which the nucleus of a human egg is replaced by the nucleus of an adult. It is certainly unsure whether this process would work in humans. It is the genetic manipulation on which novels and motion pictures like "The Boys from Brazil" are based. We were rather taken back at National Women's when we made our initial press release that we were starting an *in vitro* programme that on the following Saturday night on TV the film was "The Boys from Brazil".

Ectogenesis

The term ectogenesis describes the full external development of human infants. The word may well conjure up in our minds visions of Aldous Huxley's "Brave New World" and its Central London Hatchery and Conditioning Centre. In truer perspective, partial ectogenesis, at least, is now well established and an important medical procedure. In the specialist neonatal units of larger obstetric hospitals, babies born prematurely perhaps as early even as 24 to 26 weeks of pregnancy are nurtured in their incubators and continue to grow and develop into normal infants.

The development of a suitable artificial placenta for extending the survival period to even earlier in the pregnancy clearly can be seen to represent legitimate and important research though the achievement may be some time off. When we do have this artificial placenta the challenge of Huxley's "Brave New World" though will have arrived, for by adding IVF and embryo culture on one end and intensive neonatal care on the other we will have the potential for complete ectogenesis.

While researchers have demonstrated the biological feasibility of gene replacement – consider briefly genetic engineering – implanting for example the rat gene for growth hormone into mouse embryos and producing "mighty mice" some 80 percent larger than normal, it is probably unrealistic to assume that the door has now been opened to successful gene manipulation in human embryos. Moreover, while tremendous advances have been made in the past few years in what has been popularly called genetic engineering, the field is extremely complex. It is unlikely that manipulation and replacement of genes in human subjects will be possible in the near future.

The slippery slope argument

I would like, just before I conclude, to comment on what is termed the slippery slope. Many critics of IVF procedures and of genetic engineering argue using the principle of the "slippery or sliding slope". They foresee that, beginning on a basis of application that is widely accepted, small steps are introduced, each one justified because it differs only slightly from the one that preceded it and yet yields a new benefit or advance in understanding. The expanded programme achieved at the end is one that would never have been approved at the beginning but eventually, when it is arrived at, it is too late to change or restrict. The present situation with nuclear weapons is a good example of this reasoning.

I do not agree that IVF and genetic engineering necessarily must mean embarking on the slippery slope. Clear purposes for their use can be defined and guidelines can be established to confine their applications to those society considers acceptable. Such a policy of course requires informed public discussion and debate.

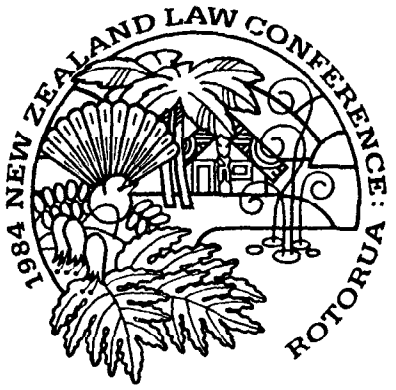
When I introduced this paper I compared IVF and embryo transfer as an advance of comparable significance to mankind as the splitting of the atom or the launching of Sputnik I. Each of these advances have enormous potential to influence or have already influenced our civilisation. Each can be used, depending on how we decide, for our benefit or detriment.

We have seen with the splitting of the atom that has led on the one hand to the use of nuclear fission in generation of electricity, to radiation therapy in cancer treatment and to the use of radioactive isotopes in medical diagnosis, applications of much value and benefit to us all. On the other hand, the development of nuclear weapons holds us in fear of a holocaust that would destroy the human race. Similarly we see that rocket delivery systems can be used to put in space sophisticated satellites performing many new and useful functions for our benefit. But increasingly there is talk of military activities and weaponary in space.

It may be too late to restrict atomic technology and space technology to solely peaceful ends but we are only at the beginning of developments with IVF and with genetic engineering, and effective controls can still be introduced to ensure research and application of these new advances are directed along strictly ethical and moral guidelines towards good and beneficial goals. □

Law Conference 1984 —

Discussion on Bioethics



Chairman: Hon Mr Justice Barker

John O'Neill (Otago): Professor Caughey is an emeritus Professor of Medicine at Auckland University I think, but he is a man now 80 years of age and in 1934 he was present at an address in Germany given by the doctor who pioneered treatment for mental patients, according to the term that you know that treatment that was used there under the Nazis. That was listened to with great respect apparently, and no doubt I am sure there were many thoughts around in those days of change, but there is more to it obviously than change.

I am the father of an intellectually handicapped child, and in Dunedin 20 other little girls, more than 20 in fact, have had hysterectomy operations. That has been done to the distress of the IH Society to which I belong, and I pick up from page 29 of the paper the point from Arkansas that mentions a law there that discriminates against people because of mental disability. There is also Baby Jane Doe who is six months old in New York in hospital at the present time who is waiting surgery for a brain swelling that she has.

The laws of humanity are what should guide us and these are not laws made by man but laws by which humanity remains human. The paradox here seems to be that the spirit behind this, which I realise is compassionate, of building families, is going alongside of the destruction of life at a rate that is beyond any previous human experience and also the dissolution of the family to the extent that we have it at the present time. As the Attorney-General mentioned the term used is dissolution of links in those statutes in Australia. That dissolution of links unfortunately is very rampant in many respects effecting the family at the present time.

I would like to ask the speaker, Dr France, when he is involved in this procedure in Auckland how it relates to respect for human life. If for example I were to propose some benefit for one person in this hall at the expense of the cost of the lives of two other people in this hall obviously none of us would approve that and yet that seems to me to be the situation in the placing of three or four oocytes that have been fertilised back in the womb of the mother and I don't see how that differs from the analogy that I have given.

I would like to propose that we have laws against the sale and buying of human sperm or ova and against the storage. I think that is something that could be done and also that there should be a moritorium on this IVF programme in Auckland, about which we did not have the opportunity of public debate before it got under way.

Dr France: Mr Chairman, I think I made it clear in my presentation that I am concerned about exploitation of embryos to the benefit of others. I think there is a difference though in the replacement of three embryos with the possibility that only one of those, or perhaps even none of them, may result in a pregnancy for several reasons one being the attitude and the purpose of the people involved in the aims of that replacement. Three embryos are placed in the uterus in the hope that at least one of those, if not more, will implant. There is no direct action taken to effect any one of those embryos it is a natural event if they do not implant. No direct intervention by the IVF team is involved so it is an indirect not a direct demise of embryo if that does happen.

The second reason would cover the fact that in normal reproduction a large percentage of embryos are lost. It is worked out on the basis that normal fertile couples having intercourse have about a 50 percent chance of a pregnancy. What I mean by that is a pregnancy which involves implantation and continuation. In the 50 percent who do not become pregnant a fair number of those will have a fertilisation but the embryo does not implant so it is a natural event anyway.

Carolyn Rennie (Wellington): I am an accompanying person from Wellington. There's recently been a move in New Zealand to enable adult adoptees — a move made to pass laws — so that they may find out more about their background and their natural biological parent. I am interested to know what is going to happen to AID people when they wish to find out more about their fathers. What arrangements are going to be made to keep some sort of record of who the father is so that when they want to find for psychological or emotional or genetic reasons who was their real father in terms of the sperm donated, how is some record going to be kept of this.

Chairmain: Well I think I'll ask both Mr Scott and Mr McLay to comment on this.

Mr Scott: This question is one of the most difficult in the artificial conception area. At the moment I am very heavily involved in research on it in relation to AID children. Two or three comments so as not to take too much time should be made.

Britain passed a law in relation to adopted children in 1976 under which all adopted children have the right by law to obtain a copy of their original birth certificate upon attaining the

age of 18. That law has not yet been followed in Australasia. I am aware that you have a Private Members Bill in New Zealand. I've had a look at that Bill and its quite a good Bill, at least it tries to grapple with the problems. The major work in relation to adoption has been carried out in Britain by a man called John Treselliotis and I suggest you get his articles or his book. He was responsible for the introduction of the British Act of Parliament.

But even Treselliotis in his works baulks at the problem of, what they call, indentifying information. There is a tension in here between the claim of the adopted child, I will come to AID in a moment, on the one hand to learn the truth of his or her biological background, and the claim of the other parties involved to privacy and confidentiality and the balancing of that tension is a very difficult exercise. Treselliotis claims that his studies indicate that less than 2 percent of adopted persons who want to know about their origins want identifying information, that 98 percent are quite satisfied with non-identifying information. The identifying information does create great difficulty and there is no law anywhere in the world that gives anyone a right to obtain that identifying information.

Now with AID you have a different situation. With adopted children both the adopting parents stand in the same relationship to the child. With AID the mother is the true mother of the child taking the normal situation of a married woman whereas her husband has no biological relationship to the child and that is a different factual situation. The subject is called the study of geneological bewilderment and it is a very difficult thing to resolve. My tendency at the moment is to think that the benefit of the child should be in the forefront of our minds, that there should be a right for the child to have access to information. The real question however is how much information – does it include identifying? I cannot provide the answer at this stage and I don't think anyone has yet provided a satisfactory answer.

The Victorian legislation that I have mentioned I think might have run into trouble on just that ground because they recommended the establishment in relation to IVF and AID children of a government register which will contain full details of all donors of gametes, both eggs and sperm. They recommended that every hospital licenced to perform IVF should keep a subsidiary register which will feed into the government register, but they then said in their report we don't really know what the answer is to the question of how much information and to whom it is to be available, is it just the child, is it someone with a legitimate or sufficient interest to use the old legal expression.

When that was announced because I think (this is my view), they hadn't addressed that critical question, the donation programme in Victoria has, I gather, gone into a steep decline with virtually no donation of sperm or eggs since the beginning of this year. However you have mentioned a very important subject which has to be resolved and I think all we can do is to keep working at it.

Hon Mr McLay: Starting with the adoption question, I certainly agree that there are some problems when one gets to the level of identifying information as opposed to background information about medical information that might be useful to the adopted child. I personally have some reservations about the broader adult adoption information Bill that we have before us at the moment largely because as a practising lawyer 10-15 years ago I was, on the basis of the then existing law, able to give certain assurances about the confidentiality of the adoptive arrangement to birth mothers at the time they were making or giving their consent to those arrangements. I find it difficult now to see those arrangements changed by, although it isn't retrospective legislation, what would be regarded by many in that situation as retrospective. I realise the Bill has certain safeguards built into it but I don't think they necessarily go the full distance.

I say that only as background to the more difficult question that we have before us because there is at the moment in our adoption procedures, quite apart from the adult adoption information Bill and its fate before Parliament, there is a procedure adopted by social workers where in fact much of the information we are talking about is in fact given to adoptive parents and thus able to be passed on to the adopted child. There is much more openness in adoption arrangements today than there was even 10 years ago. That is the current Social Work technique that is used. I would like to think that something similar could apply in the area of AID but when I hear Mr Scott outlining the scheme of the Victorian legislation and what would be necessary to achieve it all, it appears as a result of government regulation and control and government established registers and the like, I must confess that I am scared of it. To be perfectly honest, I don't believe that we can go to the extent of establishing that sort of registration system because I think it would be unacceptable to many people, particularly to donors.

Chairman: I suppose another problem that arises from what Mr Scott has just said is the right of the child to be told – that I was an *in vitro* child or I was an AID child. What would you say about that?

Mr Scott: Over the last six weeks I have spoken to every AID clinic in New South Wales and written to every AID clinic and practitioner in the other States of Australia and in contradiction of really what I am saying and what the earlier questioner was suggesting, we have ascertained that almost without exception AID parents do not tell the child that it is an AID child. Now the general thrust of medical and psychological thinking as we've seen with adoption is that a child has a right to learn the truth, that the truth no matter how unpalatable is something that people are entitled to have. Yet we have discovered in New South Wales that there is virtually no known case where the parents of an AID child have at least indicated to the clinic that they intend to tell the child of its AID origins. So you have again that tension of principle that I mentioned earlier because I can't deny in principle that any person is entitled to learn a broad amount of truth about his or her biological origins. Yet we have this deeply ingrained attitude on the part of AID children [this is apparently a slip of the tongue for AID parents – Ed] which illustrates perhaps a further difference between AID and adoption.

Linda Kay (Auckland): I'd like first of all to qualify myself by saying that a couple of years ago I was asked by a private medical institution in

Auckland to prepare a report for them on the legal implications of AID, so I have got some knowledge of the procedures involved in that although I can't claim that same expertise about IVF. One particular point of terminology that I would like to raise is that the men who provide the sperm for AID are not donors, they sell the sperm and I am going to refer to it as AIV which is artificial insemination vendor. I'd also like to point out although I have some sympathy with a view that we should monitor rather than prohibit these things, that the organisation that I was instructed by was looking at AIV as a money making venture.

I feel that the most important thing that we can do here as lawyers, and in the future, is make sure that there is informed and open public debate on all the issues that these matters involve. So what I want to say now is simply by way of contribution to this debate. I want to start by saying that as a lawyer I like to think that I can bring an objective mind to debates but as a woman I'm conscious that in this context of artificial reproduction my body is an object, and I would prefer to control my own fertility.

I actually heard in the loos one woman say to another woman it makes you feel a bit like an incubator doesn't it? And I would like to support that. It does, and I think that we should be involved in the debate. It did strike me as unsatisfactory that all the speakers this morning were men in that particular context.

I would also like to say that my research into AIV and my experience as a Jewish woman make me feel very uncomfortable about the aspect of genetic selection that is involved in this and the racism that is involved. I was very interested in your comments on South Africa. In the private clinics whose work I investigated, it was a very, very expensive business – artificial insemination – and it doesn't always work. Therefore it is only available to a certain class of people. We're talking about selecting donors and we're talking about selecting recipients and I wonder what kind of racial bias we will bring to those selection procedures. I was going to raise the issue of adoption and knowing your natural parentage but someone has already raised that so I won't pursue it.

Another aspect that I was interested in as a family lawyer is this talk about the break down of the family. One of the things I discovered was that artificial insemination is very, very simple. You can actually do it with a spoon and it's been done for centuries that way and I do have the research data to support that. Now why are we doing it in hospital? That makes no sense to me at all and more interestingly it only occurs where you have a couple, at least in the clinics that I investigated, you have a couple – we're confining it to couples it seems. [There was a break in the tape-recording at this point – Ed]

. . . people still see [a woman becoming pregnant by sleeping with a man other than her husband] as adultery. I think that is an issue we ought to look at – this medicalised institutionalisation of the prohibition against adultery which is perhaps a little bit anachronistic I am suggesting.

Finally the thing that really does worry me is we talk about responding to a deeply felt need of infertile, once again couples, and yet the success rate is 21 percent. I want to know what has happened to the other 79 percent of the women who come here to these programmes for fertilisation? I want to know whether we can justify the enormous technological and financial input into something that may result in conception for 21 percent of the people who apply for it? And I want to know whether we mightn't better apply that money to research into the causes of infertility and to medical assistance for disadvantaged groups who need this assistance?

Although we may not wish to prohibit the research that is going on we as taxpayers control the application, or should do, of health funds and I would suggest that there might be higher priorities than investing vast amounts of money in programmes with a 21 percent success rate when we have heard a number of speakers talk about millions of unfed children all over the world.

Chairman: That very thoughtful contribution I think raises a great number of matters and I think there is something for every member of the panel.

Mr Scott: Well, that was interesting but I am going to be a little hard on that speaker or questioner. Firstly, the reference to 21 percent is quite inaccurate unless it's being confined to *in vitro* fertilisation. The success rate with AID in Australia is in the region of 80 percent pregnancy of people being treated. If 21 percent is referring to *in vitro* fertilisation let us bear in mind that the people who seek *in vitro* fertilisation are the people who have one very serious infertility problem so you cannot compare them with the community at large.

The tubal matters that Professor France referred to earlier are the basic problem that attracts the attention of *in vitro* fertilisation and therefore it is quite misleading in my submission to try to compare a 21 percent, if that is the percentage, success rate in IVF with the community at large. It may very well be a brilliant success rate when you consider the problems of the people who are approaching the clinics. But that is IVF and to the extent that the speaker was purporting to describe artificial insemination that is quite inaccurate, at least as far as Australia is concerned.

The suggestion, going back to the preceding point, that there is little point in the medicalisation of artificial insemination I find quite remarkable. The suggestion that instead of medicalising it people should go off and find a complaisant person to sleep with is quite practical, but I doubt that it is acceptable or would be acceptable to the community at large.

Bear this in mind that artificial insemination is a problem of infertile couples, it is a legitimate aspect of medical practice. The speaker was talking as though all you needed, please forgive my bawdiness, is a little spoon and you can solve your own problem. No. Professor Snowdon of Exeter in England recently sent me a letter and he tells me that you can buy do it yourself artificial insemination kits by mail order in the United States and that they have been available for some years. He also tells me that there was a great run on turkey basters in one of the American States at one stage when the do it yourself craze got slightly out of control.

But while all those are interesting facts the truth is that the public hospitals in Australia, of which there are say six in Sydney carrying out AID programmes, do it to provide medical services to infertile couples and infertility as I said in my paper, is a serious and very often a tragic development. It is very easy for people who are not infertile to talk about the starving millions in the

world and to deny the imperative that operates in most of us to have our own children. I, myself think that the sort of people, as I said in my paper, who want these services are among the finest we have in the community because they are trying to build households and give a home to the children that they want. Now perhaps I should stop there and allow some of the other speakers.

Hon Mr McLay: I noted two matters of the number that were raised by the intervention that seemed to be appropriate for the legislators. The first one was the suggestion that private clinics, money making ventures might get involved in AID or even perhaps in IVF techniques. I think the latter is at least unlikely at this stage because my understanding is that the enormous expense involved, the research, the background, the facilities are such that at least for the moment in Australasia it is almost exclusively the province of hospitals in the public sector. But I have no fundamental objection to private clinics providing an AID service in itself. If that means that they have to, at the end of the day of their activities, either at least make ends meet, break even or show a small profit that in itself is not objectionable to me, provided all of the guidelines that have been laid down, whether they be the present professional guidelines or those that might be imposed by some outside agency, are strictly followed.

Coming to the second question which I think was perhaps directed to legislators at least to some extent, was the question of AID being perhaps replaced – and like Mr Scott I found it a rather extraordinary suggestion – replaced by what amounts to an act of adultery as an alternative. I do find that suggestion extraordinary. I think it would be, while obviously it is perfectly possible and may indeed happen, I think it would be objected to by the vast majority of the community who would, despite the fact that the law no longer recognises adultery, still see it as unacceptable. I believe that the other partner would certainly find it unacceptable and that the woman who was being expected to conceive by this means would certainly find it unacceptable.

Dr France: I would just like to start by putting into perhaps perspective infertility that might involve AID. Some 10 percent of married couples or couples who try to achieve pregnancy are infertile and of that 10 percent, 45 percent of that infertility arises because of male factors. So 65 percent of the cause of the infertility is associated with some disorder in the woman and 45 percent in the male. Of that 45 percent and most of those are caused because of inadequate sperm production or ineffective sperm production, a small percentage of those have minimal sperm production and would necessarily have to be treated by AID. Most of the others are currently treated by AID I might add as well.

One of the spin-offs that has come from the IVF programme has been the development of sperm washing and sperm preparation techniques which immensely improves the quality of sperm, and as you know only one sperm is required for fertilisation. This has opened up the possibility of providing for an infertile couples with a male factor. The possibility of AIH in which the husband's sperm, which has a low sperm count, is improved in quality through the washing techniques and using the special transfer methods that are used for the embryos using that sort of catheter, timing ovulation very carefully, it is possible now to offer these couples the chance of pregnancy with the genetic father as the natural father and the husband.

That programme has been pioneered in Adelaide where they have a current success rate of about 20 percent and it's a programme that we are looking at very carefully at National Women's. We have done a few pioneer applications, very few numbers, but it is an area we would like to get under way.

I would like secondly to comment about cost. If you have an IVF treatment in Australia it might cost you something between – depending where you have it – in a private clinic, between $1,500 to perhaps $2,000 a treatment cycle. One of the important parts of our programme at National Women's is to see if we can have an IVF at minimal cost. So we have cut back on the expense of laboratory tests, they are kept to a minimum. There is one over-night stay in the hospital in beds that usually would be vacant anyway, and remember in a hospital scene if you have got a bed there it still costs $100 and something a day whether it has got a patient in it or not. So it is probably better to have a patient in it. So when we talk about the horrendous costs of IVF programmes they need not be as high as we think they might be. Certainly the programme that we have in Auckland is considerably less cost per patient than in many other places – most other places – in the world.

Mr Scott: I'd like to add something on that cost question because I think it may be helpful. What Professor France says is right, it is reflected in Australia. An IVF programme is not an expensive programme, certainly not for the community. It is available through the public hospitals and it is not expensive for the public hospitals because the patients themselves pay most of it and resort back to their medical benefits insurance.

As to the sale of sperm, the very first thing mentioned by the speaker with her AIV, the uniform transplant law that I mentioned earlier that now applies throughout Australia forbids the sale of human tissues and that includes reproductive tissue. It is an offence for there to be commerce or traffic in them. The United States pemits traffic in many body materials and has a thriving international market in sperm. There is an organisation in Virginia called the Xytex Corporation, that has a multi-million dollar international frozen sperm business. That was reported in the British *Observer* last year. But the general fear that people have that provision of AI services and IVF services is a great expense to the community is quite unfounded, it is borne principally by the patients themselves.

The general question of commerce in human body materials is a difficult question which we have solved in Australia by means of disapproval. I'm quite sure that New Zealand, well you have legislation here that forbids the sale of blood, as far as I am aware, and I am sure that New Zealand would set its face against trade or commerce in sperm and reproductive tissues also.

Chairman: Just one final matter arising out of Professor France's area, is what people might be interested to know what are the results to date of the IVF programme at National Women's.

Dr France: What are the results to date of the IVF programme at National Women's? Can I perhaps first again go over the guidelines that we are following at National Women's

relevant to answering that question and point out that it is unlikely that the more controversial techniques that I referred to in my paper will be considered for any clinical service or for research purposes in New Zealand in anything like the foreseeable future.

The guidelines that we follow are the following: only married couples or those of a long standing stable relationship are accepted; the woman must be less than 40 years of age; the couples must have no more than two children with priority being given to couples with no children; the cause of the infertility is irreparable tubal damage in the woman; up to the maximum of three eggs are fertilised per cycle of treatment; and all embryos from successful fertilisation are transferred back in the woman's uterus.

The results and figures up to the middle of March from the beginning of the programme in July of last year – we have treated 41 patients for a total of 64 treatment cycles, the fertilisation rate where we have collected eggs – we don't collect eggs every time, sometimes the egg pick-up just doesn't work satisfactorily – is 90 percent. The number of pregnancies that we have is six. These are clinically confirmed pregnancies, two of them are on-going and are due for delivery in June of this year. We have had one miscarriage at 14 weeks, we had one tubal pregnancy at nine weeks and we have had two miscarriages, one at six weeks and one at nine weeks. So in total we have had six clinical pregnancies in treating 41 patients.

Chairman: Thank you Professor France. Well now you can see how one intervention from the floor can give rise to such a number of topics. Now can we have the next one please. The gentleman over there. I would ask speakers to try to confine themselves to three minutes because it is very apparent that there are a lot of people who wish to speak.

Mr Allen (Auckland): I would like to pick up on the matter just raised of adultry and I wonder if we haven't forgotten where the Commandment not to commit it came from. It seems to me that if we divorce the issues we're talking about from the author of life himself we will tread a dangerous path. In reading in detail Russell Scott's article I was impressed by the numbr of questions raised by it and as I went through I found more and more. The panellists today have left me with not a lot of questions but a lot of things to think about, and I think that this topic is well considered by us at this Conference at this time so we can get up with the play of what is happening.

I would just like to address myself to one of Russell Scott's points in his paper which has to do with surrogate motherhood and the example he used from Genesis. I agree with his facts but perhaps it should be clarified that there was no precedent intended there. In fact it seems to me that Sarah and Rachel were motivated by dissatisfaction or jealousy to prompt the use of concubines and they both, as you know, later had children in God's providence, offspring of perhaps even greater importance naturally in Isaac and Joseph. In addition to that there are Old and New Testament teachings revealing that God's pattern of procreation is the union of man and wife so let's take a little bit of issue with that.

The second thing is the point of the ethics-morality dichotomy and the use of O'Donnell's linking of that with natural reason. There is obviously a fair degree of subjectivity in that in mankind and I wonder whether it is enough. Your article suggests, and it has been discussed this morning, that genetic engineering, cloning may follow on from scientists revealed capabilities. Indeed maybe the following things are already happening, for example I believe in Scandanavia abortion techniques, although not officially may be directed towards a purer breed. For now perhaps the suggested monitoring seems right. I was going to raise the point, and it was raised by Dr France, the slippery slide point. I hadn't thought of it that way, but I have looked at the non-selective ingenuity of the backroom boys and the superpowers in the developments of weaponry and how they were pursuing the excellent abilities that they had, but perhaps in the wrong direction. I just raise the question how far is the door to be left ajar to accommodate any misdirected creative drive of our medical scientists and should we as a profession follow the keynote speaker's lead in being active in shaping popular opinion in this area of bioethics as well as making good law.

You know, I was reading my little boy, the first night I arrived down here, a book which he chose which was Dr Suess "The Lorax". Some of you may know it. It seemed to tie in with your last paragraph in your paper Mr Scott in your plea for courage, balance and enlightenment and I would endorse this for us as a profession, corporately and individually. He said at the end of that book "But now says the Ono, . . . now that you're here, the word of the Lorax seems perfectly clear, unless someone like you cares a whole awful lot, nothing is going to get better, it's not."

Chairman: I have nothing contentious to offer in reply to that and I will defer to the speaker's superior biblical knowledge.

Miss R Charters (Wellington): There was a point raised by Miss Kay's comments which wasn't actually responded to and I would like to take up on it. Though the question of cost may have been covered and some of the fears allayed there, the question of the priority given to preventing infertility in women rather than trying to cure it after the event has not been answered.

I would like to read an extract from a very thorough article written by Phillida Bunkle in the recent *Board-sheet* magazine where she questions the medical politics involved in the whole procedures and the place that women have on the receiving end of those politics. She says:

> International reputations depend on attracting this type of investment (meaning IVF programmes) in fact the success rate of the expensive technology is very low. The Auckland unit will successfully treat only a tiny fraction of the women who are infertile because of damage to their fallopian tubes. It would help far more women far more if a fraction of this money was spent on preventing infertility. There appears to be an increasing incidence of infertility and especially of tubal damage. The major cause is undiagnosed and untreated pelvic infections and intrusive contraceptive technology (she later refers specifically to IUD's). There is a lot of practical preventive action that can be taken to protect fertility and to make sexual activity safer. A little of this money spent informing women about how to protect their own fertility and educating doctors to take this issue seriously makes

good sense but it is not the stuff that careers are made of. *In vitro* units are the stuff that empires are made of. If Cambridge has one, Melbourne must have one and if Melbourne has one Auckland must have one. Doctors need to be educated to respond much more to the effect of symptoms of PID. In New Zealand there are many women made infertile by doctors who did not take their stories seriously, who sent them away for a month to see if things would settle down and who made judgments without a physical examination. Much could be done medically to prevent infertility but it is low tech, unglamorous work. There are some fine people who undertake it but it is not the foundation of an empire or of an international career. It is therefore without medical interest and is poorly funded.

I invite Dr France to make some response to that.

Dr France: I think, I've read that article by the way, and there is a certain amount of insight in it that I would not disagree with. It is the nature of scientists, as it is I guess the nature of lawyers, to create careers, and to try to be the best and try to introduce new techniques, and that certainly comes into IVF programmes. However I don't think I would picture it in the same way as the article does. IVF programmes were introduced specifically for the treatment of infertility. The consequences of those in building careers for people like Edwards and Steptoe, who I might add already had well established international careers and didn't need IVF to complement those, it is just a consequence that followed. The forming of IVF programmes in departments is important, we regard it as an important aspect now of treating infertility. It's available in most other major centres now throughout the world as a normal technique and to say that a programme such as ours at National Women's for example, has been established so that the people involved in it can establish and develop a scientific career which will aid them in their future prospects I would regard as somewhat offensive. The other question about research into preventing the cause for the need of *in vitro* fertilisation, tubal disease, pelvic inflammatory disease and so forth. There are many active research workers involved just in that very field. I might say though in my opinion it is probably society where the answer to that will come. We can't have, it seems now to be a natural link up, the freedom of women to have fairly open sex lives which society does seem to be accepting, seems to be going along with the increased incidence of pelvic inflammatory disease. It's not necessarily a consequence of contraception though the use of IUCD's is associated with increased pelvic inflammatory disease. The main cause is a fairly open sex life. I think if you just wanted one word, it's not the primary cause and it's not the main cause but if you want an emotional one that would be it and I think to pick up the speaker's question and argument in that line then perhaps we should be looking at what we regard as permissible and perhaps normal behaviour in society.

Miss Patricia Clancy: I am from Melbourne and I thought I might share with you an experience that we had in Melbourne late last year that hasn't been to referred to by the speakers. The Attorney referred to the moratorium that was introduced for a while by the Government on the donor ova programme. That upset a number of women many of whom were from other States who were undertaking the programme. They sought legal advice and as a result of that they brought an action against the Attorney of the State of Victoria under the provisions of the Equal Opportunity Act saying that as the donor sperm programme was continuing it was discriminatory that the donor ova programme was not continuing. In fact that all came to nought because in the meantime the Government gave it consideration and revoked the moratorium so that the matter didn't need to proceed. I thought perhaps Mr Attorney ought to take heed of it over here.

Unidentified Maori participant: My intervention is by way of comment. It is to do with something we haven't touched on as yet and that is the termination of life touched on by Mr Scott.

My comment is prompted by the symbol depicted in our Conference emblem and that is the fantail. The fantail in Maori cultural terms is a bird of death. I don't know whether it was the wisdom of the architect of such an emblem to encompass this bird in this emblem but they have done so, quite appropriately too might I add.

The fantail was responsible for the death of one of Maori people's most famous folklore heroes, this person being Maui. He may mean something to some of you, he certainly means something to me. Maui was enveloped in the vagina of Hinenuitepoa in his efforts to acquire perpetual life for mankind. This brings me to a point which I wish to make and that is for Maori people, for myself, there is honour in death and there may not be a need for legislation in this area for Maori people.

I make the point then, the point is twofold. Firstly there need not exist any legislation to protect this for Maoris and the second point that this may be an illustration whereby a different cultural perspective on an aspect pertaining to us all requires a different legal input.

Mr Matthews (Christchurch): I'd like to ask the Attorney-General whether it is the intention of the Government to set up a committee perhaps similar to that in Australia to advise on the matters which have been raised this morning. I use advised in the widest sense of the word to incorporate really the collation of the obvious mass of information which there is on this subject worldwide, both factual and of opinion base, and also the obvious interest groups which exist in this country whose views would need to be put together with that information in order to provide a central core from which a proper opinion for New Zealand's situation could be developed. I wonder if that question could be answered.

While I'm on my feet and having only one turn I wonder if I might just ask just another subsidiary point. Could I please be advised on the point the Attorney-General expressed some horror at when raised in a different context, that was the registration of who gives what to whom and for what purpose. He expressed horror at that in the context of the question of information being made available to children at a later stage in their lives as to where they came from, which of course is very important in itself. But it is also important if we are to protect, I believe, the prohibited bounds of marriage between persons of close relationship for the future generations of this country, because if donation

of sperm and donation of embryos is to become a proliferated activity, which I can see a certain amount of good sense for and obviously a good deal of common support, then there must be some protection to ensure that brother and sister do not at some stage, quite inadvertently, marry. This after all has been protected by laws, and indeed the Book of Common Prayer, for a very long time and is not a point to be overlooked in a scientific debate of this nature.

Hon Mr McLay: Perhaps I can deal with the second question first. I think you may have misinterpreted what I said in answer to the question about adoption and information being made available to AID children about their background. I didn't actually express horror, what I expressed was concern, not at the making available information about medical background and the like, but the availability of what is usually termed identifying information. That is my area of concern.

While I appreciate the problem that you raise it is of course something that we have had inherent in our adoption system for as long as the present Adoption Act and its predecessors have been on our statute books. I believe that the present open system of adoption that operates for the future may well be the solution to that problem. My concern is more about the past and the clear understandings on which people entered into adoption arrangements in the past and I guess every practitioner in this room has at some time taken a consent from a birth mother and been asked the question "Can I ever be traced subsequently?" And I think that you all know the answer that we have been able to give in the past.

Can I come to the substantive issue which was the question of establishing some sort of committee to advise the New Zealand Government. As I indicated in my paper, my address, we have been very closely monitoring not only legislative moves in other countries and indeed participating in the discussions that have been undertaken by the Standing Committee of Attorneys-General in Australia since 1977, but we have also been closely following reports and the work of committees such as the Waller Committee in Victoria and the Warnock Committee in Great Britain. I have, however, delayed – perhaps that's not quite the right expression – declined to make any specific recommendation to my colleagues as to what steps we should take. First until those two reports had been made available in their final form, and secondly until this discussion had taken place at this Conference because I believed that this was probably the first truly public opportunity for a debate on the sort of issues that we have in fact been addressing and I regarded this as a very important contribution.

As to whether a committee or an advisory body of some sort is the most appropriate course of action before we take any steps I have yet to make up my own mind. I have a slight fear of the great Kiwi solution to all problems which is to form a committee to advise on the matter. At the same time I recognise the factors that the question raises that there is a whole range of different opinions and different disciplines that we would want to bring to bear in terms of advising the Government. A committee of some sort, perhaps not using that expression, but perhaps some sort of advisory group before we do act may in fact be the most desirable course of action.

That may of course not be necessary in respect of AID status legislation because that is an issue that I think is starting fairly clearly to emerge. I think most people would probably say, and I'd be interested in any reaction from the floor of this gathering, that whether or not we approve of these techniques the reality is that people are being born as a result of them and questions might now be raised about the legal status of those children. Whatever we may think about those techniques, whatever people may think about those techniques we owe it to those children once born to ensure that they enjoy a proper legal status.

Miss Jane Chart (Canterbury). The Attorney-General I think has raised a very important point about what happens to the children once they're born and I'm just wondering how much attention has really been given to this issue during the discussion today. We've heard a lot about techniques and some of the legal problems and the embryos discarded or not discarded. As far as I am aware certainly the progrmame, the AID programme, which is run at the Christchurch Women's Hospital is concerned, records are routinely destroyed and this is still the case. I'm not aware of what the situation is at other hospitals but it does seem to raise a very basic issue of how information – non-identifying information even – could possibly be made available. The other concern that underlies the destruction of records in this programme is confidentiality with respect to the donor.

All that is fine but it also produces an underlying secrecy about the entire programme. Again looking at this particular programme with which I am familier, the attitude of the medical profession there is this is a secret between us, the child need never know. It seems to me from all the research that's been done in relation to adoption that that assumption is quite naive. Those sorts of secrets cannot be kept within family environments. Moreover if we attempt to keep them, the child starts to sense very early on that something is wrong and very often the child may begin to believe that something is the child.

Now it seems to me that we ought to be thinking about these assumptions that are being made, first about destruction of records which means that even if we reverse our present policy we have got no choice, the information simply isn't there. That is one issue that seems to me to be necessary to be considered by the profession and by society and the second thing is this whole question of secrecy. Should the child be told? What should parents be advised to do?

It seems to me while I'm on my feet and have this opportunity another issue that should be addressed by the profession and by society is what happens to infertile couples when they go through these programmes. Again looking at AID couples how much "counselling" are they given before they go into the programme, has the husband really accepted his feelings about fertility? If he hasn't what implications does this have for the child. Now this isn't a question of legislative controls, it is a question of practice and saying we are playing God here. We are producing new life, and what responsibilities do we as a community have towards the children who are produced?

Chairman: I will ask Mr Scott then Dr France.

Mr Scott: Very perceptive comments were just made. I've been looking very closely at the first question raised, this question of secrecy and factors have emerged in our research in New South Wales – where the practice by the way relects what you've described. It has been normal for hospitals to destroy records particularly in relation to donors after two or three years, and for confidentiality and secrecy to be absolutely guaranteed to donors.

There are two reasons for this as far as we can make out. The first has been the confusion of the law, the fact that under the law as it stands the donor being the biological father appears to be the person, if it could be proved, who would have the obligations of maintenance, the rights of custody, there is the confusion of inheritance law, all those things. Therefore because of the lack of legal clarity it has been thought by many people to have this secrecy procedure, we are advised by many of the clinics involved. Bear in mind that as far as we can make out there are currently being born throughout Australia about 1,000 AID children a year. That's some work we're just completing at the moment, it hasn't been published or given to anybody else except you at this stage.

The clinics all say that a potent factor with donors is the possibility of somebody knocking on the door in 20 years time when the donor is married and has a family and he opens the door and there's someone standing there who says "Hello Dad" and this weighs quite heavily apparently on donors' minds. So that legal confusion is one thing, this second factor is another. I think however that the kind of status legislation that the Attorney was talking about a moment ago that we've just introduced in New South Wales should go a long way to altering the situation.

My personal view is that some kind of recording of information has got to be done. We've got to work out a mechanism of proper protection of all the persons involved because there is a primary factor, that is the welfare of the child in there, and there is an entitlement on the part of the child to learn a certain amount of information. We have to solve the hard ones – how much and to whom – but I think there will be an alteration once we've got the status of children legislation into effect and then begin to work on the next step.

Dr France: I thought the comments were excellent and said many of the things that I have personal concerns about, and I emphasised some of those in my paper. I think perhaps one of the reasons of confidentiality dates from the introduction of AID methods as a real medical service perhaps in the early 1950s, at a time when adoption was also regarded as a rather secretive affair in terms of who the natural parents were and I think, doctors viewed it in somewhat the same way. Now that has certainly changed in recent years with regard to adoption and it is being appreciated I think with AID and Mr Russell Scott has talked about that.

In regard to counselling and I'll just talk about the National Women's experience. We have two areas of counselling that a couple coming into our programme would be involved in or if they were in the AID programme for that matter. They would be counselled by a clinician who would be seeing them within the infertility service and by the clinician in the IVF programme if they moved into that. They would also have very intensive counselling with one of our social workers who is particularly attached to the infertility service and has developed skills in that area.

We are concerned about the suitability of the couple as parents in the use of procedures that are new and do not involve normal natural intercourse. We are also particularly concerned about the effect that conception in such a way would have on the child in later life. This being a new technique of course we don't know. Maybe we have to ask ourselves what sort of research should be got under way just to investigate whether these children do have problems. Hopefully we don't believe that they should. It is possible that they could. But then you have the difficulty in setting up such a study, you make them very special and what may be normal behaviour may be regarded as abnormal behaviour. It is a very complex issue to get into.

Mrs Olive Smuts-Kennedy (Wellington): It has just occurred to me with respect to this commonly observed secrecy with respect to AID children I wonder if insurance companies have ever made any comment with respect to their actuarial tables being upset. It strikes me we all have to fill in forms when we apply for life insurance. Have any of your parents or progenitors had this, that and the other thing. It seems to me that an awful lot of AID children and indeed adopted children will be filling those forms in wrong.

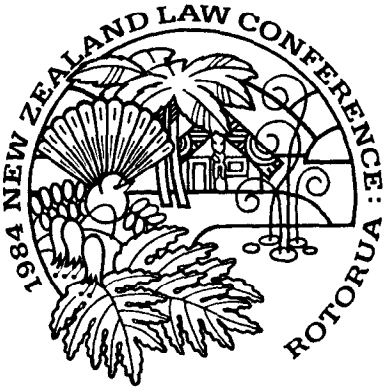
Chairman: Have you thought of that one Mr Scott?

Mr Scott: No. I'm flummoxed with that. I haven't encountered that as a problem before. I don't think in absolute terms the numbers really are sufficiently great to effect, what you might call the life tables, but it is an interesting thought and it may be that the question of misrepresentation on insurance proposals and the obligation of disclosure might have to be amended in the light of the speaker's comments.

Chairman: Ladies and gentlemen and fellow Conference delegates I think that today's session is a real justification for law conferences. People think it is sometimes fashionable to say that they are just junkets or old and tried topics and brought out again and in fresh garments; but today we have had a topic that for a law conference and indeed for New Zealand is a deeply novel one, a topic of vast potential importance to this country. I think that the contributions of the three speakers and indeed the contributions from the floor have shown both the importance of the topic and the thinking that people who attend this Conference have been giving to the problems concerned.

This debate, I don't think that anyone could call it necessarily a debate, a quest for information, an attempt to articulate many thoughts that we all have, which we have not resolved, has produced many things. Mr McLay mentioned that he was awaiting the outcome of this discussion today to assist him in some of the difficult decisions that he and his colleagues will have to face in this field in the future. It certainly demonstrated that there were a number of matters that haven't been thought about sufficiently. I just quote purely as an example the very thoughtful intervention about the Maori cultural aspect about all that we have been speaking about. I think that nothing but good can come from an experience such as today's and we wouldn't be in that happy state were it not for the quality of the speakers and the obvious effort that they have been prepared to put into their papers today. □

Law Conference 1984 — Closing Session Panel Discussion



Mr Bruce Slane: Ladies and gentlemen, we've assembled here — I was going to say a collection of people — a distinguished panel of people who have been present at the Conference and have to a greater or lesser extent been able to be around the Conference sessions or participating. Some as they would hasten to point out haven't had much opportunity to go to other people's sessions — people like David Andrews who has been working part of every day since he has been here. But others have been to the sessions in which they weren't participating and as you can see from the people we've got here they have also been participants and involved in the organisation, chairmanship or production of papers at sessions.

Just in case any of you can't identify them readily, from the left — Ted Thomas, QC from Auckland, Bernard Teague from Melbourne, Lord Scarman from London, David Andrews from London, Jim McLay from Birkenhead, Russell Scott from Australia — from Sydney, Mr Justice Tomkins from Kuratau, Fali Nariman from New Delhi and Sian Elias from Auckland.

We're not going to endeavour to sum up everything that has happened at the Conference, everything that has come out of it. What we hope to do is to give you some personal flavour from these participants, what they saw and what they heard and what they thought of during the Conference.

Now we know that the theme has been about the future and it seems to me that the thing that most catches the flavour of the future being here now, is the computer. I wonder whether, David Andrews, having now got some feedback from the New Zealander and having been at the Conference both in the surgeries, and in the wider field of the computer, you have some impressions to tell us.

Mr David Andrews: Thank you Mr President. What time are we due to go? I was being driven by a taxi man from the centre of Rotorua to my hotel the other day and in the course of conversation with him I said well this is the week to get into trouble if you want to get into trouble because you are surrounded by a thousand lawyers who will get you out of it. And he turned to me and he said "I may be surrounded by a thousand lawyers but I can't afford to speak to one of them". I thought that very neatly summed up the problem that we're really all talking about and certainly in terms of computers and how they can help us to overcome that problem.

Now my chief concern, and this has been borne out here in discussions this week, is the danger, the risk of oversell. Those of you who did attend the main computer session earlier in the week will have heard a presentation in which mention was made, in fact quite a lot of emphasis was placed upon what is called fifth generation computer development. We haven't got to fifth generation yet, but we're getting there quite quickly by the sound of it. I think there is a great danger in talking too much about the far distant future. The great danger as I see it is that instead of encouraging the legal profession to take advantage of the many benefits that computers undoubtedly have to offer us we will, if we are not careful, frighten the profession away. It is easily done, and there is a great risk that that is in fact what the oversell, the salesman, the high pressure salesman, might well do for us and that would be a tragedy.

The other risk is that you end up creating a cure for which there is no known disease and the profession if it takes the cure could well kill itself. Well it's quite clear from the discussions that I've been involved with this week that the profession here is enlightened, it is receptive, of course it's highly intelligent and it is approaching the subject, if I may say so, in what I would describe as a highly sophisticated way. Quite a high proportion certainly of the solicitors part of your profession here, are using computers already in some of the ways in which we have also been using them for some years now in United Kingdom, organising offices, accounting, financial management, word processing.

I have placed the emphasis this week on what I regard as the logical extension of word processing which is into the organisation of our masses of information within our offices. The know-how that is really the kernel of our profession of our individual firms which for most of us resides, as I have said often during the week, in drawers and cupboards in our offices that we don't even know exist. Now I have placed emphasis on the development of systems that are going to enable us to organise that aspect of our offices leading to the development of legal support systems, dynamic support systems and diagnostic systems that are really going to help the likes of you and me to get our daily job done. There seemed to be a lot of sympathy for that approach and indeed a lot of interst was expressed in some of the things we discussed of that nature.

The emphasis must be placed on a constant dialogue between our

profession and the suppliers to our profession. The suppliers are well intentioned but you must bear in mind that very few of them, if any, ahve actually been lawyers, and have satg behind a lawyer's desk, and ahve known what it is like to sit there with the pressures of desperate clients wanting their work done yesterday, on their shoulders the whole time. The suppliers can't understand that and we can't expect them to. We must therefore maintain a dialogue with them. We must let our requirements be made known to avoid the development of irrelevant computer systems and software packages.

Mr Bruce Slane: David, I just want to say, does that mean in effect what you are saying is that the profession must remain in control.

Mr David Andrews: The profession must certainly remain in control of the systems, the planning of systems, the development of systems, yes. I am not suggesting and I hasten to say, I am not suggesting that the profession should itself seek to develop these systems. I don't think that is a practical proposition for a whole wide range of reasons but certainly maintain control of development. As I did say in one of my sessions I think one of the most important roles for Law Societies is to identify in a sophisticated and skilled and careful way the requirements of the profession; and make sure that those requirements are made known to those who are trying to supply systems to us.

It is often said to me by suppliers that one of their greatest problems is finding out what the profession really needs and they do bemoan the fact that there seems to be precious little co-ordination of those requirements. Otherwise suppliers and we will simply be bypassing each other, and again that would be a tragedy. It is a bit like the parachutist I may have described to some of you earlier in the week. Having just leant to parachute he takes his first jump, pulls his cord and finds it doesn't work, frantically pulls it a second time, it still doesn't work. He is gathering speed, hurtling towards the earth and suddenly notices somebody hurtling up towards him. He notices this guy is carrying a large spanner in his hand and as the spanner holding gentleman whizzes passed our parachutist, the parachutist yells after him "Do you know anything about parachutes?" And the hurtling man with the spanner says "I don't know anything about parachutes. Do you know anything about gas cookers?" Now that, ladies and gentlemen is a situation that I suggest we do not want to get into with the suppliers to our profession.

It is often said that the computer runs the risk of dehumanising our profession, of dehumanising our offices and of course if not properly used that is a real risk. But I would venture to suggest to you that a far more dehumanising factor in this day and age of over-supply of legislation and legal material, the far more dehumanising factor is lawyers who have been trained to be lawyers sitting behind their desks day by day pushing backwards and forwards pieces of paper that require precious little intellectual input. That is what we are spending far too much time doing and that is what the computer, if properly programmed to serve us, is going to enable us to get out of doing and to get back to being lawyers which is what we are all trained to do.

Mr Bruce Slane: But David, I want to push this around a little bit because I want to come back to you again. Isn't part of the problem that the computer also produces information – vast volumes of it too?

Mr David Andrews: Well I would like to push that one I think onto my senior colleague Lord Scarman. Lord Scarman has been one of the few Lords of Appeal in Ordinary who have for more years than I care to remember, and probably he cares to remember, has been a great supporter of the development of the computer. As you probably know he's been Founder President of the Society of Computers in Law in the UK, and indeed the National Law Library, and I think he probably has some views to express about over supply.

Lord Scarman: I certainly have. In England the Judges of the Court of Appeal and the Law Lords in the House of Lords are very apprehensive at the growth of what might be described as research material, and of course the computer is a technological facility for encouraging the growth and storage of that material. Indeed the House of Lords has now declared *ex cathedra* that it will not look at transcripts or other print outs of previous decisions unless they have been reported in an accredited series of reports authorised by a legally qualified reporter. This has created a certain amount of disturbance at the English Bar because of course there is a library in which all the decisions reported or not of the Court of Appeal are stored and the computer is now on stream storing a great variety of judicial decisions. I think that we have got to be careful that the computer is not used to increase the supply and thereby I fear overwhelm the quality of reported cases as a source of law.

Having said that – words of warning – we do now increasingly make use of the computer in our judicial system. The computer has of course essentially two roles in the judicial system. First of all it can promote efficient judicial administration, it can help to deal with the problem to which the Chief Justice referred earlier this morning, the problem of delays, by a proper organisation of lists thoroughout the country. Apart from that there is nothing very strange or original in using the computer in judicial administration. Judicial administration is like any other administration and the computer has already proved itself and I say no more about that.

The other importance of the computer I have already touched upon is its value as a reseach facility. If this is properly controlled, this is going to be immensely valuable. In the House of Lords at the moment we have this facility. We have in the library in the House of Lords two computerised databanks where we can find all the reported case material in the USA, all the reported case material in the Common Market countries and in Luxembourg, the seat of the Common Market Court. We have the whole of the statute law in databank, and increasingly the case law of the United Kingdom. So the facility is there, and it is useful; but I do repeat words of warning. Somewhere there has got to be a legal intelligence deciding what goes into the databank and what must be thrown into the wastepaper basket.

Mr Bruce Slane: Thank you Lord Scarman. The Attorney-General has some interest I know in the legal information retrieval situation. Do you want to comment?

Hon Mr McLay: Just very briefly Mr President. When I was listening

particularly to Lord Scarman's comments I couldn't help thinking that I have been out of active practice now, although I have remained very close to the law, for the past ten years. Recently someone showed me a set of submissions that had been prepared for the Court of Appeal and they included an enormous weight of material that had obviously been extracted from some form of databank – I don't know the detail or background of the arrangements that were used to obtain the information but it was very clear where it had come from. What occurred to me was that there were still three Judges sitting up there who finally had to absorb all this material and I likened it in my mind to the situation with the microwave oven. It will cook your food much quicker but you still only have the same body to eat and absorb that food, and thus you mustn't use it to produce any greater quantity than in fact you need. And I think there is a very real danger with computer systems generally where in fact we will get into this area where we simply use it as a means of producing more and more material, throwing more and more material at the problem and not necessarily making it any easier. In fact making it very much harder to solve it.

I wonder, however, if I can bring the discussion on computers back to a very basic level because both Mr Andrews and Lord Scarman have assumed that the profession have grasped the computer technology and certainly I accept that for the majority that is the case. But there are many lawyers who are still, I know, very reluctant to do little more than engage perhaps in word processing or using sophisticated electronic typewriters in their offices, and are certainly not happy even about computerised trust accounting. And of course we have also got to recognise that there will be many who cannot afford it; and that as we move in this country towards the development of a computerised legal information retrieval system, the sort of thing that is being looked at at both governmental and private level at the moment, there will be many lawyers who simply cannot afford to have that sort of service.

I recall 14 months ago when I was attending the meeting of the Commonwealth Law Ministers in Sri Lanka that it was interesting to hear countries like Britain, Australia and Canada talking at considerable length about the great advantages to their practitioners and to their governmental structure of having a sophisticated computerised legal information retrieval system. But there were many countries who couldn't even afford law books and for them to be talking about the development of computerised systems was utterly meaningless. For many of our legal practitioners in this country, similarly, to be talking about the use of computerised systems is utterly meaningless. For a country like New Zealand it is questionable how many practitioners will in fact be able to afford to subscribe to and use such systems. And therefore I think that while we can get very excited about these systems, and well we should, that at the same time we have got to recognise the reality for the vast majority of the members of our profession.

Lord Scarman: Mr President, may I intervene. The Attorney-General has raised a very important point and that is to say the cost to the practitioner, and ultimately to the public, of computerising the offices and research facilities of the profession. David Andrews, on my left, has played an immensely important part in the United Kingdom in seeking ways and means of keeping those costs within bounds, and there is a way which I would just like to leave with you to mull over. The way really is for the profession to do what so many agricultural and business interests do on the Continent of Europe. Form co-operatives in order to provide common services. I see them all over France, that's how the farmers operate. Now if one could have in, let's say, a small country like New Zealand, or in a heavily populated but small country like the United Kingdom, if one could have some centralised databank and, as far as search is concerned, all that solicitors and barristers have to do is have a terminal in their office and pay for the use that they make of it, and then ensure that in that databank one has not an overwhelming quantity of the primary sources which really don't interest the profession. I mean the lawyer in the small town in New Zealand or in the small town in the United Kingdom doesn't want to have the sort of stuff which for instance Lord Diplock would require. What he wants is help immediately from the textbook on the problem which his client just over the table has just mentioned to him and therefore one wants to look for textbook material in his databank. It can be done that way co-operatively, a centralised databank and the subscriber link and I believe all of us both the few New Zealanders living in their very rich country and the large number of United Kingdom citizens living in their very poor country can afford.

Mr Bruce Slane: David, do you want to make a comment on that?

Mr David Andrews: Can I just add one thing, because, like Lord Scarman, I found the Attorney-General's point very much right on the spot. The one thing I would say is this, that in a way the cost element is central to my own thesis. I believe that cost is directly linked to relevance. Some of the systems that are being talked about as long term future developments, of course cannot be afforded even by the profession as a whole today let alone by individual offices. Now I take the view that what we are really talking about is not costs as such, we're talking about cost effectiveness. If the computer systems that are developed are useful to us, are going to help us shift that paper more quickly, get more work through our offices, improve our service to the public, generate great productivity – in other words, the down-to-earth systems I have been describing – there is no question whatsoever that they will be cost effective and it matters not one iota what it costs if it is cost effective. Thank you.

Mr Bruce Slane: I take it . . . Russell Scott do you want to add to it?

Mr Russell Scott: Mr Chairman, to comment on the way in which we recently used it in our own Law Reform Commission, when it came to the basic research on artificial conception methods it became desirable, in our view, to find out the state of the law, the statute law, the case law, in a variety of countries relating to the subjects that I have been talking about at this Conference. The rapidity of obtaining and culling information from the computer databases was remarkably effective. In New South Wales we used the law libraries of the Universities. One of my research assistants happened to be going to England where the famous

Lexis database is accessible, and by using it at the Institute for Advanced Legal Studies in London we were able to get information about all the United States case law and a lot of the statute law relating to artificial insemination and *in vitro* fertilisation. In that way we assembled very rapidly a local and international quantity of fundamental research material for our purposes which was an excellent use of it, of the computer concept. There are two other very practical matters that. . . .

Mr Bruce Slane: I was going to ask you what was the cost, was the cost reasonable?

Mr Russell Scott: The cost from our point of view was extraordinarily low – extraordinarily low. I think for our London *Lexis* search that culled parts of Europe and America, no moe than $150 Australian dollars, and the local one was far cheaper than that.

I have a friend who provides us all with, or me anyway, an embarrassing example when one thinks of preparation of speeches and papers. He has now himself, as a lawyer who speaks a lot, mastered the word processor system. When I said to him the other day, as he informed me he was going to San Francisco to deliver a paper the following day, I said to him, have you prepared your paper and he said, "well I am going home tonight to finish it. I put it on the word processor in my study at home last Saturday and I'm just going to finish it off on the word processor tonight".

Finally, on what might seem to be irrelevant but is an interesting side effect. We use word processors to a great extent in Law Reform Commissions and offices in Australia and there has been the appearance of an extraordinary illness called tenosynovitis. We have two of our word processor operators in the NSW Commission away at the moment indefinitely. They have developed this unusual complaint and can't use their arms properly and I gather that it is a medical consequence of the repetitive use of the hand.

Mr Bruce Slane: This raises the question of costs and I was going to move anyway to the importance of that for access to the Courts.

Mr Ted Thomas QC: The whole subject of computers of course is very fascinating. For myself I have up till now thought that my humble cash book, believe it or not, doesn't warrant a computer.

Mr Bruce Slane: Well, in other words, the computer is not going to make you any cheaper. (Laughter) But it seemed to me that there are two aspects of the access to the Courts that have been discussed here that might be touched on and one is this question raised by the computer whether that will help in the question of cost. Now you were involved in discussing the cost of going to Court. What did you get from that session?

Mr Ted Thomas QC: Well I can put that point very thoughtfully I think it is accepted by everybody that the use of modern technology is essential to speed up the Court processes.

Mr Bruce Slane: What else have we got to do?

Mr Ted Thomas QC: I don't want to repeat my speech Mr Chairman. Or rather I do want to repeat my speech but I know you wouldn't let me. There is, of course, a great deal to be done and the Chief Justice indicated in his address this morning that there is a real motivation to do something about the present delays. He extended to the profession an invitation to co-operate with the Judiciary in doing something about it. Oddly enough in the course of my address I extended an invitation to the Judiciary to co-operate with the Bar in bringing about some speeding up of the processes of the Court. Now it does seem to me that we could bring these two offers together in the framework of an offer and acceptance without too much difficulty.

In the course of that address I stressed the need to cease blaming each other or one another for the Court's delays and to start as they have in Australia to co-operate and to try and deliberately work in harmoniously one with the other to bring about an improvement in the system. The Australians have established a Judicial Administration Institute consisting of the Judiciary, practitioners and academic lawyers for the very purpose of trying to achieve a more harmonious and co-operative relationship that will bring about the much needed reforms and I have made the same suggestion in my paper.

Having suggested and demonstrated that it was not necessary to blame anyone for the Court's delays – they can be attributed to a system, a system which can be corrected and improved – it was then disappointing to see in the discussion that took place that in fact everybody started blaming everybody else. One group of lawyers blamed another group of lawyers, other lawyers blamed the Courts and the Judges and at least one Judge blamed the profession. I don't think we are going to make real progress until that is stopped and we begin a co-operative effort to improve the Court system.

Mr Bruce Slane: Do you have a reaction to that, Judge?

Mr Justice Tompkins: Yes I do, but first of all, as they say on television, I regret the poor quality of the sound. I regret even more that that is due to over participation in the Conference entertainment programme. (Laughter)

I, of course, haven't been involved in the judicial side of the profession for very long. I have been a little surprised at the lack of apparent facilities within the Court side of the Justice Department, the lack of modern technological facilities. I suspect that probably the need is well recognised and maybe something is being done about it, but it is not apparent from where I am.

But to come to Ted Thomas' point of view, I would agree entirely that the answer must lie in effective co-operation. The regret that I have is the inability to translate what is so obviously desirable into reality and we just don't seem to have the machinery to effectively implement – when I say reforms, they are not reforms in the sort of philosophical or jurisprudential sense but simply procedural reforms. Ted Thomas made the point in his paper that we have been talking about this for years at Conference after Conference and yet in practice really little seems to have been achieved. Maybe if something comes out of this Conference it may be a realisation of the need to start doing things instead of talking, and the matter of judicial and Bar co-operation is a first class example of it in, for example, the pre-trial conference approach in the ordinary action.

Mr Bruce Slane: It seems then that a mediator might be needed between the profession and the Courts and who better than the Attorney-General who actually pays the bills.

Hon Mr McLay: Thank you Mr President. First if I can pick up the

point that was made by Ted Thomas right at the beginning of his comments. I think that if we consider the Court environment, and particularly in terms of preparing for cases and that's what barristers are involved in, if we use the computer and electronic databanks to gather the same information to use that we gathered previously in a much shorter period of time then computers really are assisting us. But if we use them to gather more information in the same period of time as previously then maybe they are not assisting us.

Can I say in relation to his proposal about the Judicial Administration Institute I listened to his comments on that with some considerable interest. I was disappointed that in fact the idea wasn't taken up in subsequent discussion. It is one of many ideas that I will be taking away with me from this Conference. Perhaps not a formal institute in the way that operates in Australia but perhaps some sort of machinery that provides for greater co-operation between the various arms that are involved in making our Court system work.

I also have been looking, indeed I've got to say this was largely at Ted Thomas' initiative, at the whole question of a commercial causes list or alternatively some sort of structure which might move particularly commercial litigation through our Courts with much greater speed than was previously the case. Although I always have this lingering worry that there are other important pieces of litigation in our Courts apart from the commercial. We must always bear that in mind and must not allow one type of litigation to gain an unfair priority in the Court system as a matter of course rather than because there is real merit in the request for urgency.

I also take up the Chief Justice's indication of perhaps a need for the Judges to have control of proceedings right from the commencement. I believe, as experiment with judicial control particularly in Auckland has indicated, that may well provide us with another means of moving work through the Courts much more quickly than has been the case in the past.

Miss Sian Elias: Can I first take up the point that was made earlier about the access to Courts session? I think that was an extremely disappointing session not because of the papers, which I thought were excellent, but because of the discussion. If there has been a disappointment I've had with the Conference it has been that the theme that was, or the warning, that was given at the outset by Shridath Ramphal hasn't been taken to heart by the delegates in my view and that is that we must look very critically at our profession and at ourselves in assessing where we're going to be in the future and I think that there were two types of topics in this Conference.

There were the ones which were more outward looking and I think discussions that followed those were excellent sessions, like the bioethics session and I think the discussion that followed the minorities session and the Human Rights sessions because they didn't effect the profession perhaps as intimately. But where the profession was required to look at itself, and I'm talking about all aspects of the profession, and particularly in the access to law session there was so much defensiveness and unwillingness, I thought, to really realise the extent of the change that we must be prepared to envisage or at least contemplate. I don't think there was a smugness in the attitude but I think there was a lack of awareness of the potential for change.

On this question of access to law from the minorities, I think it was particularly disappointing that minority groups were not invited to speak. I think it is quite revealing that in the access to law session Judge Brown when he was discussing the ways they have coped really with minority access in the District Courts virtually didn't speak about lawyers at all. What I thought was revealing in itself – well the impression was, that we weren't playing the role we should be playing in getting decent access for minorities to the Courts.

Mr Ted Thomas QC: Sian, the point here, of course, is that putting Mr Justice Eichelbaum and myself on the same platform on that topic is like inviting Tweedledum and Tweedledee to speak. She's quite right, the organisers made a mistake with me.

Can I turn then to the substantive issue which has been raised about the question of more modern facilities in our Courts? I am acutely conscious of it and I've got to tell you also that enough of my colleagues find themselves in a courtroom environment on occasions to comment to me about, for instance, the laborious means whereby we gather and record the evidence and other things as well. So I think I can tell you that if we can arrive at the technology that is appropriate there will be no unwillingness to provide the resources.

But the difficulty is in fact with the technology. Those of you who have been around only a few years will recall the great difficulty we had in replacing those old so called soundless typewriters that the associates used for many years. Those who were involved in the Erebus and Thomas Commissions will recall our experiments with the use of word processors as a means of recording evidence. It was to a limited extent a success but it also threw up many problems. In some of the Courts we have experimented with the tape recording of evidence. That has proved to be of limited utility. We are now, after some considerable difficulty in recruitment, about to experiment with one of those little machines which we all see in the American television programmes to see whether they might provide us with a better means of recording evidence because in fact they can be linked directly into a word processor and the material immediately transcribed and of course we are not too far away from the technology that will enable someone such as myself speaking into a microphone then to have that automatically recorded in word processed form.

So all of those things are possibilities open to us but I simply say to you that our extensive inquiries into improved technology for the Courts have proved that so far they are of limited utility. But I certainly am prepared to embrace any new technology that might speed up the procedures that we follow in our courtrooms.

Mr Bruce Slane: Thank you. The other aspect of access is who can get there and whether the Courts can adequately cope with the needs of minorities for instance. Sian, you've been interested in that and you've been involved also in the session regarding Human Rights. Just taking the Court's aspect itself, what is your impression of the discussion?

Miss Sian Elias: In fact the papers, I thought, were excellent in that they had some very good ideas in them. It

was just a shame that the Conference didn't take them up, and we keep coming back to very good suggestions like the judicial commission which has been obviously a very hot potato for some time now. But I think it is about time now (now I'm going to mix my metaphors) we grasped the nettle and it may be that we don't need to make Judges disciplined by this but we need some agency for monitoring how responsible our Court system is.

Mr Bruce Slane: Fali Nariman, you must have a perspective on this because India is the land of minorities is it not?

Mr Fali Nariman: At the moment I don't have a perspective, I can only tell you how I feel. (Laughter.) I feel like some rare Indian bird being brought up for public exhibition for the last time before it becomes extinct. I don't know why you call Bruce Slane a good organiser. I think he is a damned good slave-driver and I feel really like a minority who's really been pushed too hard. (Laughter.)

On the question of access – because I wouldn't now like to talk about minorities and, pardon my saying so despite my enthusiasm for Human Rights, I am about sick of minorities for the day – on the question of access I would only like to say that I shared Sian's view. Although one had a good discussion, and I attended it and I don't quite share the view that it wasn't good, but I do feel that we could have had more litigant participation. That perhaps would have been very beneficial. I think of these Conferences and how we talk about what we should do to improve ourselves and the profession and look to 2000 AD and so on. We have just finished a Conference in Bombay on Administratiion of Justice in 2000 AD, and we have said all the clever things and all the nice things that we should do, but I always notice that we lawyers set the problems and that we solve them. We don't have somebody else to tell us what the real problems are so that we may find some difficulty in their solution.

I am always reminded of what Robert Benchley once wrote in an examination paper. It was a set paper in International Law and he was asked – tell us the point of view of the great powers of Great Britain, the United States of America, Japan and China on the world fisheries problem. Now, he hadn't done his homework too well so he sat down and wrote – that I don't know the point of view of Great Britain, United States of America, Japan and China and the world fisheries problem and so I will discuss the topic from the point of view of the fish. (Laughter.) And I think we should have had a little more of the point of view of the fish in the topic access to Courts.

Mr Russell Scott: I am reminded on the topic of judicial inadequacy that we might recall the famous story that is contained in Megarry's book, *Miscellany at Law* on the subject. Perhaps there is an Englishman here who could correct me if I go off the rails a little, but as I recall it when the British Courts of Justice were opened in the Strand a hundred or so years ago, the Judges had to address Her Majesty, Queen Victoria, who came to open them. The Lord Chief Justice was said to have prepared a speech which opened with the words "Your Majesty, as conscious as we are of our manifold defects. . . . When that was circulated to the Judges a number of them made it known that they were not aware of their having any particular manifold defects so there were successions of considerations of this opening for the speech, and a brilliant compromise was reached. When the Chief Justice spoke to Her Majesty, he said "Your Majesty, as conscious as we are of the manifold defects of each other. . . ." (Laughter.)

Mr Bruce Slane: There has been some discussion of our manifold defects in terms of education, are we adequately teaching the skills compared with the teaching at the law itself, the skills of mediation, the skills of dealing and understanding the needs of particular types of clients?

Hon Mr Justice Tompkins: I would like to perhaps, return, in a way, to a theme I mentioned a moment ago and that is how we are going to implement the steps that clearly seem to be necessary. I suppose for 10 or 15 years now the profession has consistently complained about the inadequacy of the training of the recently graduated, and the Law Society has reacted to that by genuinely trying to devise an improved method of practical training. The attempt which I think has probably been going on for about seven or eight years has failed, and as far as I am aware we're really back to where we started. We have made no progress at all in solving the problem of providing the recently graduated and recently admitted with an effective programme of practical training and I would like to repeat the plea I made at the Education Session that I believe the time has come for a complete, thorough and authoritative examination of the whole of our legal training system.

I would embrace in that the academic course although I am inclined to think that that is the area that may need the least attention. I would include in it the pre-admission practical training, the post-admission practical training, and indeed the whole area of legal training throughout practice.

Getting back to the academic content I have a personal belief that there is a great deal to be said for the idea floated by Bruce Robertson who in his paper said that the law degree should be a post-graduate degree. I think that the need in the future, and I am talking about the next 10, 20 or 30 years, is probably going to be for fewer but better educated lawyers; and it may be that the adoption of what I gather is the American practice of having law as a post-graduate degree may be a means of achieving it.

But what we've got to do is to try to achieve something, and the policy that I've been urging of trying to set up an authoritative investigation into the whole area of legal training might produce that. And finally I would say that I don't believe the profession should shy away from it. I don't think we should be apprehensive of such an examination. I think we should welcome it and if it comes up with some fairly significant changes to the way of practising that we know it then I would regard that as a plus.

Mr Bruce Slane: There is just one point about that, for instance you're going to have the post-graduate degree. With the difficulty that many people from poorer families have in staying at university isn't there by this means a likelihood that we're going to eliminate even more the number of people who can enter the legal profession, including people from minority groups?

Mr Justice Tompkins: Yes, that I suppose would be a possibility. A possibility that could be overcome by adequate provision of student

support schemes, bursaries and the like, which of course costs money, as indeed I suppose would the post-graduate degree course. It would be a more costly one. One realises, as one involved in university administration, that this is a very real problem and that the source of funds is certainly not bottomless. I would have thought that that is a difficulty that should be realised and ought to be able to be overcome.

Mr Bruce Slane: The Attorney-General is taking notes, I wonder if he is taking note of what you're saying or what he is about to say. Do you want to comment on the question of education?

Hon Mr McLay: Only really to endorse the Judge's comments, and that is I have long felt the need for perhaps a post-graduate law degree rather than the present structure. I've got to say, just to sort of bring the thing rather close to home, that my wife, who if the revue I saw on Thursday night is anything to go by, comes from a British Colony in the North American continent, was absolutely astonished when she came here to find that lawyers did their degree at the under-graduate – their legal qualification at the under-graduate level.

Mr Bruce Slane: One of the ways in which the profession is taught to perhaps develop best has been by the application of market forces and Victoria [Australia] have been the cause of some scandalised comment here about their move towards, or the absence of rules against touting, the move to advertising, the opening up of the profession to competition. Is that going to be a way to improve the efficiency of the profession?

Mr Bernard Teague: I think having initially in my address covered the matter, then having answered a further question at the time, I feel that it is very much a matter that could be seen as one of subjective impression. I note that it is not used in terms of solicitation or other words, but always somebody concerned about the problem speaks of it as touting because it does carry its own unsatisfactory or unacceptable connotations. I believe the end result, as I have indicated earlier, will be that we will be more competitive as a result of those touting and advertising rules going; but I don't think there will be any substantial difference in what is the end result of those restrictive practices so far as the trust that members of the profession have of each other.

When one looks at those same advertising and touting rules from the point of view of the members of the public, what they perceive those limitations to be are means of preventing them, that is the members of the public, getting information about the services that lawyers can provide to them. They feel that they ought to be able to get [information] in situations such as the, well, the Erebus disaster, rather than have the relatives of the victims wait until they, themselves, put the matter in the hands of a lawyer. It seems to me that an organised process that would be possible through touting to ensure that the whole matter was in better hands at an earlier stage isn't necessarily a bad thing.

Mr Bruce Slane: What's been the reaction of the New Zealanders who you have heard talking about the question of advertising, the more competitive, internally competitive aspects of the profession, particularly in conveyancing?

Mr Bernard Teague: The reaction, once one gets involved in an in-depth discussion of what it is that goes on now here in the way of touting, does reveal that the sort of situation that does exist in Australia appears also to exist here. The sort of pressures that we saw were coming as distinct perhaps four years ago from being already upon us, are now being perceived to be here.

I can briefly say that four years ago Gordon Lewis and myself put forward a presentation to the Council to reduce limitations on advertising and on that occasion after he and I addressed the Council of 30 a vote was taken and 27 voted in favour of retaining the existing rules. Three were the other way. Yet 18 months after that, because it became clear that the pressures were increasing in relation to conveyancing and other matters, the decision was taken by a majority that we would reduce our limitations to some extent; and we, in effect, achieved a halfway house. But what happened in the course of the following two years or there abouts with the opportunity being given to solicitors to advertise was that the rest of the profession appreciated that there were very few that were going to advertise, and that it had materially affected the impact that the politicians and the media would have upon our position; and so when the matter came up for discussion two months ago, and in effect the removal of all the rules on advertising was discussed, the matter went through without dissent.

Mr Bruce Slane: There is a radical change and one thing that somebody suggested to me during the Conference that might come out of the injection of Australian discussion into our Conferences and the greater flow backwards and forwards is that on problems such as the bioethics subject there might be a much more international approach. Do you think that is possible Russell Scott? Will similar countries start moving in a similar way perhaps?

Mr Russell Scott: I can't see much evidence of it. I think, of course, that it would be the ideal solution and the calls for international attention to the subject began ten years ago with Patrick Steptoe in England, one of the two original pioneers of the IVF process. Certainly it is a national problem and is more relevant for Australia than New Zealand because you instinctively will tackle problems, I would think, of this kind on a national basis. In Australia it is beginning to fragment because of lack of initiative from the Federal Government into a State by State approach, and I regard that as a very undesirable development. International regulation and international guide-lines quite plainly should happen, but I am not aware of any initiative to that effect nor can I say at this stage how the machinery could be gotten moving; but as a second best, national attention definitely.

Mr Bruce Slane: By the means you mentioned with the computer these days and by means of bulletins, like those from the Commonwealth Australian Law Reform Commission, it is possible to know much more about what is happening in each country isn't it? What steps are being taken?

Mr Russell Scott: Absolutely, yes, and this subject I have mentioned of surrogate motherhood for example that is very well entrenched in the United States and widely practised there. Indeed I was sent a copy of the *Washington Post* only the other day where a woman has set up a company, I have forgotten its name, but she said

that "I would like this to become the Coca Cola of the surrogate mothering industry". It is well underway in the United States whereas in Australia it has hardly impinged upon the public consciousness at all although there is quite a bit of activity that I have discovered of that kind. So the possibilities of certainly co-operation between Australia and New Zealand are I think very distinct, and I would be the first one to encourage that, and I will send such information as your Attorney-General or anybody else would like that we have come across.

Mr Bruce Slane: Mr Attorney.

Hon Mr McLay: Mr Chairman, first of all just in case anybody thinks that there might be a good commercial enterprise available to them in New Zealand as well, let me immediately draw attention to the provisions of the Adoption Act which would probably, hopefully, prevent the sort of thing developing in this country that was foreshadowed in that *Washington Post* article.

On the question of some sort of international code I must confess that I see it at this stage at least, very difficult to envisage how that might be developed. I think we're probably still not far enough down the track in understanding these techniques, as the discussion on Thursday morning I think clearly indicated, for countries to be able to get together and adopt some common attitude; and there would on top of that be very difficult cultural problems to be overcome. They were just touched on ever so briefly in the Thursday morning discussion.

However for a country like New Zealand we can certainly draw on the experience of others and I make no secret of the fact and said so the other day, that we will draw on particularly, the work of the Waller Committee in Victoria and the Warnock Committee in Great Britain, both of which are looking at these issues. Certainly we will also look closely at the legislation being passed in various countries to see whether we should follow along the same lines. I think from a practical point of view Australia and New Zealand can co-operate closely and again one of the things I will be taking away from this Conference is a contact with Mr Scott on many of the issues which we as a country, we as lawyers, and we as legislators, are going to have to address over the next couple of years.

Mr Bruce Slane: Now finally, because our time is coming to an end, I thought I would give the panel just a brief opportunity, say about 30 seconds, to individually mention one thing that they're perhaps taking home with them. We've just had the Attorney-General mention a couple of things that he's seized on to sort of tuck away and put in his bag and take back to work, and there might be a couple of impressions that you could quickly refer to. Anyone want to go first? Bernard Teague.

Mr Bernard Teague: You will appreciate that because I am running a convention next year mine is a far more critical eye, but I'd like to have the assistance of Lord Scarman and Fali Nariman in relation to the speakers. There was excellent control of all Chairman at all times; but perhaps like lawyers always are it seemed to me that too often we speak too many words too quickly, and that's particualrly I think unhelpful for those people who are not lawyers who are listening. What has been clear from virtually every occasion, if not every occasion, when Lord Scarman has spoken, is that he has spoken very succinctly, he has used fewer words but he has got the message across. What is clear in relation to Fali Nariman, not only does he have the same quality but he manages to inject into it a great deal of humour. If so many more speakers could achieve those things we would all be very much more appreciative.

Mr Bruce Slane: Having introduced you now Lord Scarman have you got a few slow words to say.

Lord Scarman: I've only got two comments on what Mr Teague has just said. First of all I think that the billed speakers all speak too long. I think that the temptation to go over one's paper or to select points from one's paper should be resisted. I feel that the important part of the Conference is getting a dialogue going between the floor and the table where the billed speakers are performing and this does mean restraint on the part of the billed speakers. There is so much to be discussed and great value in the paper being circulated beforehand – I think that is indispensable – a short statement on the basis of the paper and then brought as quickly as you can to a discussion in which everyone present has an opportunity of participating. May I say, Mr President, I thought it was far better organised here than it was at the Commonwealth Law Conference in Hong Kong.

Mr Bruce Slane: Thank you Lord Scarman. Fali Nariman.

Mr Fali Nariman: May I say a word about my impressions, just two things. One is that I was really struck by the number of young people participating in this Conference, Attorneys-General being no exception, and it is quite remarkable how the paper writers have been extraordinarily young, and the only persons who brought up the average I think was Lord Scarman and myself. (**Lord Scarman:** Just a moment! I cannot allow this. I am here because of my youth.) I was just about to say in deference that so far as Lord Scarman is concerned you will notice how simply everything was put. In fact what was said of Lord Denning applies really to him. That, their sentences are short – even verbs are sometimes optional. One other impression which I treasure and I leave with is that of the beautiful sulphurous city of Rotorua. Incidentally as an Indian I was wondering how Indians would love this place because they could eat garlic every day without being socially unacceptable. (Laughter.)

Mr Justice Tompkins: Well I think as I drive back in the car tomorrow I will be thinking about two things. One is what to me was an extraordinarily stimulating and interesting session on the Bill of Rights written constitution issue. One is aware that that had become an issue recently, and at least to me the session bought it alive. The other one is that I have really up until now rather thankfully adopted the attitude that I was born too soon for the technological age. In fact my family refer to me as a technological Luddite. I've realised though, having read the paper and listened to the session that really none of us are born too early for that, that we're all going to be involved in it whether we like it or not, and like it has been said of something else, if it's inevitable then you might as well get into it and enjoy it. I really am stimulated to the extent of really quite looking forward to trying to see how not only the profession but I suppose from my vantage point, the Judiciary are going to be able to use modern

technological methods to increase their efficiency and productivity.

David Andrews: Mr President, my problem is that I've clearly got to be even briefer than Lord Scarman. You know the story of the solicitor writing to his client and ending by saying "I apologise for the length of this letter but I didn't have time to write a short one". I suppose one message I take away from this splendid Conference is that we perhaps have to be a bit aware that it doesn't become a high status to study problems and a low status to do anything about them. I think that is a risk. Lawyers can be a little introverted and I think there is enough awareness here to suggest to me that it isn't going to happen in New Zealand. I think a lot of us can learn an awful lot from you and I would simply like to end by thanking you enormously for having invited me to be with you this week.

Hon Mr McLay: Mr Chairman I have already indicated some of the many things that I will be taking away from this Conference. For me, personally, it has been extraordinarily invaluable. However, just one or two quick impressions. The first one is, and I say this with some very real feeling, this Conference gave me very real pride in being a lawyer. Here we were a profession despite, as Sian has made clear, our tendency sometimes to blame others for problems that we may be best able to solve ourselves. Nonetheless looking positively to the future of a whole range of really very, very important issues. Second comment, I think there is considerable benefit, as one or two others have said, in the idea of cutting down the time spent by the authors of papers in presenting them. If all papers rather than just the lead papers were prepared and pre-distributed and hopefully pre-read there would be little need for more than a few comments from the author in presenting that paper and then afterwards engaging in a two-way discussion with those who have after all come along, come great distance, to participate. And a final comment Mr Chairman, as a politician I tend to dislike slogans – I won't go too much into that – but they do tend to come back and revisit you a year or so later. But I couldn't help thinking last night that the term "The Friendly Conference" did come alive with that ball in the Sportsdrome. To many of us I guess it was a woolshed grown up, and that's no criticism of the organisers I can assure you, when we were all handed that bottle of champagne and two glasses as we walked in the door. If I am left with a lasting impression it will be the sight of Lord Scarman arriving and being handed a bottle and two glasses.

Mr Russell Scott: I am too young to drink! Reference to correspondence put me in mind of a letter I recently received in New South Wales at the Reform Commission which concluded with the paragraph "This is an urgent matter. If you do not receive this letter would you please let us know and we will send you a copy". However, in under 20 seconds Mr Chairman, I think the impact, the significance of this Conference will not really sink in for us until we have left this beautiful, mysterious Rotorua that you have here, and have returned to our normal routine lives. The message which was sent with great power by Sir Shridath Ramphal and was reinforced for me by Lord Scarman's paper, by Mr Nariman's paper and by other papers, is very simple and that is that 1984 has arrived, the future is here.

Mr Ted Thomas QC: Mr Chairman, I have a general rule that I never speak immediately after other speakers have expressed the desirability of being succinct and putting things simply. But if I could make two points. One, I will never get an opportunity to contradict a great Law Lord again. I do suggest that however valid the general principle that Lord Scarman suggested about the shortness of principal speakers may be, I personally could have listened to him for much longer than the length that he had been allocated. It was a remarkable speech which will certainly remain in my memory. The other outstanding moment of the Conference to me was the speech that Sir Shridath Ramphal made at the ICJ luncheon [see 1984 NZLJ 193]. I must admit that when I realised he was going to be serious I felt an initial disappointment because one expects to be entertained; but very quickly taking the theme of 1984 and putting it in an international or global context, he bought home in a most moving way the extent of the oppression and deprivation and injustices that still exist in this world, and I was happy to be reminded as a lawyer at a law conference that that kind of thing exists and should not be forgotton.

Miss Sian Elias: Two things. When I spent a considerable period of time some 14 years ago I was discussing whether New Zealand should have a Bill of Rights. One of the obstacles I had to overcome was Geoffrey Palmer's eloquent denunciation of the whole topic as a non-issue. The time of the Bill of Rights has arrived and I think it is very exciting. And the second point is the one already made by the Attorney-General. I thought it was very ambitious of this Conference to be billed as the Friendly Conference but it really did work out like that.

Mr Bruce Slane: I ask you to join with me in expressing your appreciation to the members of the panel. (Applause.) You can tell from that applause that your efforts this morning were appreciated as was the amount of work and extra effort.

I just want to add one personal note that is that during most of the period of the preparation for this Conference I had the privilege of being your President and I can say that I have watched with admiration at close quarters what this committee has done. The usual crises have occurred and quite recently they were still talking to each other and they remain talking to each other; they have been a delight as far as the New Zealand Law Society is concerned; they have been open; they have kept us informed of what they were doing; they have attended, as far as I was concerned, to all the matters that needed to be attended to; they have thought of them in advance; they have provided for me so adequately that I've been able to drift around the Conference in the sort of state that so many of you have been in, just taking it all in and sometimes taking a little too much in. But I personally have had nothing but good relations with Gerald Bailey and the committee and I cannot help but commend them to anybody else who wants anything organised. They are a very good team.

(A gracious and warm expression of thanks on behalf of all participants was then made to the Chairman Gerald Bailey and the other members of the Organising Committee. Mr Bailey and his wife Jenny were asked to stand. They received a most enthusiastic and prolonged round of

applause before Mr Bailey went to the rostrum to speak.)

Mr Gerald Bailey: One thing that wasn't organised was some notice of what might happen if I was asked to talk to you this morning and you will agree that getting up early in the morning on the day after a Ball is not the most propitious way to collect one's thoughts.

I regard the 28 April with very mixed feelings. On the one hand I look forward to resuming a normal life again with my wife and I'm very grateful to you John for mentioning her, will have a husband again and my children might have a father again, if it's not too late, and my partners will be relieved to have a partner again. But on the other hand we have been warned very carefully of an imminent feeling of anti-climax when this is all over. I am prepared this morning to mention within ear-shot, or stage whisper ear-shot, of the Chief Justice my very great concern that Her Majesty's Judges would take a benign view tonight if, while meeting at the Hyatt, they found some people misbehaving in an extraordinary manner in the pool or elsewhere, and I ask for some form of immunity to which I hope he made a suitable stage whisper in the direction of the Attorney-General.

But more particularly there is sadness because this is the end of a project which has become very much part of one's life. I have tried to say in various places that it has been a lot of fun. Had I not known Bruce better it might have been something to make one a little angry when he spoke of the committee still talking to each other because we have enjoyed very much working together. This group of people who came together in June 1981 have, and I speak for all of them I am sure, become very, very close friends and it is a rather dismal prospect that we won't see so much of them although we have perhaps seen just a little too much of each other in the last few weeks. We long ago, and I commend this to you Austen, eschewed the idea of formal motions for our meetings. If someone floated an idea that no one else liked much we quickly changed the subject and didn't let it lapse for want of a seconder or anything like that. They got the message and there were some fairly long rearguard actions fought, but consensus was soon appreciated.

To begin with we met monthly and that soon became fortnightly and then the pattern emerged of meeting on a Monday night and all day Tuesday. I am sure some of our partners and families wondered what on earth we were getting up to and from time to time it did seem that we were spending an inordinate amount of time preparing something that would be over in a flash – as indeed it has been over in a flash for all of us. But if the Conference has fulfilled Steve Brooker's expressed expectations and hopes at the opening ceremony on Tuesday, and I'm not very hard at this moment to persuade that it has, it is not because of any flashes of inspiration on our part, but, as applies I suppose to so much legal work, it has just been solid grind.

But I want to take time publically to thank these very good friends of mine because Graham, Steve, David, Wayne, Cecily and Joan have been in all honesty the most dedicated, the most committed bunch that I've ever worked with. I've had, and this is a New Zealand sin Jerry that the lot of us seem to fall into, I've been involved over the years in a number of committees but never have I met a bunch of people who took the project entrusted to them and devoted so much attention to it.

Then with them we have had a team of 26 controllers each of these people in charge of one particular area of the Confrence and nearly all of them have had teams of helpers with them. Even before I came to Hamilton to practise it was a feature that I observed that the practitioners in the district had a very good relationship, a very friendly relationship with one another, and the co-operation of the members of the Society as shown in this project is typical of them. I also want publically to thank Convention Management Services particularly Jan Tonkin and Richard Buchanan who most of you will have seen in the Registration Centre. They freed us of all the arrangements regarding accommodation and that sort of thing which has assailed previous organising committees. I suppose it ought to have been the case that we could have spent less time on our organisation because of having these nuts and bolts arrangements taken away from us but in truth having them there going far beyond the call of duty as Steve indicated to you the other day, has left us abundant time to plan a programme and do all the other things that we hoped would assist in making this the Friendly Conference. □

The Companies Amendment Act 1983 (No 2)

An addendum

Mark Russell has requested that a correction be made regarding his article at [1984] NZLJ 132 on the Companies Amendment Act 1983 (No 2). The error in his article refers to s 18, Companies Act 1955 as now amended. He writes:

> Section 18 now provides for alteration to a company's memorandum to be achieved by the passing of a special resolution. Section 18(2) provides that, subject to ss 36 and 209(3), and to any express provision in the memorandum, where the memorandum contains a provision which could lawfully have been contained in the articles of the company, a company may by special resolution alter that provision.
>
> My error came when I mentioned s 18(1C), [in the Bill] which basically provided that if share class rights were contained in the memorandum, they could not be altered by special resolution. However, s 18(1C) was removed by the Statutes Revision Committee. Why this was done is not clear. One wonders what status a "variation of rights" clause in the articles of association will now have. □

Books

Sim & Inglis, Family Court Code [*Family Law and Practice in New Zealand*]

By B D Inglis, one of Her Majesty's Counsel; Butterworths, Wellington; price $78.75. 414 pp + i-xii (index). ISBN 0-409-60127-6

Reviewed by P R H Webb, Professor of Law, Auckland University

The sub-title of this work is: "An exposition of Family Law and Practice in New Zealand contained in the Statutes of 1968, 1969, 1980, 1981 and 1982 and their Amendments and the Rules promulgated thereunder, the whole being intended as a successor to Sim's *Divorce Law and Practice in New Zealand* 8th ed, (1971)". In his Preface, the learned author says that "nearly everything Sir William and Sir Wilfrid Sim wrote about has either gone altogether or been changed out of recognition". He adds that he felt it "important to preserve a name that had served the New Zealand profession well for not far short of a century" and accordingly did not accede to the suggestion that Sim's *Divorce Law and Practice* should cease to exist and that the present edition "should be presented as an entirely new publication". There must be many practitioners in this country who, like the reviewer; will feel that honour has been duly and properly satisfied.

Lawyers in practice, for whom Dr Inglis's work is primarily written, will find that it opens with an excellent Introductory section devoted to the history of New Zealand family law (paras 1-54) and to Counselling and Conciliation (paras 55-63). Section 1 is concerned with the Family Courts Act 1980, together with useful "Comments" on the principal sections. There then follows (paras 350-369) the Family Court Practice Note of 18 January 1982, and some brief comments thereon. Sections 2 to 8 inclusive deal with, respectively, the Family Proceedings Act 1980, The Social Security Act 1964 in so far as it sets up the "Liable Parent Scheme", the Guardianship Act 1968, the Status of Children Act 1969, the Domestic Protection Act 1982, the Family Proceedings Rules 1981 and the Domestic Protection Rules 1983. All these statutes and Rules are set out verbatim; thus the work will at once be seen to be a most valuable *vade mecum* for a practising family lawyer – and, indeed, for law teacher and student of family law.

The Forms provided by the Rules are also set out, so that Dr Inglis has also provided a readily accessible set of precedents. The obvious "absentee" is the Matrimonial Property Act 1976. The 1963 Act, it is true, appeared in the last edition of Sir Wilfrid's work, but Dr Inglis states in his Preface that no commentary is offered on the 1976 Act, "which has almost become a field of law in its own right. Other commentaries on that Act are available, and it seemed an unnecessary exercise to attempt to duplicate them here." One cannot, therefore, quarrel with the decision to omit the topic.

The practitioner who has a legal problem necessitating in depth research will be able confidently to start with his copy of Sim & Inglis provided, however, that the topic to be researched forms the subject-matter of one or more of the author's sometimes pithy, sometimes extensive, comments on the various Acts and Rules. In some cases, however, he will have to refer to fuller commentaries that are available. Of the many comments Dr Inglis makes, the reviewer would pick out for special excellence those on Counselling and Mediation (paras 500-608); Separation Orders (paras 650-678); Dissolution of Marriage (paras 750-805; some of which display an amusingly ready wit); Maintenance (paras 900-1091); Appeals under the Family Proceedings Act 1980 (paras 1400-1410); Guardianship (paras 1772-1783 and 1804-1808 and 1821-1826).

The prize, in the reviewer's opinion, would go to the single comment on s 23 of the Guardianship Act 1968 as to the paramountcy of the child's welfare (paras 1900-1921), or to the several comments to the sixth section, which is concerned with the Domestic Protection Act 1982. Dr Inglis has not feared to criticise where criticism is due – for instance, in the matters of the disappearance of voidable marriages (para 753) and some of the difficulties attending sections 40 and 41 of the Family Proceedings Act 1980 (paras 800-803).

The learned author dates his Preface 1 January 1983, having attempted to state the law as at 31 October 1982. This means that the work could not, perforce, make mention of very many cases decided under the new legislation. The same kind of difficulty must, some years ago, have attended the learned author of Fisher's *The Matrimonial Property Act 1976*. It is a price that has to be paid – because books of this sort cannot be written, printed and published overnight. The reviewer has with pleasure and profit to himself, and hopefully, to others, noted many cases decided by the learned author in his judicial capacity for past and future issues of *Recent Law*, and he much regrets that Dr Inglis must have had to put his work "to bed" before he could accommodate these decisions. The user, therefore, must ensure that he brings himself up to date not only with respect to subsequently enacted amending legislation but also with respect to the more recently decided cases before finally advising on a family law matter falling within the ambit of the book. The same is true for a student writing a detailed essay or opinion.

The hardback edition of the book is attractively bound. There is the occasional misprint and one or two sentences have been slightly jumbled. *Corsett v Corsett* [1977] P 83,

mentioned in para 884, is a slip for *Corbett v Corbett* [1971] P 83.

The reviewer must admit that the number of his years equate to that of Heinz's well-known varieties. Perhaps this factor was responsible for his feeling from time to time that the comments (but not the text of the Acts and Rules) conjured up memories of the "regrettably small print" in the exclusion clause of which Miss L'Estrange complained in *L'Estrange v Grancob Ltd* [1934] 2 KB 394 (CA), decided when he was just turned seven years of age.

Subject to these minor strictures, the reviewer considers the work to be a very practical and commendable addition to all New Zealand family lawyers' libraries. □

Mason, Priddle and Fletcher Cases On Commercial Law (2 ed) by L G Priddle and K L Fletcher, The Law Book Company Ltd 1984

Reviewed by Catherine L Watson

The new edition of this case book contains some 400 pages of summaries of cases concerning aspects of the law affecting business relationships. It deals with agency, sale of goods, guarantees, negotiable instruments, insurance, arbitration and partnership. Most emphasis is, however, placed on fundamental aspects of the law of contract.

The cases summarised were, with a few exceptions, tried in the Australian and English Courts. Five New Zealand cases are included.

The authors, both senior lecturers at the University of Queensland, have prepared a handy source book for students reading an initial course of commercial law. It will be of most value to those students who do not have access to a full law library.

Recent admissions

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Anderson, S M	Auckland	9	March	1984	McEntire, J G	Auckland	9	March	1984
Barlow, P M	Auckland	9	March	1984	McGeorge, C H	Auckland	9	March	1984
Bioletti, J N	Auckland	9	March	1984	McLean, R F	Auckland	9	March	1984
Braks, A J	Wellington	11	May	1984	McPhail, S J	Auckland	9	March	1984
Brien, M	Auckland	9	March	1984	Malone, G P	Nelson	8	March	1984
Burley, J T	Auckland	9	March	1984	Mark, R C	Auckland	9	March	1984
Campbell, D R G	Auckland	9	March	1984	Muller, K M	Auckland	9	March	1984
Chambers, S R	Auckland	9	March	1984	Munro, M A	Auckland	9	March	1984
Chignell, A J	Auckland	9	March	1984	Opai, S L	Auckland	9	March	1984
Cleghorn, S	Auckland	9	March	1984	Orsborn, A C	Auckland	9	March	1984
Crawford, M J C	Auckland	9	March	1984	Parker, M E	Auckland	11	May	1984
Cunningham, P A	Auckland	9	March	1984	Parsot, S	Auckland	9	March	1984
Davidson, N D	Wellington	10	May	1984	Poore, J A	Auckland	9	March	1984
Devoy, M E	Auckland	9	March	1984	Powell, C A	Auckland	9	March	1984
Drummond, B D	Auckland	9	March	1984	Purcell, T R	Auckland	9	March	1984
Earley, G J	Auckland	9	March	1984	Ringwood, A L	Auckland	9	March	1984
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Fyers, R T F	Auckland	9	March	1984	Sayes, D J	Whangarei	21	March	1984
Fowler, W M	Wanganui	2	March	1984	Sceats, D M	Auckland	9	March	1984
Gasson, J C	Wellington	11	May	1984	Shanks, W H	Auckland	9	March	1984
Greig, A J	Auckland	9	March	1984	Shannon, T M	Auckland	9	March	1984
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Holden, G F	Auckland	9	March	1984	Stone, A M	Auckland	9	March	1984
Hopkins, R	Auckland	9	March	1984	Tarrant, C	Auckland	9	March	1984
Hunt, I G	Christchurch	11	May	1984	Tee, S J	Auckland	9	March	1984
Ingram, V J	Auckland	9	March	1984	Thompson, H M	Auckland	9	March	1984
Kennelly, P J	Auckland	9	March	1984	Thornton, N J	Auckland	9	March	1984
Khan, A A	Auckland	5	April	1984	Thorpe, V L	Auckland	9	March	1984
Kirkeby, S J	Auckland	9	March	1984	Towle, D A	Auckland	9	March	1984
Kirkpatrick, D A	Auckland	4	May	1984	Twist, P L	Auckland	9	March	1984
Klaassen, A D	Auckland	9	March	1984	Urlich, J C	Auckland	9	March	1984
Klippel, B L	Auckland	9	March	1984	Wallace, J J	Auckland	9	March	1984
Lovrich, B M	Auckland	9	March	1984	Wells, N E	Auckland	9	March	1984
Lyne, N E	Auckland	9	March	1984	Williams, K W	Auckland	9	March	1984
McCarthy, A L	Auckland	9	March	1984	Wilson, P J	Auckland	9	March	1984
McCarthy, J B	Auckland	9	March	1984	Wilson, P R	Auckland	9	March	1984
McCook, I R	Auckland	9	March	1984	Wiseman, A J	Auckland	9	March	1984
MacDonald, A G	Auckland	9	March	1984	Wong, K J H	Auckland	9	March	1984
McDonald, B J	Auckland	9	March	1984	Young, J N P	Invercargill	16	February	1984
MacDonald, G J	Auckland	9	March	1984					