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A Second Chamber

Actions we commonly say, speak louder than words; but for the Greeks speech within the polis, the political community, was the highest form of action as Hannah Arendt emphasised in her book *The Human Condition* (1958). The political aspect of this concept was most important. It can be said of words that their political significance lies in the fact that they are able to affect the will, and thus the behaviour of other people. Laws, for instance, once enacted, and even before they are ever enforced, can affect behaviour in most substantial ways. Most people obey the law because it "says so". We have another common saying that is consonant with that view – the pen is mightier than the sword. Certainly politicians believe in the power of words. They seem constitutionally (in both the biological and political senses of the term – the pun is intentional), they seem constitutionally unable to stop talking. Even if their minders are obsessed during an election campaign with the "picture opportunity" as the image for the nightly television news, the politicians themselves know that we need to hear what they have to say, or have already heard it, if we are to judge them on polling day.

It follows that our political system, our constitutional arrangements, have to provide a means for formal discussion of issues and of activities. Our very word Parliament is derived from the French word *parler*, meaning to speak or to talk. There is a sense of incompleteness therefore in our political system if strong currents of opinion, of significant interests, do not have a voice in shaping the political decisions that determine our lives. They may not be successful in their arguments, but at least they should be heard in a formal setting. As has been argued in the two previous editorials in *The New Zealand Law Journal* at [1990] NZLJ 341 and 377, our present electoral system does not do this. The news media provide, to a degree, for a variety of viewpoints to be heard, but they necessarily concentrate on the political forums where only the two major parties are heard.

A system that results in one party getting more than 70% of the seats in Parliament with only 47% support of the electorate, and two parties that got 6% and 7% of the votes getting only one seat, with Jim Anderton being the odd man out, is totally unsatisfactory. Indeed the situation is much worse than unsatisfactory when one considers the figures referred to by Sandra Coney in the *Dominion Sunday Times* for 4 November 1990. She points out in her article that only 67% of the eligible electors actually voted. Some 33% did not vote at all. Included in this number presumably were those of voting age who did not even bother to register. She went on to make the point that only 33%, one third of the citizens of New Zealand voted for National Party candidates, and 23% supported Labour ones. Putting it another way the pro-National vote was the same size as the no-vote. The other way of looking at the figures of course, is to say that the 33% of non-voters were quite happy to have a National Party government because the opinion polls had told them what would happen if they did not vote. In that sense it could be argued that 66% of the possible voters were content that the National Party should form the Government. True as this might be it does not get past the point that the politically responsible part of the community – the actual voters – are not fairly represented by the outcome.

To adapt a phrase from a different context, there has got to be a better way, a way in which all major sectors of opinion and of interest have a voice and are thus involved, on a continuing basis, in the political process. The need for a major change by way of a Second Chamber, has been suggested in the two editorials cited, and by others in other places.

It has been pointed out already in the editorials that this need is dependent on the composition and the powers of any proposed Second Chamber. The composition suggested is for a Chamber of approximately 100 members selected or elected partly by a system of proportional representation, and partly by bodies or organisations that reflect the major interest groups in our community. In this way a substantial part of the community, at present effectively disfranchised, would at least have a say in the way we are governed and in the laws that are made. Perfection is not possible, but improvement is. And improvement is now imperative.

If then there is a Second Chamber constituted in the way suggested (or even in some other way), the remaining question is, what does it do? Its essential function has already been stated. It has to discuss, to give voice to the variety of opinions there are in the community, to express dissent and also approval, to inform and instruct, to stimulate and explain, to correct and criticise. This is the first and most important function. In itself it is a sufficient

justification for a Second Chamber, for a body that reasonably reflects the New Zealand community. The present House of Representatives certainly does not do this. All other functions and powers a Second Chamber might have are additional to or ancillary to this basic primary activity.

But, and it is a big but, the Second Chamber will only be taken seriously by the general public, and by its own members, if it has some real functions, some positive powers. At the same time these functions and powers must not be merely an opposition, or be destructive of continuing orderly government.

The first and basic function that has to be considered is in the area of finance. As is well enough known the question of the financial powers of a Second Chamber created major constitutional crises in the United Kingdom in 1910-1911 and in Australia as recently as 1975. In both cases the crisis arose out of the refusal by the Second Chamber, the House of Lords and the Senate respectively, to grant supply – in other words to pass the Budget in the form of the Appropriation Acts. And in both cases the crisis was resolved by the Monarchy, with the King agreeing in 1911 to create sufficient new Peers if necessary to have the Budget adopted, and in the other by the Queen's personal representative the Governor-General of Australia exercising his powers under the Australian constitution to require that the political crisis be referred to the people by the holding of a general election. In 1910 the conflict in the United Kingdom had led to a second general election the result of which is what determined the King on the course he should follow in 1911. In Australia the general election insisted on by the Governor-General ended the constitutional crisis.

The major power the Second Chamber could have therefore, should be the ability either to force a general election, or to force a binding referendum. This could apply not only to financial measures but also to any other Bill that, having been rejected by the Second Chamber is passed a second time by the House of Representatives (in effect, as everybody knows, this means by a particular political party) and still not be acceptable to the Second Chamber. In such a case the Second Chamber should have the power to determine whether there should be a binding referendum on the Bill as passed unamended a second time, by the House of Representatives or whether there should be a general election. If a newly elected House of Representatives passed the Bill again in the same form, it would then become law.

In that event however, allowing for the inevitable lengthy delay, what would happen to supply, to the Budget? The taxing and spending statutes at present are annual in effect. The previous year's Budget legislation could simply remain operative until the crisis was resolved as already set out. The chances of a conflict of this sort arising and needing such a drastic solution are not great. The very existence of such a power residing in the Second Chamber however would give it status. It would ensure that the Second Chamber had respect from the community at large, and received cautious consideration of its views by the then current executive branch of government.

One other substantial function the Second Chamber should have. Its elected members, as distinct from its appointed members should be eligible for Cabinet selection, or to be more technically exact for appointment to the Executive Council. This should be a requirement to the effect that not less than four nor more than seven members of the Second Chamber would be in the Executive. In Australia there are always some Senators in the government and in the United Kingdom normally some members of the House of Lords. Under the Westminster system, as distinct from the American system, the direct involvement of the executive in the Second Chamber, and the Second Chamber in the executive through an element of joint membership is essential for the proper working of Parliament.

It will be noted that the recommendation for some members of the Second Chamber being in the executive branch of government is restricted to those who are politicians, and not to those nominated by interest groups. The reason is two-fold. On the one hand those to be in the Executive Council should be members of the governing party. On the other hand those selected by interest groups should not formally be, or be tempted to be, party members. As an incidental restraint they should not attend the caucus of any particular party or be subject to a party whip. No doubt they will have their own general leaning to right or to left, but they should be expected above all to preserve their independent judgment. Avoiding formal party alignment by the nominated members probably would have to be left to convention rather than express regulation; but preventing them from being Ministers would assist in lessening pressure on this point. Also such a restraint would be a possible balance for the benefit of the extended nine year term of office they would have as members of the Second Chamber as suggested in the preceding Editorial at [1990] NZLJ 377.

The ordinary function of the Second Chamber would of course be to debate the normal flow of Bills that come before Parliament, and to pass, amend or reject them. The machinery for this can be readily adopted or adapted from other places, such as Australia to take the closest example. The committee structure of the Second Chamber should be established in such a way as to provide for a close supervision of the working of the bureaucracy.

Another function that the Second Chamber could have would be the formal approval of the appointment of the holders of certain offices. The ones that are obvious, because they are responsible to Parliament and not to a particular Minister, are the Ombudsman and the Controller and Auditor-General. Others could include the Governor of the Reserve Bank, the Solicitor-General and the Commissioner of Taxes because they have vested in them by statute certain specific responsibilities, and independent powers. The list could be extended to many, if not indeed to most quangos. The fact is that many of these office holders possess more power, and a lot more influence, than ordinary Members of Parliament, and indeed within their own sphere often more than a Cabinet Minister. Appointment to specified offices such as these could only be made with the advice and consent of the Second Chamber, to use the American terminology in respect of the United States Senate. The judiciary should not be included since the Judges are Her Majesty's Judges and are not responsible to, and should never be responsible to a Minister, or even to Parliament. There exists a remedy for removal of a Judge, and with a Second Chamber being in existence it should be only by joint resolution of both Houses. Otherwise the legal system, with its appeal system and its collegial standards, should be left alone. Its appointment process should not be put at risk of being politicised. The judiciary is an equal partner under the

constitutional scheme, and should not even appear to be subservient to either the legislature or the executive.

Finally a decision would have to be made on the power of the Second Chamber to initiate legislation, whether government inspired or by way of a private member's Bill. Allied to this might be some need to provide that a Bill once passed by the House of Representatives must be considered by the Second Chamber within say three months or some other fixed period. These however are machinery matters and do not affect the major issues being discussed. These major issues are whether there ought to be a Second Chamber, and as part of that question, how it should be constituted, and what functions and powers it should have.

The scheme proposed can be summarised as follows:

1 A candidate should only be elected to the House of Representatives by winning 50% or more of the votes cast on the first ballot, or in a subsequent run-off ballot between the two candidates with the highest number of votes on the first ballot.

2 Only those votes in the hands of the Returning Officers at the time voting ends would be counted as valid votes, so that postal or special votes would need to be cast before polling day, and not on it, to be counted later.

3 There should be a Second Chamber as an integral part of the New Zealand Parliament.

4 The purpose of the Second Chamber should be to provide a greater balance in the constitutional system (a) through a more widespread involvement in the political process for minor political parties and for interest groups; and (b) by acting as a restraint on the executive branch of government.

5 The membership of the Second Chamber should be approximately 100 members to give it equal status with the House of Representatives.

6 The members should be partly elected on a proportional representation system, and partly nominated by substantial interest groups within the community.

7 Approximately 50 members should represent the political parties on a proportional representation system of 3 seats for every party that gets the minimum of 4% of the vote on the first ballot and 1 seat for every complete 2% thereafter. Thus a party that won say 5.75% of the popular vote would get 3 seats, and one that won 7.2% would get 4 seats, and one that won 45% would get 23 seats.

8 The individual members should be elected from each party from the unsuccessful candidates in the order of the number of votes they had obtained. They would serve for one Parliamentary term, but could be re-elected if they met the voting criteria for proportional representation at the subsequent election after failing to be elected to the House of Representatives again.

9 The interest groups should select or nominate 48 members, in multiples of three.

10 The nominated members should hold office for three Parliamentary terms (normally nine years), with one third of the representation of each interest group retiring at each election.

11 Nominated members should not be eligible for re-nomination. This is to avoid any suggestion that they are in the Second Chamber as formal delegates of the nominating organisation and must on all issues carry out its directives.

12 The Second Chamber should have among its functions the right to discuss government policy, executive decisions, and bureaucratic administration, as well as the power of initiating, debating, amending, approving or rejecting legislation.

13 In the event that a Bill is passed a second time by the House of Representatives after being rejected by the Second Chamber, then the Second Chamber could refer the whole Bill for decision by binding referendum, or alternatively require the Governor-General to dissolve Parliament and call a General Election.

14 The Second Chamber should have a minimal representation of four and a maximum representation of seven of its elected members in the Executive Council.

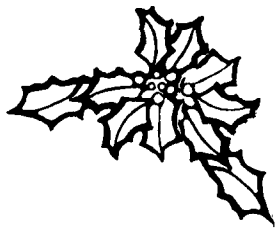
15 The Second Chamber should advise and consent on the appointments to certain public positions such as Ombudsman, the Controller and Auditor-General, the Commissioner of Taxes, the Governor of the Reserve Bank and others who exercise independent statutory powers.

The suggestions made in this and the two preceding editorials amount of course only to the bare bones of a scheme for a Second Chamber. Such a body as suggested, however, would encourage greater involvement in the political process, ensure more adequate debate and discussion of policy and specific legislation, emphasise the need for interest group representatives to be aware of the national interest in a wider variety of areas than their own special concerns, and provide a restraint on the executive branch of government without unduly hampering or stultifying the necessary continuation of essential and normal government activity. These particular proposals also offer a way of achieving an element of proportional representation so that electors will feel that their votes are not wasted, that voting even in a safe electorate for an inevitably losing candidate is not a pointless political action.

The present constitutional arrangement is leading to apathy, and eventually will lead to discontent and disillusion with the political process. Reform is needed.

P J Downey

Christmas Messages



From the Attorney-General, Hon Paul East

Traditions are often put to one side because they are considered old fashioned or out of step with this changing world. I am pleased that the tradition of an annual message to the legal profession is still in place, and honoured that as Attorney-General I have been asked to carry on this tradition.

Christmas is an appropriate time to reflect on the year that is drawing to a close. We can look back on the challenges that we were faced with, and the achievements that the year has brought. The New Zealand Law Society can be justifiably proud of the success of the Commonwealth Law Conference. We are all indebted to those practitioners who worked so hard to ensure that it was a success.

During the Parliamentary year, your President and Council members maintained a close and fruitful relationship with both the Government and the Opposition. As always the Society excelled at the task of presenting submissions to Parliamentary select committees.

In the new year, Parliament will deal with several matters that are of considerable importance to the legal profession. In particular, new legislation will be passed that will make substantial changes to the way in which legal aid is administered. The structure of our Court system is also likely to be altered considerably. 1991 will be the year when final decisions will be made on the proposed Crimes Bill and I hope that the Parliament will also place high priority on commercial law reform.

It's a great privilege to be appointed Attorney-General. I am looking forward to working with the profession as we face new challenges in the year ahead.

I wish you all a very happy Christmas and a healthy and prosperous New Year. □

From Graham Cowley, President, New Zealand Law Society

I am grateful to the *New Zealand Law Journal* for the opportunity to send a message, not only to members of the legal profession in New Zealand but also to all readers of the *Journal* throughout the world.

This year I make special mention of seasonal greetings to those many new friends in the legal profession through the Commonwealth we met, entertained and, it is hoped, enlightened, during the very successful Commonwealth Conference in Auckland in April. For their contribution to a most successful and enjoyable week, I say thank you on behalf of the Organising Committee of the Conference and the profession in New Zealand. To our New Zealand practitioners who participated in the organisation of the Conference, or the Conference itself, I say a thank you for projecting, to the Commonwealth in particular but to the world at large, a New Zealand legal profession concerned about the Rule of Law, the integrity and independence of our profession and, above all, conference organisers and participators par excellence.

1990 has fortunately been less disastrous for the image of lawyers in the eyes of the community than could be said for the two or three years preceding. It has not been perfect and there have been blots on our escutcheon but it is hoped there is a sign of higher adherence amongst our many members to the professional legal standards, the independence, and the integrity for which the legal profession ought to be recognised.

I am disappointed that during 1990 greater progress has not been made in establishing a system of administration for legal aid and the provision of legal services. The Society's submissions on the Legal Services Bill would, in my view, have produced a system of administration which could have resulted in improved application of the legal aid moneys presently available and assistance with funding for future legal aid through better recoveries. Unfortunately, the proposed legislation does not itself address the issue of easing the burden of that section of the community which fails to qualify for legal aid but nevertheless has insufficient resources to pay personally for proper and adequate legal advice and assistance. It is hoped that when the legislation is finally enacted (which I trust will be very early in the New Year) the Legal Services Board will be able to apply its efforts to addressing this issue.

On the legislative front, the Society has continued to try to make a contribution to the improvement in the quality and content of legislation. It has also made proposals for improvements to the legislation process itself. The profession, I think, has an obligation to play its part in ensuring that the laws of New Zealand are appropriate, fair, and a reflection of the views and aims of the community which they govern.

On behalf of the Council of the New Zealand Law Society, I wish all readers of the *Journal* a happy and relaxing Christmas and the opportunity that it provides to gather our strengths to meet the inevitable challenges of the New Year. □

Child sexual abuse (III): Child witnesses and the Rules of Evidence

By R Mark Henaghan, Nicola J Taylor, and David C Geddis

This series of three articles has been written by people trained in the disciplines of law, social work and medicine. Mark Henaghan is a Senior Lecturer in Law at the University of Otago, Nicola Taylor is Executive Officer of the Plunket Society and David Geddis is Medical Director of the Plunket Society.

The series focuses on criminal offences where evidence of sexual abuse is the crucial issue. In the first article, a broad overview of the topic was provided. The second article dealt with ways in which accurate testimony can be obtained from child victims.

In this third article the authors evaluate the rules of evidence which apply to child witnesses in cases of a sexual nature. While there have been important recent changes, the authors argue there is still more that can be done to achieve a fair balance in the criminal justice system.

I believe it's a sort of legal rule, a sort of legal tradition — for all investigating lawyers — to begin their attack from afar, with a trivial, or at least an irrelevant subject, so as to encourage, or rather, to distract the man they are cross-examining, to disarm his caution and then all at once to give him an unexpected knock-down blow with some final question.

Feodor Dostoevski: *Crime and Punishment,* 1866

Introduction

An English lawyer, J R Spencer, in a paper prepared for a British conference on Child Witnesses expressed the view

> For myself, I fail to see how any rule or tradition can sensibly be dignified with the title of a basic principle of criminal justice unless it furthers one of the following three objects: the conviction of the guilty; the acquittal of the innocent; and the conduct of the trial in a humane fashion which inflicts no greater pain and indignity on the participants than the seriousness of the case makes necessary. Any so called basic principle which does not further one of these objects is bogus, a dispensable supernumerary at best, and more likely a malevolent imposter, seeking to turn the serious business of criminal justice into a cynical game, amusing and enriching for lawyers but detrimental to the general public for whose help and protection criminal justice supposedly exists.
>
> (In "Child Witnesses, Corroboration and Expert Evidence" (1987) *Criminal Law Review* 239-251.)

As they apply to cases of sexual abuse involving children, some of the rules of evidence are ". . . too inflexible to enable justice to be done". (Spencer, supra, at 242.)

While there have been important changes to the current system, the appropriate balance between the interests of the defendant in getting a fair trial and the interests of the complainant and the community in having the guilty convicted has not yet been struck.

What has been done

The Evidence Amendment Act 1989 and the Summary Proceedings Amendment (No 2) 1989 make significant changes to the process of receiving evidence where there is a child complainant in a criminal case of a sexual nature. Both these Acts came into force on 1 January 1990.

I Modes of giving evidence

1 *At the preliminary hearing*

Section 185(C) Summary Proceedings Amendment (No 4) 1985 provides special rules for the giving of evidence by complainants in certain offences of a sexual nature. The general rule is that the complainant's evidence is required to be given in the form of a written statement, and the complainant is not to be examined or cross-examined on the statement. The exceptions are: (1) the complainant after advice of the right to give evidence in written form nevertheless wishes to give evidence orally; (2) the Judge orders that the evidence be given orally on one of the grounds set out in s 185C(b) (i) or (ii). A primary purpose of this provision is to protect complainants in cases of a sexual nature from the trauma of having to go through giving oral evidence twice. Section 185A of the 1985 amendment listed a specific set of offences to which the procedure applied. Omitted from the list were specific offences which relate to children; such as s 133, indecency with girl under 12, s 136 sexual intercourse or indecency with girl between 12 and 16. This anomaly in the law has now been corrected by s 4 Summary Proceedings Amendment (No 2) 1989. Section 185A of the 1985 amendment to the Summary Proceedings Act has been amended and the procedure of using written statements now applies to "any offence against any of the provisions of section 128 to 142A of the Crimes Act 1961" and "and other offence against the person of a sexual nature". The latter would include offences such as s 27

Summary Offences Act, indecent exposure.

The 1989 amendment to the Summary Proceedings Act has gone a step further. Consistent with other amendments to the rules of evidence involving child witnesses in crimes of a sexual nature, the Court is given discretion in a preliminary hearing to admit the evidence of a complainant who is under 17 in the form of videotape. There is no indication what under 17 means. It could mean under 17 at the time of the preliminary hearing, or under 17 at the time the complaint is laid. The Evidence Amendment Act 1989 defines under 17 as at the commencement of the proceeding. It is not clear what proceeding that Amendment is referring to. That Amendment is primarily directed at the trial and it may be the commencement of the trial proceeding which that Act is referring to rather than a preliminary hearing. This is a crucial point which needs clarification. On it all the special procedures for child witnesses hinge.

The Judge must be satisfied that the videotape has "been made and is identified in the prescribed manner and form". Section 23I(a) Evidence Amendment Act 1989 empowers the Governor-General by Order in Council to make regulations, "prescribing the procedure to be followed, the type of equipment to be used and the arrangements to be made, where the evidence of a complainant is to be given by videotape". At the time of writing these regulations are still being drafted by the Justice Department. The Summary Proceedings Amendment (No 2) 1989 *was* meant to come into force in January. As the regulations have not been completed by April, a Judge has no power to use the videotape procedure because that power is dependent upon the videotape being made and identified in the prescribed manner. If there is no "prescribed manner" yet available, there is no basis for the Judge being satisfied as to a crucial element of the empowering section. This is a depressing state of affairs. The haste with which economic regulations and provisions can be drawn up and passed, shows where priorities and interests truly lie.

There is detailed provision in the Evidence Amendment Act 1989 as to how a Judge is to exercise a discretion to use a videotape (or other special procedure) at the final trial. (Section 23D(4) Evidence Amendment Act 1989.) The Summary Proceedings Amendment Act (No 2) 1989 is silent on what factors a Judge is to take into account at the preliminary hearing in deciding whether to use a videotape. There is a link between the two pieces of legislation. Section 23E Evidence Amendment Act gives a Judge discretion at the final trial to use the videotape shown at the preliminary hearing. A Judge at the preliminary hearing will need to give careful consideration to whether or not the particular child complainant is likely to require special procedures at the final trial. If that is so, a videotape should be made so the trial Judge has the maximum range of choice with regard to special procedures.

2 *At the trial*

(a) Limitations on the new procedures

The Evidence Amendment Act 1989 provides a new set of procedures and rules in cases of a sexual nature involving child complainants. A child complainant is defined as a person who has not at the commencement of the proceeding attained the age of 17 years. Because this amendment is specifically directed at trial proceedings (rather than a preliminary hearing), it could be argued that if the complainant turns 17 a day before the trial starts then the special procedures do not apply. This would seem to run counter to s 23E(a) which allows the Judge discretion to use the videotape from the preliminary hearing at the trial. If the use of such videotape hinged on whether or not the child turned 17 between preliminary hearing and trial there would be a large incentive for defence lawyers to try and delay commencement of trial in some cases so that the videotape would be kept out. Section 23D uses the term "committed for trial" and it seems reasonable that proceedings commence at that point.

The other limiting factor on the use of the special provisions in the Evidence Amendment Act 1989 is that they only apply to a child complainant's evidence. Another child called to give supporting evidence does not have access to the procedures. The other child may be part of the same family and share similar fears and traumas about giving evidence. The amendment as it stands, does not give the Judge discretion to use the procedures as set out for other child witnesses, apart from the complainant. Before this amendment was passed the Court of Appeal was prepared to approve the use of a screen for a child complainant. (*Crime Appeal*, 163/88, CA 20 December 1988.) Parliament has now given specific powers to Judges in certain cases under certain conditions. To go beyond the legislation and create judicial exceptions in other cases may be to act ultra vires. It is paradoxical that in legislating specific provisions for child complainants, even though the Courts had been prepared to create their own exceptions before the legislation, when the legislation comes into force there may be no room for creating other exceptions where similar interests and needs are required to be met.

(b) New pre-trial procedures and the discretion to use new modes of giving evidence.

The Evidence Amendment Act 1989 provides a new pre-trial procedure. The prosecutor is mandatorily required, in every case where there is an offence against ss 128-142A Crimes Act 1961, or any other offence against the person of a sexual nature and the complainant has not attained 17 years at the commencement of the proceedings, to apply to a Judge for directions as to the mode by which the complainant's evidence is to be given at the trial. The application is to be heard in chambers and each party is to be heard. The judge is given inquisitorial powers to call for reports from persons whom the Judge considers to be qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in any particular special mode prescribed by the Act. The most likely persons to be called to give a report are those who have become involved in the case in a professional capacity. There is nothing in the section requiring the report giver to be

called for examination and cross-examination on the report. It is not clear from the wording of the provisions whether the report giver is to write a report in the abstract or whether the report is to be specifically on the particular complainant. The Court of Appeal in *Crime Appeal* 163/88 oscillated between general propositions of any child likely to be intimidated by the sight of an accused who had committed acts of an "intimate and degrading kind" (per McMullin J) on the child and the general trauma of the atmosphere of the Court on children, to more specific propositions that the particular child in the case would have been unwilling to speak without the screen (per Cooke P and McMullin J). As the calling for reports is discretionary, a Judge would be acting within the provision by using a protective mode of evidence based on general propositions that children are likely to be traumatised and intimidated by giving evidence in certain cases.

In exercising the discretion whether to use a special mode of giving evidence the Judge is mandatorily required to have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused. This is a difficult task for a Judge. The less time a child complainant has to spend in the witness box in open Court arguably the less stress for that complainant. The fact that one of the special procedures is used cannot in itself cut against a fair trial, otherwise there would be no point in legislating for them. These two propositions lead to the conclusion that in all cases involving a child complainant one of the special procedures should be used. The problem is that there is another factor which does not appear to be part of the equation as the legislation stands. That factor is the possibility that the use of one of the special procedures (eg videotape), while it is likely to "minimise" stress, may make it more difficult in some cases to obtain conviction. For example, if considerable time has elapsed since the taping of the session and the child's appearance in Court, the child's memory for certain peripheral details may have faded. Under cross-examination this may be portrayed as "significant discrepancies" and used to discredit the child's testimony. The impact on a jury of presenting evidence in video form is not known. The use of electronic media may enhance the credibility of a child witness. Conversely, essential aspects of the child's demeanour may be distorted because of such technicalities as the angle of camera placement. The child witness may seem less real. To concentrate the Judge's mind only on the need to "minimise stress" and ensure a fair trial for the accused may mean that the interests of the community and the complainant in having the guilty convicted could be overlooked. The Judge will need to consider carefully what stress is to be minimised and how the special procedure will minimise it.

In *Crime Appeal* 163/88 it was argued by defence counsel that the true test for the use of special procedures (such as the screen in that case) was that the child would be otherwise unavailable because the emotional stress and trauma that would be suffered by giving evidence would be *significantly* more severe than the emotional distress or trauma often suffered by other witnesses. McMullin J rejected this test as being too high and accepted the approach of the trial Judge that a "very real possibility" of the child being inhibited in giving evidence was sufficient. Cooke P used the term "reasonably necessary" in describing the standard when protection of child witnesses by use of special procedures should be carried out.

(c) New modes of giving evidence.

There is a range of new modes of giving evidence provided by the Evidence Amendment Act 1989. They are: by videotape, behind a glass screen or wall partition, through a closed circuit television. If a videotape was made for the preliminary hearing then that tape may be used as evidence at the final trial. The trial Judge is mandatorily required to view the tape before it is shown and may order excised from the tape any matters which would be excluded if the evidence were to be given in the ordinary way. (s 23E(2) (a) and (b) Evidence Amendment Act 1989). There is discretion under s 23E(e), provided there are necessary facilities and equipment, to direct that the complainant's evidence be given at a location outside the Court. The accused, counsel, and such other persons as the Judge thinks fit, are entitled to be present. The complainant's evidence is recorded on videotape and will be admitted in that form with such excisions as the rules of evidence may require. Section 23E uses the term "give any of the following directions". That may be read as meaning the Judge may use a combination of techniques which best fits the case rather than make specific choices between them. This is the most sensible approach as flexibility is needed to adopt procedures which are appropriate to the circumstances rather than leave the Judge with choosing one or other when a combination is preferable.

(d) Rights and manner of cross-examination and re-examination

Defence counsel have the right of cross-examination no matter what special procedure is used (s 23F Evidence Amendment Act 1989). The Judge is given power to disallow any questions which, having regard to the "age" of the complainant, are "intimidating or overbearing" (s 23F(5) Evidence Amendment Act 1989). Whether age is the appropriate guideline is questionable, given that the nature of the offence and the vulnerability and state of the complainant are likely to be crucial factors no matter what the age.

The accused person is only entitled to cross-examine the complainant when the accused is not represented. Then the accused may put questions, whether by means of an audio link or as the Judge directs, to a third person, who will repeat the questions to the complainant (s 23F(3) Evidence Amendment Act 1989). Throughout the trial the Judge has the right to question the complainant.

Where a videotape of the complainant's evidence is to be shown at the trial, the Judge is mandatorily required to give directions, as the Judge thinks fit, relating to the manner in which cross-examination or re-examination of the complainant is to be conducted (s 23E(3) Evidence Amendment Act 1989). When the child complainant gives evidence in chief by means of closed circuit

television (outside the Courtroom but within the precincts of the Court), or behind a wall or partition by means of an appropriate audio link, specific provision for cross-examination and re-examination is made. The Judge is required to direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person (approved by the Judge and placed next to the complainant) who will repeat the questions to the complainant.

(e) Impact of new procedures

The new procedures will have their most significant impact in cases where the child would not be able to give evidence in any other way. This was the case in *Crime Appeal* 163/88 where it appeared from the evidence that without the screen the child would have said nothing and therefore given no evidence. A similar situation arises with young children who may be totally overwhelmed by the Courtroom and who would be more appropriately questioned via closed circuit television.

It would be a grave mistake to see the availability of technology as a panacea to the difficulties child complainants may face when giving evidence. The giving of evidence is not just an event in isolation; it is part of a process which begins from the moment the alleged offence occurs. Through that process the attitudes and responses of those who come into contact with the child complainant will have crucial effects on how the evidence is given in the end (or indeed whether evidence will be given at all). A child complainant who is given support and understanding is more likely to be able to work through all the processes and more likely to be able to withstand the stresses of giving evidence. There is a need to explain to the child, in a manner that the child understands, how Court procedure works. It would be a great pity if legislating for special procedures led to the attitude that all is well for child complainants now, and that the Judge will sort out an appropriate procedure when the matter comes to Court.

II Expert evidence

The general rule of evidence that "the opinions of skilled witnesses are admissible wherever the subject is one on which competency to form an opinion can be acquired only by a course of special study or experience",[2] has been given specific expression in s 23G Evidence Amendment Act 1989. "Expert", for the purposes of the section, is defined quite narrowly: a medical practitioner registered as a psychiatric specialist practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children, or a registered psychologist practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children. The provision allows experts to give evidence on specific matters. The first is the intellectual attainment, mental capability and emotional maturity of the complainant. This assessment is to be based on either the examination of the child complainant before their evidence is given, or observation of the complainant giving evidence whether directly or on videotape. It is crucial for the effective working of this provision that the therapeutic and evidentiary roles of an expert not become mixed. An expert who has worked with the particular child in a therapeutic role, is not the appropriate person to give evidence under this provision. Such an expert would be vulnerable to cross-examination that they have become too close to the particular case to give effective evidence. There is also the issue of confidentiality in the therapeutic relationship which puts the expert in a difficult position to give evidence.

The second matter on which experts are able to give evidence is the general developmental level of children of the same age group as the complainant. A controversial matter in which experts are able to give evidence is the issue of whether the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children of the same age group. The provision limits the expert to forming an opinion from evidence given during the proceedings. This would make it difficult for an expert who had been involved with the child in any other way, either through treatment or by way of pre-trial interviewing, to be able to give evidence on this point. It would not be impossible, provided the expert was able to clearly identify the evidence during the proceedings, which led to the formation of the opinion. There would remain the inference for defence counsel to possibly explore that the opinion was formed not on what was heard at the trial but on other contact the expert had with the child.

It has been suggested by Vignaux and Robertson[3] that the provision has been put in place to get around the Court of Appeal decisions, *R v B* [1987] 1 NZLR 362 and *R v S* (Unreported, Court of Appeal, 8 March 1989, 174/88). In *R v B* the Court of Appeal expressed the view that:

> As child psychology grows as a science it may be possible for experts in that field to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are so clear and unmistakable that they can be said to be concomitants of sexual abuse.

In *R v S* the Court of Appeal found that the evidence given by the expert did not demonstrate in an "unmistakable and compelling" way and, by reference to scientific material, that the relevant signs were characteristic of child abuse.

The Evidence Amendment Act 1989 has lowered both the threshold and the basis of the test. The evidence of the expert need only demonstrate that the behaviour is consistent or inconsistent with behaviour of sexually abused children. There is no requirement that it be demonstrated in an unmistakable and compelling way. The basis for the evidence need not be professional literature but may be from the experience of the expert.

Vignaux and Robertson have questioned whether evidence of behaviour consistent with that of sexually abused children of the same age group as the complainant is relevant to the fact to be proved, namely, whether or not a child has been subject to abuse. The definition of relevance adopted by Vignaux and Robertson is "one fact is relevant to another if the existence of the one fact in any way affects

the probability of the existence or non existence of another".[4] A closer reading of their objections indicates that the terms "consistent" and "inconsistent" become all important. A wide interpretation would suggest that "consistent" means that as long as such behaviour is possible in abused children, it is consistent. A more restricted interpretation would mean that a high correlation with abuse would need to be shown. But even if this second interpretation is followed (which is getting back to the "clear and unmistakable" approach of the Court of Appeal), Robertson and Vignaux are of the opinion that it is "useless" in itself. The argument is that even if a very high percentage of abused children (say 80-90%) exhibit a particular behaviour (say nail biting), and the child in question is a nail biter, the evidence lacks two vital elements: (1) It does not spell out what proportion of nail biters have been abused; (2) To be able to give that figure, it would be necessary to know the proportion of abused children in the population as a whole. Those extra two details then enable a calculation of the probability that the particular child in question has been abused. In Robertson and Vignaux's words, "without knowledge of these other matters, the evidence to be given by the expert . . . cannot materially affect the assessment of the probability that the child concerned has been abused . . .".[5] With respect, to calculate probability the crucial missing figure is the percentage of *non-abused* children who are nail biters. This figure is problematic as it is not really possible to be categorically certain who the non-abused population are. The most that can be said, is that a particular characteristic appears, on the research done to date, to be rare or absent in what is believed to be the non-abused population.

Vignaux and Robertson provide excellent material for defence counsel who want to minimise the impact of expert evidence which has not been carefully prepared. They also sound a warning to expert witnesses to make sure they have done their homework and can link their findings into as specific a picture as possible. To go as far as to suggest that evidence of a high percentage correlation between particular behaviour and abused children is "useless" and "irrelevant" is to go too far. The assumption underlying Vignaux's and Robertson's analysis is that evidence proceeds on a totally rational basis, based on mathematical calculations of probabilities, in relation to one piece of evidence at a time. A Judge or jury is entitled to look at the total picture and draw inferences from it. In that context, evidence that 80% of abused children have a particular attribute which the child complainant has, may be the last piece of the puzzle. When combined with all the other evidence, it has relevance and weight. This is particularly so if the attribute appears to be rare or absent (unlike nail biting) in the non-abused population.

There is a heavy onus of responsibility placed on an expert witness. Despite the wealth of information currently available, there is at present no complete and definitive body of knowledge surrounding all aspects of child sexual abuse. Nevertheless, in certain areas a skilled and experienced person will possess sufficient knowledge to offer a "sound' opinion. It is in the remaining grey areas, where facts are least plentiful, that "unsound" dogmatic opinions could flourish. The controversy in the United Kingdom over the interpretation of the physical findings of medical examinations demonstrates this very point.[6]

III Directions to the jury on corroboration and young persons giving evidence

Courts have tended to be guided by the view that children's evidence must be scrutinised with special care since "infants are prone to invention or distortion". The case most often cited for that phrase is *R v Parker* [1968] NZLR 325 (CA). Two young girls (aged 7 and 9) had given evidence to the effect that a man had approached them in a park. He was found guilty as charged. The appeal rested not on questioning the reliability per se of the children's evidence but on whether or not their evidence was of a "sexual nature" and therefore should have attracted a warning from the Judge to the jury. Thus, despite the fact that the truth of the children's evidence was never an issue, the Court in its judgment nevertheless managed to articulate a very precise view on the reliability of children as witnesses, viz:

> New Zealand Judges almost invariably advise juries to pay particular attention to, or to scrutinise with special care, the evidence of young children and equally invariably explain the tendencies of infants to invention or distortion. We hope that this course will continue to be followed for we think it prudent. (*R v Parker*, supra, at 328). This bald assertion was made without any supporting evidence and seem to have been accepted without question.

Children (and adults) do hold beliefs which are viewed as strange and incorrect by the general population. Some children believe in Santa Claus (an adult invention). Some adults believe they have met extra-terrestrial beings. If an individual of the latter persuasion was to give evidence, it is unlikely the Judge would warn the jury of the danger of convicting on uncorroborated evidence on the basis that the witness believed in space visitations and therefore could be considered to be "prone to invention or distortion".

Even though there is a certain lack of consistency in the approach taken by the Courts, the real basis for concern is the failure to appreciate a fundamental point. A child — no matter how inventive — cannot speak of real matters which are outside its experience. For example, a four-year-old child who is able to describe sticky milk, which tastes yucky, coming out of the end of Daddy's penis, must have some basis of experience from which to offer the description.

Sections 23H(b) and (c) Evidence Amendment Act 1989 have addressed the issue by mandatory requirements that the Judge shall not give any warning to the jury relating to absence of corroboration of the evidence of the complainant, if the Judge would not have given such a warning had the complainant been of full age. The Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care, nor suggest to the jury that young

children generally have tendencies to invention or distortion.

IV Recent complaint

For many years, where a victim of a sexual offence failed to complain of the incident at the first "reasonable" opportunity, the trier of fact was entitled and even encouraged to infer that the complainant's allegation against the accused was either totally or substantially untrue. In fact, in cases of child sexual abuse, the victim will often not disclose any information relating to the event(s) for many months or even years.

It is pleasing to note that the 1985 Evidence Amendment No 2 Act recognised that such delays do not of themselves cast doubt on the veracity of the child's report. It is important that the Court is made fully aware of the fact that in cases of intrafamilial child sexual abuse, delay in reporting is the norm rather than the exception. A child's credibility should no longer be questioned on this ground.

What needs to be done

1 Hearsay

While the hearsay rule is of general application, it has become subject to a number of statutory exceptions introduced to meet modern situations and the ends of justice. Given the nature of child sexual abuse and the circumstances surrounding its disclosure, these exceptions rarely apply even though the original intention behind them may well do. As an example of this, it is difficult to make use of the "excited utterance exception" which requires the element of "spontaneity". This requirement is often measured in terms of the time lapse between the starting event and the statement. Regrettably the child's delay in making a statement may far exceed even the most liberal interpretation of the excited utterance exception. An out-of-Court statement made by a young child, which indicates the child may have been sexually abused, is usually inadmissible hearsay. This is unfortunate since these statements may be the most compelling evidence available. It is now known that children frequently wait months or even years before making their first spontaneous disclosure of sexual abuse.[7]

The hearsay rule is defensible in so far as it forbids the use of a second hand account of an incident when a more reliable first hand account is available. But in so far as it prevents second hand accounts being given when no first hand account is available, or when the second hand account is potentially more reliable than the first hand one, the hearsay rule is deficient. Suppressing such evidence not only makes it harder to convict the guilty: it also makes it easier to convict the innocent.[8] Provided Judge and jury are aware of the possible errors that may creep in when one person is repeating what another said (namely, the first person is unclear or dishonest, or the second person suffers from faulty recall or distorted perception[9], there seems to be no other good reason for keeping out such evidence.

2 Spousal immunity

Neither husband nor wife is compellable in any proceeding to disclose communications made to each other during the marriage (s 29 Evidence Amendment Act (No 2) 1989). The privilege resides in the witness, not the giver of the information. Like other privileges, there is justification in allowing certain information to remain private.

But the laws of evidence go further with married couples. A legally married spouse is considered a competent and compellable witness for the defence of the accused (s 5(2) Evidence Act 1908). While deemed competent in specific situations, a spouse is not a compellable witness for the prosecution (s 5(3) (4) Evidence Act 1908). There is some force in the argument that to compel one spouse to testify against the other is to cause family disruption and tension. But just as much tension may be caused by compelling a spouse to give evidence for the defence of the accused.

It comes down to what is the most important value to protect — the value of obtaining the maximum information so the child at risk is protected, or the value of preserving harmony between the spouses. By protecting a spouse from giving evidence against another spouse, the law is putting the child at risk.

Given the nature of child sexual abuse and the circumstances under which it occurs, the information available from a spouse might allow a more complete picture to emerge. Maintenance of spousal non-compellability can actually impede the discovery of truth in cases of child sexual abuse, since potentially relevant testimony is not accessible to the judicial process. This impediment should be removed.

3 Relevant previous history of defendant

The similar fact rule which requires conduct to be strikingly similar, has the rationale of avoiding tainting the accused with activities other than the one at trial. The similar fact rule is construed narrowly and requires specific acts that are strikingly similar (see McGechan, *Principles of the Law of Evidence,* 65-79). There is evidence[10] to suggest that the nature of sexual offences against children typically follows a progressive pattern whereby the offender engages in one or more of a range of sexual activities with a child or children. To concentrate on specific, strikingly similar acts means that evidence of the progression of activities is not available to the Court. Clearly such evidence, if it were available, would have potentially prejudicial effects for the accused. Careful thought needs to be given as to whether these prejudicial effects are now outweighed by the probative value of putting the particular offence in the context of a progressive pattern of activities.

Concluding remarks

It is only over very recent times that some limited statutory amendments have been introduced as a consequence of our improved understanding of the dynamics of child sexual abuse. While we have highlighted the need for further amendments we believe that in and of themselves legislative changes will not be enough. The attitudinal changes that spur these amendments are not necessarily adopted by all who must operate under them. Beliefs that complaints

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Enforcing second-tier agreements

By Professor A J Geare, Department of Management, University of Otago

The question discussed in this article is whether wage increases should pass on to incentive schemes and the consideration of this question by the Labour Court. Professor Geare is of the view that although the Union lost on the facts in the Tomoana *case nevertheless as a matter of principle the Court has allowed for there to be a flow-on effect in future cases once second-tier agreements were accepted as being incorporated in the workers' contracts of service.*

In an earlier issue of the *Journal*, the author (at [1990] NZLJ 139) discussed the *Alliance* case (*NZ Meat Processors etc IUW v Alliance Freezing Co Ltd* AC154/87) and pointed out that the *Tomoana* case (*Auckland and Tomoana Freezing Works etc IUW v Weddel Crown Tomoana Ltd* WLC 81/88, 18 August 1988) was to be considered later. This paper examines the *Tomoana* case which ostensibly was concerned as to whether wage increases should pass on to incentive schemes. At a deeper level, the case attacks one of the major theoretical foundations of the Labour Relations Act 1987.

Description

This dispute involved a claim under s 198 of the Labour Relations Act 1987 for the recovery of wages payable by the employer to some 1450 workers employed at the Tomoana Freezing Works. The workers were subject to one or more successive awards, namely the New Zealand (except Westland) Meat Processors', Packers', Preservers', Freezing Works Employee Awards (Doc 310) (1985 BA 8195, 1986 BA 10907 and 1987 BA 5931). It was also accepted that the contract of employment of each worker incorporated an unregistered local incentive agreement made between the plaintiff union and the defendant company. There are some 22 such agreements, each of them covering workers employed upon particular tasks or within a particular department of the Tomoana Freezing Works.

As outlined by the Court, a simplified version of the claim was as follows. The union alleged that each incentive agreement is based upon award rates and is indexed to those award rates so that incentive payments continue to be proportionately the same as changing award rates. Under clause 70 of the 1986 award, with effect from 7 April 1986, there was provision for an additional flat monetary amount of $35 per worker per full ordinary week to flow into actual overtime worked. The union accepts that the flat payment and overtime payments have been made but alleges that proportionate payments under the incentive agreements have not been made.

For interest it should be pointed out that the claim was not insignificant. If the union won its claim, it was estimated that it would cost Tomoana around $1.6 million and if then applied throughout the country, would cost all employers around $60 million.

The employer's advocate argued first that the Court did not have jurisdiction to hear the claims. In brief the argument was that the incentive agreements were unregistered and therefore unenforceable in this Court. The

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of sexual assault are often bogus and that children are unreliable, never less so than when they are testifying about sexual assault, are difficult to remove.

An assumption of fabrication means that children come into the criminal justice system in a disadvantaged position. Others hold the belief, which can be just as dangerous, that all allegations of child sexual abuse must be true. The whole purpose of a system of criminal justice is to put aside such assumptions and to carefully probe and scrutinise the evidence with an open mind. To be able to do that effectively, it is crucial that as much of the evidence as possible is available to the Court, and that children do not suffer unnecessarily by giving it. □

1 McMullin J in *Crime Appeal* 163/88, Court of Appeal, 20 December 1988, states that "the administration of the criminal law frequently calls for a balancing of competing interests". The "rights of the appellant as an accused person and the position of the community as represented by the Crown" are cited as the weights in the balance.

2 McGechan, *Principles of the Law of Evidence* (7 ed) 152.

3 Vignaux and Robertson, "Authorising Irrelevance?" (1990) *Family Law Bulletin* 67. See also Robertson, "Expert Evidence in Child Sex Abuse Cases" [1989] NZLJ 163.

4 Supra, fn 3, 67.

5 Ibid, 68.

6 Report of the Inquiry into Child Abuse in Cleveland 1987, London: HM Stationery Office 1988 (320pp). See also Levy "Using Scientific Testimony to Prove Child Sexual Abuse" (1989) 23 *Family Law Quarterly* 383.

7 See Porter R (ed) *Child Sexual Abuse Within the Family*, Tavistock Publications, London, 19.

8 See for example *Sparks v The Queen* [1964] 1 All ER 727 where the utterance about the skin colour of an assaulter by a very young child was ruled inadmissible because it was not sufficiently close in time, place or circumstance to the assault. The accused, a person of different skin colour than that alleged by the child, was convicted.

9 See Robertson, "Expert Evidence in Child Sex Abuse" [1989] NZLR 163.

10 See Berliner L, and Cook J R "The Process of Victimisation : The Victim's Perspective" (1990) 14 *Child Abuse and Neglect*, 29-40.

argument concentrated on s 132 of the Labour Relations Act 1987 which states that:

> The general object of this part of the Act is to establish that – (a) the terms and conditions relating to the employment of groups of workers are fixed by a single set of negotiations . . .
> . . .
> (e) any agreement reached with an employer bound by an award who has not been specified for separate negotiations cannot be registered . . .

If the Court was deemed to have jurisdiction, the crux issue then was whether the increase in clause 70 should be passed on through the incentive schemes.

The wording of the clause 70 of the 1986 award is as follows:

> APPLICATION OF $35 INCREASE
>
> 70. An increase of $35 will be paid to all workers per full ordinary working week.
>
> The $35,87.5 cents per hour, will apply to actual overtime worked as defined in clause 2 of this agreement irrespective of whether the workers are hourly workers or pieceworkers.
>
> With the exception of allowances as agreed, no pay rates in this agreement will be amended because of this settlement. Any ancillary agreement made pursuant to clause 13 of this agreement or otherwise and whether in writing or not will also be specifically adjusted because of the terms of this settlement.
>
> This situation will apply for the currency of this agreement only.

The clause 13 referred to above was not quoted in the decision, however it is as below:

> 13.(a) Wage rates and special conditions of work for piecework and other types of "payment by results" systems not provided for in this agreement may be arranged by mutual agreement of the employer and the union.
>
> (b) All such agreements shall be in writing and signed by the authorised representative of the union and of the employer.
>
> (c) All agreements made under this clause shall specify:
>
> (i) The work to be performed.
> (ii) Hours of work and what provision is to be made for overtime.
> (iii) Manning scales and provisions for any variations in manning.
> (iv) Hourly, piece or other rate of pay with sufficient details to allow the pay calculation to be understood by the workers concerned.
> (v) Agreed provisions governing the introduction of learners into the manning scales.
> (vi) Any other matters which the parties agree should be included and which provide for conditions not less favourable than those of the current Award.
> (vii) A stipulated time period for termination.
>
> (d) In all matters the provision of the agreement shall apply, and any dispute arising from the operations of any agreement made under this clause which cannot be settled by the parties, may be referred by either party for settlement by a disputes committee set up under the provisions of this agreement.

The incentive schemes referred to in clause 13 had an "exceptions" clause. For example:

> "Cost of Living Orders, General Wage Orders and Award Alterations shall apply to the incentive bonus scheme in accordance with the conditions laid down by the issuing authority".

The union's case was in effect that incentive payments are linked to award rates and ought to move accordingly, and indeed the Court agreed that in general the structure of the incentive agreements is such that they may be categorised as of the type "award plus percentage" because a base derived from the award is subject to a production multiplier to arrive at the incentive payment. If structure was the sole determinant then an award increase would yield an increase in incentive payment.

The employer's advocate argued that the intent of clause 70, together with the exceptions clauses quoted above, was that the $35 was not to flow on into ancillary agreements. This was supported by a letter from the Acting Minister of Labour who wrote after a six week strike but prior to the award being concluded that it was his understanding that it had been agreed that a payment of $35 per week for members of the New Zealand Meatworkers Union was to be made on the understanding that there would be a resumption of work as soon as possible and that conciliation would commence in Christchurch on Tuesday 8 April 1986 at which time the outstanding claims of the parties would be processed. He also understood that it had been agreed that the $35 would apply to overtime worked but would not flow into clause 13 type agreements. (Prebble, Hon Richard, letter to New Zealand Meat Industry Association and New Zealand Meatworkers Union, 4 April 1986)

The union countered by pointing out that clause 70 states that ancillary agreements "will also not be *specifically* adjusted" (my emphasis) and stated that the ancillary agreements did not have to be specifically adjusted to take into account a change in award rates.

Decision

The first decision that the Court had to make was whether it had jurisdiction to enforce unregistered "second-tier" agreements such as the incentive schemes operating at Tomoana. It was agreed by all parties that under the Labour Relations Act 1987, registered awards and agreements, deemed awards and agreements, and registered redundancy agreements were enforceable as if statutory. The Court observed that it seemed to be further agreed that unregistered agreements between unions and employers were not enforceable *per se*, under the Act.

A significant matter was whether or not the incentive schemes were deemed to be incorporated into the contracts of service of the individual workers. The Court noted the remarks of Prichard J in the High Court in *Re Andrew M Paterson Ltd* [1981] 2 NZLR 289 at p 298:

> I must, therefore, conclude that an unregistered industrial agreement between a union and an employer is not a contract enforceable by an individual employee, albeit a member of the union. If the employee can show either by direct evidence or by necessary inference that his individual contract of employment was entered into on the basis that the provisions of the unregistered agreement are incorporated into his contract of service, then of course, he can enforce the contract of service accordingly. But, as appears from *Young v Canadian Northern Railway Co*, an inference that the individual employee's service contract embodies the terms of the unregistered collective agreement is not to be drawn merely from the fact that the employer has chosen, in practice, to observe those terms.

During the hearing, the union claimed that the employer's advocate was apparently conceding that the agreements were incorporated. After taking further instructions from the company, the advocate did admit that the agreements were incorporated into the contracts of service. As a consequence, the Court considered the question as to whether a contract of service — incorporating the incentive agreements — could be enforced by the Labour Court under s 198 of the Labour Relations Act 1987.

In fact, s 198 states that:

> Where any payment of any such wages or other money has been made to a worker at a rate lower than that fixed by the award or agreement or *otherwise legally payable*, the whole or any part, as the case may require, of any such wages or other money may be recovered to the use of the worker in the same manner as a penalty for a breach of the award or agreement, by action commenced in the Labour Court under section 201 of this Act by any union (my emphasis).

The Court decided that an above-award payment properly contracted to be paid is payable by law and therefore falls within the description "otherwise legally payable". The Court accepted that there was a lack of judicial authority, but considered the lack of earlier judicial authority may be due to the fact that the recovery of above-award payments in this Court has not been challenged. The Court considered two previous cases — *Canterbury Rubber Workers IUW v Dunlop NZ Ltd* [1982] ACJ 645 and *NZ Engineering etc IUW v Dunlop NZ Ltd* [1986] ACJ 848 in which the then Arbitration Court had authority to hear above-award claims. Although the advocate for the employers argued that jurisdiction was not challenged, the Court gave its opinion that in both the cited cases the previous Court had considered that it did have jurisdiction, and that the parties had accepted the Court's view. As a consequence the decision in the Tomoana case was that the Labour Court did have jurisdiction under s 198 to hear the present claims of these workers that they are entitled, pursuant to their contracts of service, to certain incentive payments in excess of the award. If found to be properly owing under the contracts of service, such payments are "legally payable" to the workers whose positions or employment are subject to the award.

From the point of view of the union, the real issue was probably not the matter of jurisdiction, but rather the question as to whether or not the clause 70 increases flowed on to the incentive agreements and hence whether or not it was awarded $1.6 million. On this question the Court was decisive stating that clause 70, quoted above, was quite clear to anyone familiar with industrial negotiations and documents. The intent was that the $35 was not to flow on into ancillary agreements and clause 14 of the incentive agreement between the parties showed the intent was that the $35 per week will be excluded from the award base for incentive payment calculations. The intent that the payment of $35 should not flow into ancillary agreements was described as a condition "laid down by the issuing authority". Thus, on the base issue the union was the "loser", with the Court dismissing the claim under s 198.

Analysis of the decision

In the *Alliance* case, this writer disagreed with the Court's decision. In this case, however, the writer is in total agreement with both decisions — with respect to jurisdiction and to whether there was in fact a "flow on".

Notwithstanding the fact that in this case the union was the "loser", the Court's decision has undermined one of the fundamental philosophical foundations of the Labour Relations Act 1987 — the concept of there being only *one* enforceable document governing the wages and conditions of any group of workers. The Labour Government made this very clear in the build up to the Labour Relations Act 1987 — and made that philosophy explicit in s 132 quoted earlier. However, unless the Labour Relations Act 1987 is amended, the decision in this case opens the way for unions to get second-tier agreements enforced through the Labour Court. Certainly, those agreements would need to be accepted as being incorporated in the workers' contracts of service, but once that had occurred the wages part at any rate of "unenforceable" agreements will now *be* enforceable under s 198.

Just as in the *Alliance* case, ironically the "loser" could ultimately be the "winner". Given the shift in the balance of power over the last few years away from unions, the opportunity provided by this decision to enable unions to enforce second-tier agreements could well be of real significance. While the Tomoana union was definitely the loser in this case, unions as a whole could well consider themselves winners as a consequence of the ruling. □

RELATIONSHIP. Stereotype rejecting, personal space respecting, trusting, caring and equal, a relationship is a love affair designed by a committee of social workers.

Nigel Burke
A Dictionary of Cant

Ninth Commonwealth Law Conference April 1990

Company Law: Directors and the Company they keep

The afternoon's sessions deal with Company Law matters. The first session is Duties and Liabilities of Company Directors. The Chairman is Professor Bob Baxt, who is the Sir John Latham Professor of Law, Monash University, currently on leave as Chairman of the Trade Practices Commission in Australia. Professor Baxt is extremely well-known through his many writings and pronouncements on company and commercial law subjects.

Professor Baxt

It gives me great pleasure to welcome you here for the first of the two sessions on corporate and securities law. We have been privileged to have the organisers put together an extremely well-known panel of speakers who, I am sure will not only inform you, but entertain you, on the subject of extremely major importance, not just in this part of the world where the collapse of a large number of companies and the spotlight on the behaviour of those in control of those companies has resulted in a number of initiatives that are no doubt known to those of you who live in this part of the world, but also in other parts of the world we have seen similar concerns being expressed about the way in which corporations are being run and whether the law is, in fact, adequate to deal with the question of directors, directors' duties, and the tension between the power and the duties of directors and, of course, the shareholders in the company which they direct.

In Australia there has been a major Senate inquiry into the whole question, with a report published last December. In New Zealand, of course, we await particularly the results of the Law Commission's work on Company Law Reform, and there have been important inquiries and developments in other jurisdictions as well.

I will not take up any more of your time by commenting on the subject but I will introduce the first of our speakers who is, in fact, the major paper writer today, Dr Len Sealy. Dr Len Sealy is, of course, a New Zealander who has spent now a number of years at Cambridge University. He has visited this part of the world on many occasions and quite recently was quite heavily involved in the work being done by the Law Commission in relation to the Law Reform paper. He has written a paper which is in the book of proceedings that you have. He is a man who has written a large number of very important and very influential articles and books in this area of company law, and I ask him now to address us.

Dr Len Sealy

May I first say how agreeable it is to come back under the sky where I was born and address this gathering today. I am very grateful for the invitation.

The subject of directors' duties is of central importance in any code of company law, and one of potentially very wide scope. Whole books, substantial monographs, have been written on the topic. The American Law Institute has spent nearly 10 years studying it and producing annually successive tentative drafts, and so has Professor Bob Baxt's research team at Monash been working on the subject for years. In Australia, there has recently been produced the report of the Cooney Committee, some 200 pages long, and that doesn't cover all aspects of the subject. It is, indeed a vast subject and we have to try and have a meaningful discussion in just one session this afternoon.

I would like to begin by wandering somewhat from the framework of my paper and airing one or two rather random and unconnected thoughts. One is to note that this area of directors' duties is not one in which we have the benefit of much empirical research. Very little has been done in the way of fieldwork or statistical or quantitative study, not at least in published form. And what has been published, mainly by economists and law and economics writers in the United States, could only be relied on with considerable caution when applied to our quite different conditions in the various jurisdictions represented here today.

For example, in most of the jurisdictions represented here, fewer than 1% of incorporated companies have a public listing and are dealt in on the Stock Exchange. And of the companies incorporated, taking the United Kingdom as a typical example, something approaching 70% are closed corporations, that is, owned by individuals and shareholder managed. The researchers of the American Law Institute use the prototype of the typical Delaware Corporation which would not be typical in the world which we know.

Secondly, I think I must nail my own colours to the mast and unashamedly declare my firm belief that the primary purpose of company law is enabling and not regulatory. Successive studies by academics and law reformers all come to the conclusion that the best focus for a company's code is to see it as oiling the wheels of commerce, to make the wheels of business even better. Experience shows that tough company laws do not pay off. Many jurisdictions which have experimented with increased formalities, with centralised controls, with increasingly heavy penalties for breaches of company law, have found them counter-productive, and have frequently modified these regimes, sometimes even going to the length of rescinding them and going back to the common law.

So there is a moral there, I think if it ain't broke, don't fix it. And if

there is not too much wrong with the law we have inherited, we should think twice before weighing in with well-intentioned proposals for change. I think this is particularly true in relation to the proposals that directors' responsibilities should be owed to a wider category of constituents, not just the shareholders, but the workforce, creditors, consumers, the environment, the export drive, the disabled, every good cause you can think of should be numbered in the list of directors' duties. Wherever wiser counsels have prevailed, whether it is in the United States in the 1930s, in Canada in the 1970s, and in New Zealand and Australia, as represented by New Zealand's Law Commission's proposals and the Cooney Committee's reports, those ideas have been disowned.

Next, I think it is important to note the limits. There are limits to what the law and the Courts can be asked or expected to do. First, because enforcement is time consuming and costly, and secondly because to review business decisions, even with hindsight, is not within the skills of the judiciary. Even when they do it well there are delays and costs which impede business, and there is no reason to expect that the judiciary will always do it well.

Another thing we must bear in mind is that there is no such figure as the typical, or average, director. Nor is it a profession which, as a matter of practicality, can be expected to impose standards on its own members in the way that dentists and solicitors and stockbrokers and so on, can. Other professions do set, and police, ethical and similar standards, but they have control over entry, control over a market, they have a monopoly situation often. The only real source of control over directors is the law.

Lastly, the business of companies and of company directors, we must not forget, is risk, and risk has to have a down side. The law should not be astute to rush to the rescue of investors who burn their fingers. The public, politicians, the media, all too readily start a hunt for scapegoats when a Johnson Murphy, a Ferranti, an Equiticorp, or any other major financial or investment disaster breaks. The larger the sums involved, the louder the cries for heads to roll. But these are the same investors who took the easy return when yields were high. These were the same politicians who basked in the reflected glow of entrepreneurial successes in the earlier years and dished out the knighthoods and the peerages. These are the same journalists who, in palmier days, made folk heroes of the tycoon figures and their families in the Sunday papers. We have to remember that directors are not guarantors or insurers of the success of the enterprise.

Now, if I could turn briefly to the paper which is on page 99 of the Conference book. I would like, first, to pay tribute to the two books I have referred to, the New Zealand Law Commission's Report, and the Cooney Report from Australia, both for their clear analysis and also for their radically fresh thinking. All the best ideas are in these two publications already, there is little new for me to say. Perhaps the most significant thing to have come out of these two exercises, and as we learn from Dr Orojo's paper, more recently also from the new legislation in Nigeria, is how little disagreement there is as to what the substance of the rules governing director's duties ought to be. Critics may condemn these rules as being outdated or indequate. But no one seems yet to have come up with a better formula. When legislation replaces the common law the statutory wording, whether it is formulated in broad terms or spelt out in quite elaborate detail, does not differ substantially from the rules which have come through to us from our forefathers by the doctrine of precedent and evolution in the common law. Different jurisdictions may prescribe different sanctions, or play about with the onus of proof. But generally speaking, we find the new look obligations include the same formulations which we find in the common law – a duty to behave constitutionally and lawfully; a duty of good faith or loyalty; duties of care, skill and diligence; and, alongside the traditional fiduciary duties which include the non-conflict rule, and the rules forbidding secret profits, the abuse of confidence, and the usurpation of a corporate opportunity.

I pause to sound a note of caution about the readiness with which we use the word duty. It may be dangerous to describe each and every one of these indiscriminately as duties. The sanction for transgression will, in some cases, only be the setting aside of a decision or the nullifying of a transaction, so that, as Mr Justice Vinelott recently reminded us in the English case of *Movietex*, we should, perhaps, more accurately be speaking of directors being under a disability, rather than of their acting in breach of their duty. Each rule must be seen, then, in its own context, and in the context of its own sanctions. Sweeping generalisations in this area are potentially dangerous.

But the fact that almost all the statutory formulations replicate the common law suggests to me that there is little real disagreement about what the rules should be. The debate is about their scope, and interpretation, and appropriate sanctions for violation.

Whether we rely on the common law, or on statutory formulations, there are still difficult lines which have to be drawn – lines between what is a legitimate commercial risk and what is reckless or irresponsible trading, between the due rewarding of entrepreneurship and indefensible profiteering, called once, memorably, the unacceptable face of capitalism; between what are permissible tactics in a struggle for corporate control, and what is an abuse of power; and between condoning mere procedural irregularities or excesses of authority on the one hand, and turning a blind eye to fraud on the other.

In my paper, I consider the respective roles of four possible sources of constraint on director wrong-doing: legislation, the Courts, the shareholders, and the corporate constitution. But, on reflection, I think I should have mentioned also the importance of extra-legal forces in this context, something which the Cooney Report rightly stresses. It says:

> Most directors and company offices properly carry out their functions, not necessarily because of their legal obligations, but for reasons such as their sense of responsibility, career and economic incentives, pride and professionalism. Legal standards are necessary, but as a fall back.

And the report goes on to stress the importance of well-publicised and well-accepted business ethics, educational courses, the role of bodies such as the Institute of Directors, setting guidelines and codes of practice, market forces if you like, investors voting with their feet, and peer pressure. We do well, I think, to bear prominently in mind these positive, creative forces for good, for the legal rules which we rely on as a fall back, the "thou shalt not" come into play only after the event. The law can only be concerned with the pathology of corporate affairs, not with the dynamics and vitality of commerce.

I have said, I think, almost enough about the role of legislation. Legislation can do only so much: it can only spell out rules in the broadest of terms, and leave it for the Courts, in due course, to interpret them. And, most interestingly, however much the legislation tries to steer the thinking away from the common law, such as, for instance, in suggesting that objective rather than subjective criteria should be the yardstick for the measure of directors' care and skill and diligence duties, we find the common law creeping back. In Australia, cases like *Burn v Baker* have brought back in subjective standards, and I think, in an article I was reading recently by Professor Baxt himself, critical of the law on delegation, the case of *Metal Manufacturers v Lewis*. There were, again, allowances made for the relatively minor part that one lady in particular played in the affairs of the company. Even if the law jacks up the standards, or endeavours to do so, there are very difficult hurdles of causation and so on which have proved near impossible to surmount.

When we come to the role of the Courts, we cannot have legal rules without having the Courts to enforce them, but there is universal agreement that the Courts cannot sit in review of business decisions. And generally, they do not want to. They are not particularly good at it, and businessmen do not want it either. So it seems that in one form or another, we have to have a business judgment rule. Whether expressly recognised as such, as for instance, in Delaware, or whether it is allowed to lurk behind a rule of procedure, such as our antiquated rule in *Foss v Harbottle*.

Those are perhaps negative reasons – the delay and expense and incompetence or supposed incompetence of the Judges but I think there are also positive reasons for having a business judgment rule. The policy behind the business judgment rule is that informed business judgment should be encouraged. In that way, innovation and risk taking are stimulated. I do not propose to talk much about the Delaware position and developments in relation to takeovers, but it is interesting there that the judicial focus has recently been so much on due process and so little on substance that there are criticisms that the real or only beneficiaries of the law as now practised in Delaware, are the lawyers advising the defending boards. Directors and their advisers questing for absolute certainty prescribe over-elaborate processes, separate committees, outside advice, adjournment, making sure that there is a succession of procedural process guidelines which have been followed and in place so that the Courts never get to the substance of decision. A smokescreen of paper trails and role playing, one commentator has called it.

Even so, there are some inquiries into matters of substance which I think the Courts are well equipped to make, and ought to make, especially into questions of fairness in no conflict and corporate opportunity cases. These cases seem to me to be far better settled by judicial inquiry based on proper evidence than as we have traditionally done, leaving it to shareholder ratification or shareholder inertia to settle.

I pass over the corporate constitution and, lastly, would like to say a brief word about the modern phenomena of nominee directors, joint venture directorships and overlapping directorships generally.

We are now seeing, in New Zealand and Australia, proposals for legislative reform coming up with some positive rules. For a century or more, we have had the common law which has no policy at all, and very few thoughts on these issues. At the very least I think, it has to be recognised that nominee directors are a fact of business life; that they do, on the whole, have a beneficial function, and that those who are nominee directors are anxious to observe standards of good conduct and behave prudently. The proposed New Zealand reform which would, subject to appropriate disclosure, acknowledge their role but impose some directoral duties of confidentiality and so on on their nominators, seems to me to be a positive start. And it is only by experimentation, and by discussions in forums such as this that we will ever be likely to achieve our aim of getting the balance right.

Now I think I have gone on long enough, and I am anxious, as I know you all will be, to hear our later speakers on the various topics which have been assigned to them, so I shall make way for them now.

Professor Baxt

Thank you very much Dr Sealy.

Now we have three commentators, ladies and gentlemen, who will address us. The first of the commentators is Dr Ola Orojo, who is the Chairman of the Law Reform Commission of Nigeria. Dr Orojo, apart from being the Chairman of the Law Reform Commission, is a well-known writer in this field of Corporate Law, and I will ask to address you on his commentary on Dr Sealy's paper.

Dr Orojo

In the main paper, you will find that all the important issues, I would say, on this topic have been clearly highlighted in very characteristic ways in a very lucid and easy to follow manner. What I have intended to do in my paper, which is, as you see, a very short paper indeed, was merely to supply some emphasis in so far as these problems relate to developing countries, and in doing so, quite understandably, I have chosen to use the Nigerian situation as an example because this is one with which I am fairly familiar.

Striking the right balance between the directors' freedom to manage the business of the company on the one hand, the protection of the interests of the shareholders, or, in other words the accountability of the directors to the shareholders on the other, has been one of the major preoccupations of company law.

In my paper you will note I refer to two matters in particular which I think are important in the context of the developing countries. The first is the level of education and understanding and the lack of appreciation of the role of directors and the rights of the shareholders themselves among the people who, in fact, are the shareholders. The second arises, or is more complicated by the second, which is the rapid spread of share ownership by members of the public through deliberate government policy. As most people will be aware, in developing countries, because of the paucity of finance and expertise, in the early stages of the growth of these countries, the commercial enterprises were undertaken by the government. But the time came when the government had to go on subsidising them. As so, in Nigeria in particular, the reverse order has been given, and that is a situation where the government enterprises are now being passed on to the public. They are being sold to the public, shares are being offered to the public and this is why I am saying it is a deliberate government policy to spread the ownership of business, and therefore the shareholding, as wide as possible, and indeed to every stratum of the society and down as much as possible to the grassroots. It is a very massive programme of government, and as a result, shares in these enterprises are spread right through the society, and that, of course, makes the problem which we have spoken about a little bit more difficult. Because we now have, in fact a large number of people who are shareholders without really understanding what it really means to be shareholders. And one has to rely largely on the good nature, the understanding, and sometimes the kindness of the directors to be able to ensure that the interests of the shareholders are protected.

Now in dealing with the subject, the main speaker dealt with specific areas, for example, the role of legislation. Legislation, of course, in the context of developing countries must be very important, if only to ensure the certainty of the law. The rights, duties, and powers of the parties must be asserted in the circumstances which we are talking about. It is suggested that this can be done by spelling out the more fundamental principles of company law relating to these matters, so that not only the directors will understand what it is they are expected to do, what their rights are, but also the shareholders can be advised as to what their rights are and what their obligation also are.

While one must then have in mind the fact that the mere statement of the rules will not, in itself, achieve the desired end, in my paper I also express the view that in the society where modern company law is just taking root, and where precedents by way of examples or of Court decisions are scanty, a clear statement of statutory duties, powers and rights, is desirable, if only as a starting point. This has been the approach in Nigeria, especially in very recent times, particularly with the new company law which has just been promulgated in the country. In the course of promulgating this law, the area has been one of those that has been very carefully considered. Indeed, it was necessary to bring in the various participants the directors, shareholders (there was an association of shareholders), these people have all been brought in so that the main problems, the real problems, can be discovered and some ways can be found to resolve the apparent conflict between the directors and the shareholders.

The company, an enterprise, requires to be very well managed, and that is the responsibility of the directors. But the shareholders also have their own rights, as being, so to speak, the owners of the company, and so in the performance of their various functions, there is very likely to be conflict and some efforts have been made. One would not say that a solution has, in fact, been found, but efforts have been made to find ways by which these situations can be eased, where the apparent conflict can, to some extent, be resolved. One of the ways in which this has been done is to spell out very clearly the duties, the rights and the obligations of the various parties in this regard.

As has been pointed out, there is very little disagreement about what these duties and rights and so on are, but one has to look at these rights and duties in the light of the background, the social environment of the various communities, and this is what has been attempted in the case of the law in Nigeria, to which I refer. The decree makes a number of provisions which deal with problems under consideration, and some of these relate to the sharing of powers between the directors and the shareholders. Some of the common law rules have been streamlined and have been enacted to make sure precisely what the law is and, to some extent, to ease the work of the Courts. There is also provision for the duties of the directors, the fiducial relationship, the duty to observe good faith, and to act honestly; all these are common law principles. They have been stated and in some cases slightly modified in the light of some circumstances which have been observed in the course of the years. There are also provisions in relation to disclosure of directors' interests as we have in some other jurisdictions. There are also the duties of directors where they delegate their powers. While the duties of the directors can, to some extent, be avoided or shirked by delegation, there is provision in the Act as an attempt to prevent the director from refusing to perform his duties by merely delegating his powers or authorities to somebody else. And also, there are provisions to try to avoid a conflict of interest between the interest of the director and the interest of the company, or the interest of the shareholders, as the case may be. This particularly, in regard to multiple directorships.

Now in the paper, I listed all these, and I concluded that in a developing country, where modern companies are still largely foreign and to many people it is still a foreign institution, it has not really taken any deep root, to many of them, that is what it is to the majority of the people, and they are fast becoming shareholders. I suggested that there is a greater need to state in some detail the rules that will ensure reasonable balance between their rights and powers, and those of the directors to whom they have given the power of management.

On the rule of the Court, I have mentioned how the decree has tried to provide the shareholder with the means of redress through the provision of access to the Courts and how, in this case, indeed there is in the new law provisions for a corporate body that will administer

the company law, and in the light of the circumstances of the country, many shareholders may not be in a position to really exercise their powers of redress, and so there is further power given to this corporate body, we call it a Corporate Affairs Commission, to take such actions in cases of illegality or unfairly prejudicial action complained of by shareholders. And this way, it is thought that it will be possible for the interests of the shareholder to be more readily protected. And also referring further to the shareholders, it might be I have touched also briefly on the ineffectiveness of the shareholders, vis a vis the Board. For example, we think it is generally agreed today that with the machinery vested in the management of the company that the shareholders, particularly in less developed countries, can quite easily be marginalised. Many of them, apart from not understanding, do not see why they want to come and attend meetings, unless there is something to gain when they are told when they invest there is some profit coming to them. Unless there is some profit coming to them, they do not have the urge to want to continue to participate in the actions or the activities of the company. And in any case, this participation is probably only once a year. I am talking in particular of the company and so an effort has been made here for example, to attempt to assist them by creating an Audit Committee – it may be a little unusual. There is an Audit Committee for every public company where you have equal numbers of directors and of shareholders to look at the financial statements and so on. And also there is a Securities and Exchange Commission which, in the cases of merger and acquisitions is given substantial powers to decide what is reasonable in certain circumstances.

Now these are the main areas I have set out. And in conclusion I have said that the search for the right balance between the accountability of directors and the freedom of action to manage the business of the company is bound to be a continuing one, and the degree of success will vary from jurisdiction to jurisdiction, depending on the social and economic system of the jurisdiction. And I say further that in the developing countries, the balance will appear still to be tilted in favour of directors' freedom of action at the expense of accountability. To redress this will involve not merely legislation, but improving the social and economic lives of the people so that they are better educated and equipped to appreciate their role and duty in the management of the business companies and to participate accordingly.

Professor Baxt

Our next commentator is Mr Michael Walls, who is a partner in the firm of Chapman Tripp Sheffield Young, who has an extensive practice in this field of corporate law. I had a great deal of sympathy walking across with Michael when I learnt that he spends almost as much time as I do on planes between cities in order to do justice to the clients that he has to serve.

Mr Michael Walls

Mr Chairman, your Honours, and if that leaves any of you after those greetings, Ladies and Gentlemen.

In commenting today on Dr Sealy's paper, I have chosen to focus on one aspect of his remarks, and that is the passage where he said, and I quote:

> If the object of the legislative reform exercise is to raise standards of director behaviour, it is questionable whether this is achieved in practice apart from what little is gained by way of publicity. For instance, there seems to be no getting away from the fact that delegation of responsibility to others and reliance on their trustworthiness is inescapable in business life, and the difficulties of making absentee, inattentive or unskilled directors liable for the defalcations of others are notorious, particularly as regards the issue of causation.

The topic of my commentary paper, and of my remarks today, is the duties of company directors which may properly be left to some other official.

Dr Sealy is pessimistic that legislative reform, such as that attempted in Canada and suggested by the Cooney Committee in Australia, can achieve anything worthwhile in this area. Such rules sound very fine, he says in his paper. The challenge is to make them workable in practice. He regards the process as tinkering with the substantive duties and says that legislation cannot be drafted in sufficient detail to anticipate and deal with questions of substance. Our learned Chairman today, Professor Baxt, has recently written a number of articles commenting on the views expressed by the President of the New South Wales Court of Appeal, Mr Justice Kirby, in his dissenting judgments in *The Metal Manufacturers* and the *Darvell* cases. He has expressed his faith in the ability of the Court system to police these duties. The Courts will not allow a clear abandonment of these obligations, he says.

With respect, I disagree with both Dr Sealy and Professor Baxt. I believe that directors in many jurisdictions abdicate their duties by delegating them more frequently than is either realised or warranted. That this is inconsistent with shareholders' expectations of directors and that legislation could temper, if not halt, this practice.

My published commentary paper tries to set the scene by taking you to a classical re-statement of the older authorities. Although the principle we are dealing with is an old one, it is not necessary to go back to Noah to find its best expression. As an aside, I should point out that even Noah was an authority on commercial matters, for according to the Bible, he floated his company when the rest of the world was in liquidation.

My paper starts with Mr Justice Romer in the *City Equitable* case where he gave or distilled three propositions from previous case law with respect to duties which the common law imposed upon directors, and their liability for breach of those duties. The third of his propositions was that in respect of all duties that having regard to the exigencies of business and the Articles of Association may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. My feeling is that given the flood of corporate failures, which both New Zealand and Australia are experiencing, and

which may even be paralleled in other jurisdictions as a result of the October 1987 sharemarket crash and its failed companies who are seeking to exonerate themselves from responsibility and liability, the plea that they trusted in executives or officers of the company, or they relied upon the Chairman or the Chief Executive so that the directors themselves are not to blame. It is, I think, timely to examine the justification today for that kind of plea.

The common law liabilities of company directors, I say in the paper, for negligence in the performance or non-performance of their duties, are recognised I think in most or all Commonwealth jurisdictions, and they are added to by a number of statutory, civil and criminal liabilities. In respect of both the civil and the criminal statutory liabilities, in many jurisdictions one often finds exculpatory provisions which say that the director can be excused from responsibility and liability, usually by a Court, if the director has exhibited reasonable behaviour. It seems likely to me that a Court would at least be influenced in its attitude to what was reasonable behaviour, even in the context of these statutory offences or liabilities, by the standards imposed at common law in civil cases upon directors in exercise of their duties of diligence, care and skill.

Major textbooks generally accept the third proposition of Mr Justice Romer without dissent, with the rider that directors can rely on the proposition only where the circumstances give no grounds for suspicion. The general proposition is supported on grounds that it is obvious that a company could not hope to run its business in an efficient manner if the directors were required to do everything themselves, and were not permitted to delegate on a wide scale. An intelligent devolution of labour must be possible, it is said. Having permitted delegation, the law does not require that the director should distrust and constantly supervise those to whom tasks have been delegated, for this would defeat the whole purpose. In the United States, commentators have said because most directors are not involved in the day-to-day operations of the business, they are dependent upon officers and other employees for information and guidance.

The apparent ability of directors in the Commonwealth and the United States, though, to escape from liability does lead to one apparent conflict between those classic statements of the law, and I think present day perceptions. It is a long time, now, since Louis Brandeis said: "the only justification for a director's existence is that he should direct". The precise boundaries of his meaning are not clear, but it seems that at least he envisaged a role tending more to the active than to the passive for directors. Such a perception, I submit, is in keeping with the attitude taken towards directors by shareholders, creditors, and the investing public in most countries, not least in New Zealand. But if the proposition permitting delegation were to be followed rigorously in future cases, it would provide, or continue to provide, a powerful incentive towards the evolution of the not involved kind of director. A director would be encouraged to maintain a head in the sand attitude on company decisions, except where involvement could not be avoided. The pressure would be, or would continue to be, for directors not to inquire into difficult matters, not to attend meetings unless it were essential, and to protect themselves individually, or as a board, by obtaining advice from lawyers or other experts on particular matters, even where that advice might not be very apt, or very well informed. It is a short step, I suggest, from such a situation to that where legislators, shareholders, creditors . . . [Break in tape, during which the speaker referred presumably to the case of *Smith v Van Gorkom* and continued] . . . powers concerning a takeover offer for all the share capital or stock of their company. The majority of the Court, and the majority was 3 to 2, summarised their reason as follows:

> The directors did not adequately inform themselves as to Van Gorkom's role in forcing the sale of the company and establishing the purchase price, were uninformed as to the intrinsic value of the company, and given the circumstances, at a minimum were grossly negligent in approving the sale of the company upon two hours' consideration without prior notice, and without the exigency of a crisis or an emergency.

Now that decision has caused a furore in the United States, but it has led to the realisation, in the words of at least one commentator, that one lesson of that case is of the price of giving deference to the business judgment of the directors, and the consequent protection from liability under the United States Business Judgment rule is that the board must do its homework thoroughly and deliberately in its decision making processes.

Now I am conscious, as you are, that the United States Business Judgment rule comes from a different parentage in corporate jurisprudence from the due process, proper use of duties approach which the Courts in the Commonwealth have adopted, but I think you will agree that its role or its purpose is similar to that which we are well used to in the Commonwealth. It is a protective device, and a device only to keep the Courts from inquiring too much into the affairs of the company where no gross negligence or conflict of interest or fraud can be shown. But it does seem, even in the United States, the Courts are beginning to question whether the boundary line should stay where it has been.

In my paper, then I submit that there are real issues which are likely to become topical in several Commonwealth countries, as to the relevance of the standards accepted until now. I believe that we can hasten the development of the proper standards by thoughtful legislative amendments and that it is not a sufficient answer to say that that is something which can be left to the Courts. I believe it is dangerous, in fact, to leave this problem to Judge-made reform, even though some might see encouraging signs already in that process. Some of the criticism which can be made of the case by case method of reform I suggest are powerful. It is inherently retrospective, it is chance driven, it is unsystematic, and the Courts in any jurisdiction are not uniformly staffed by Judges who perceive a need for urgent reform.

With regret, then, I appear to disagree with Dr Sealy and

Professor Baxt. But I do suggest that the problems which exist in this area, as all seem to acknowledge, should be, and can be, improved by thoughtful, legislative reform on the basis of the existing Companies statute.

Professor Baxt
Thank you very much, Michael. At least we have one issue that might foster some debate at the conclusion of our next commentary. I'm sure there will be others.

Our final official commentator in this session today is Mr Richard Sykes, QC, who is a leading commercial barrister in the London Bar. He is a consulting editor of *Gore Brown*, one of the leading works in company law. I understand he has a connection with New Zealand as his wife is a New Zealander and I ask him to deliver the final commentary on Dr Sealy's paper.

Richard Sykes, QC
I start with two apologies. The first is that if my words are not to your liking, the explanation may be because I was at Cambridge sufficiently long ago that I did not sit at the feet of Len Sealy. There are 30 years' worth of law graduates practising law over the world who took their first halting steps in company law at Len Sealy's feet. I am proud that my daughter was one of them. I, alas, was not.

My second apology. Try as you may, you will not find a paper written by me in the large volume of conference papers. I confess, I simply failed to put anything on paper until yesterday.

Mr Chairman, what I propose to do today is to focus on one small aspect of directors' duties, that is the duty of directors in the case of takeovers. So you cannot, perhaps, describe my paper as a commentary, but rather as an amplification, and particularly, I am focusing on the duties of directors of offeree companies, companies for whose shares an offer is made. Takeovers, I know, are rather out of fashion in this part of the world at the moment, but who knows, they may come back.

The duties of directors of a company which is making a takeover bid I need say nothing about, because, subject to regulatory requirements in the particular jurisdiction, the duties of directors of such companies are substantially the same as their duties in the case when they purchase assets or effect any other transaction on behalf of that company. Parenthetically, however, I note that the New Zealand Law Commission comments that shareholders in offeror companies, have not been well served in takeover regulation. I do not, myself, believe that to be the case in England.

The real question, in relation to directors of target companies, of offeree companies, is this. Is their role merely that of advisers, who must ensure that their shareholders have all the necessary information and advice to enable those shareholders to make their own informed decision whether to sell or not, or do the directors have some duty to obtain the highest price for their company shares, and to protect shareholders from predators who seek to acquire the shares of the company at a price which the directors conceive to be inadequate? In short, should directors be advisers, or should they be protectors? I will state my own view at the outset. I consider that the proper function of directors is to be advisers and only advisers, and I have two reasons for holding that view. First, it is the shareholders, not the directors, who own the company and who, if properly informed, are entitled to sell their property at whatever price they, the shareholders, are satisfied with.

Secondly, it is a very fine line between acting to protect the shareholders and acting to protect the directors' own position, remuneration and status, and even their membership of the local golf club. Directors should not be allowed to put themselves in a position where this potentially serious conflict of duty and interest may arise.

Now is the view that I express legally justifiable? I think it is, and I will look at the fundamental duty of directors and the proper purposes doctrine rather quickly, because we do not have a lot of time. It is, I think, universal in the Commonwealth, that the fundamental obligation of directors is to act bona fide in what they consider to be the best interests of their company. That is how Section 101 of the draft New Zealand Companies Act propounded by the Law Commission expresses the duty. The commentary on the draft decides to duck the question, whether by the term "the company" is meant the company as a commercial enterprise itself, or its present and future shareholders collectively. My own answer to that conundrum is that the company means the enterprise itself, but that in most cases, and most situations of a solvent company, the interests of a company can be taken to be identical with those of the shareholders collectively.

I am not aware of any Commonwealth country in which the general duty of directors has been held to be that of acting in the interests of shareholders as such, or, in more detail, where the duty has been held to be to obtain for shareholders the highest price for their shares. There can, of course, be special cases where directors are under such a duty to shareholders, such as the New Zealand Court of Appeal case, *Kelvin v Myers*.

So the starting point for justifying legally the view I have expressed is that directors don't normally owe duties to shareholders of the kind mentioned. In this connection, I commend to your attention a Scottish decision, a very careful analysis by Lord Cullen. The case is called *Dawson International v Coats Patons*. Then I turn to the proper purposes doctrine. The directors of companies are given powers to do acts in the name and on behalf of their companies by the Constitution of the company. Those powers are given in express detailed terms, or arise as part of a general power to manage the company. The directors may not use the powers that are so given them for purposes other than the purposes for which they were given. That sounds a little double Dutch; I will try and expand.

There are decisions back to the early years of this century in which the Courts, acting on this principle, have struck down issues of shares made not for the company's business purposes, but in order to secure control at general meetings. These have been particularly clear cases since first the power, given to the directors to issue shares, is almost always expressed in the widest terms, so that on its face, the

power clearly permits the impugned issue. And secondly, the purpose of the issues has, in these cases, been obvious. But it is clear, I believe, that the principle is not confined to abuses of the power to issue shares.

The leading case, I consider, is *Howard Smith v Ampol*, a decision of the Privy Council on appeal from the Supreme Court of New South Wales. The speech of Lord Wilberforce, which represents the Privy Council decision, is a tour de force, I consider, and repays most careful study. The correct approach to the exercise by directors of any power, says Lord Wilberforce, is to go through a three-stage exercise. First of all, consider the power whose exercise is in question. Secondly, identify the limits within which it may properly be exercised. Thirdly, examine the substantial, or causative, purpose for which it is exercised, or was proposed to be exercised, and decide whether that purpose was proper or not by reference to the limits already established. Lord Wilberforce makes it clear that the Court should always respect the directors' judgment as to matter of management. Judges are not managers after all and should not "second guess" decisions of management within their proper sphere. What Courts will and should do is to determine the substantial purpose designed to be achieved by the exercise over a particular power, and accordingly to decide whether the exercise falls, or does not fall, within the proper sphere of management. Given that the duty of directors is to act in the best interest of their company, and not of individual shareholders, given that directors have their powers for the purpose of managing their company's business, the doing of an act, whose primary purpose is to thwart a takeover by a particular offeror, or to support a preferred suitor, does not fall within the proper sphere of management, and is not a use of the relevant power for a purpose for which it was given.

In summary, I believe my view of what the duties of directors in takeovers ought to be is in accordance with the law in the United Kingdom, and in most, if not all, parts of the Commonwealth. Directors must, of course, advise and inform shareholders fairly and fully. In many jurisdictions, duties of this kind are imposed by statutory or non-statutory takeover regulations. To interfere with the course of a takeover, and in particular, to erect barriers against unwelcome suitors, is not part of a director's fundamental duty to the company, and is a breach of the duty not to use their powers for collateral purposes. I feel comforted that the New Zealand Law Commission considers the duty of directors of target companies should be limited in the way I have described.

Section 178 of the draft Act imposes three positive duties on directors of target companies, all of them of an advisory nature. The section provides that directors must inform all shareholders whether, having regard to information known only to the board, the offer is clearly inadequate, whether any director intends to accept, or recommend acceptance, and of any direct or indirect interest that any director has in the offer itself, or in the offeror. Interestingly, these duties are particularly apt in cases where directors are motivated to support an offer which may not be in the interests of shareholders to accept. In the case with which I am more concerned in this paper, where directors seek to prevent a particular takeover, or seek to entrench their position against takeovers generally, the Commission's view is that various express provisions of the draft Act, including the statutory imposition of the duty to act in the best interests of the company provide a framework within which directors seeking improperly to entrench themselves can be held to account. I concur with that treatment, provided that the line is held, and any narrowing of the principles adumbrated in *Howard Smith v Ampol* is resisted. I rather feel, reading some recent Australian cases, that the Courts in Australia are moving gradually away from *Howard Smith v Ampol* and that that case is only hanging on by its fingertips on the other side of the Tasman. I would be interested to hear what the Chairman of the session has to say about that.

Now, my time is really up. I was going to say a little about the States, but I think I will not. I look forward to the opportunity of discussion on the points I have made. I believe I may get more support for the view I have expressed in this gathering than I would in a gathering of business men. Business men justify what I call entrenchment as saving shareholders from themselves and their own foolishness, and protecting good businesses from short-termism by shareholders. My answer is the shareholder choice, foolish or otherwise, is a necessary concomitant of the corporate structure, and of the raising of capital from members of the public.

Professor Baxt
Well, ladies and gentlemen, I think you have heard four excellent speakers who have presented a wide range of views on the subject of directors and the company they keep, and I would invite you now to make comments or ask questions from the floor.

Saul Froomkin (Attorney-General, Bermuda)
I confess I am surprised that Mr Sykes did not refer to the one case in the Commonwealth which rejected his view, in Bermuda, as a matter of fact, and I wonder why it certainly is the one case on point, and we have not heard a word from him.

Richard Sykes
I find it difficult to comment on that case. It is perfectly true I was in it. I was in Bermuda for three and a half months, as a matter of fact, on it.

Professor Baxt
Could you tell us what the name of the case is?

Richard Sykes
The name of the case is *Stella v Sea Containers*. I do not know whether it is reported in any Bermuda Reports. I think it is a little difficult to say that there is now a clear principle established in Bermuda law which is inconsistent with the law in the rest of the Commonwealth. But I think beyond that, I would really find it difficult to make any comment at this session, especially on a case in which I was involved.

Professor Baxt
There is, of course, the decision in *Darvell* which a number of speakers

have referred to, in which at least one of the views that Mr Sykes has put forward was not supported by the Court. Indeed, that was a split decision, and yet I think all Judges put the view that it was the duty on the part of the directors to get the best price possible for the shareholders in that particular situation. Are there any other comments or questions from the floor?

Douglas Meagher (Australia)
I suffer the misfortune of being asked to apply the criminal law to directors who have broken their duties. And I question the extent to which we are seeking to apply the criminal law as distinct from the civil law to them. In my experience, which now passes over quite a number of years, the discovery of the criminality of the act rarely occurs before the collapse of the company. It almost always follows the collapse, and it does not follow on it closely. There usually has to be a report by a liquidator or a receiver, followed then by investigation by a Corporate Affairs Officer, followed then by referral to the police, perhaps, followed then by preparation for committal and trial. The experience throughout most of the western world has been that that is rarely done within five or six years of the collapse of the company, and the directors are then brought before the Court and it is equally rare in my experience that the issues can be restricted to a few. Usually, the matters are broad, involving lengthy trial.

Now, I have noticed that in recent legislation in Australia, there has been an increasing tendency to impose very substantial penalities for breach of duties – a five year prison sentence is to be found repeatedly in the provisions. I question the ability of the law to really enforce those penalties. My own experience does not speak well of it. I think it is becoming very hard to get the matters on in a timely fashion. It is becoming even harder to get them to completion. I would suggest perhaps the panel's consideration of whether such penalties should be reserved for areas where fraud, in its common law sense, is established. They should not be extended to areas which involve something less than that, and I would suggest further that it is time that we thought of divorcing that from our company law and company regulation, putting it back into our criminal legislation, treating it as criminal, and not seeking to enforce corporate law by reference to such sanctions.

Professor Baxt
That is a very important and interesting comment, Mr Meagher. In the Cooney Report, I would perhaps ask Dr Sealy to expand this, there is, in fact a specific recommendation along the lines that you have suggested. I wonder, Len Sealy, if you would like to comment on this further.

Len Sealy
Well, not to say much more. It is true that the Committee has recommended that criminal liability under Companies legislation should not apply in the absence of criminality. Where appropriate, civil penalties could be introduced into company law to cover those places where it is important to sanction misconduct of directors where the conduct falls short of a criminal offence. I think it is true to say also that the New Zealand Law Commission Report says that if the matter is criminal, the criminal code can deal with it, and it should not be anything to do with a Companies Act.

Michael Walls
This a situation where I think many directors find that they are facing what is sometimes called the tyranny of hindsight, and five or six years' later's hindsight. It is very hard to get the real thought of what happened. The pressures that actually existed, the balance of pressures at the time which led to a particular action, which in the cold harsh light of some years later is examined. So there is that inherent difficulty anyway in arriving at some form of justice.

And then I think it has been considered by some commentators that the criminal law in this area is at best only a surrogate for the people who are really hurt and who have been damaged by what has gone wrong. The problem is that shareholders, and people in that situation, hardly have the means with which to make some sort of effective protest against whatever they find unpalatable, and that is partly a question of purse, and partly a question of lack of access to information. But if you can solve those problems, and I think the New Zealand Law Commission recommendations attempt to solve them, then there is no place for the criminal law. I would agree with the speaker.

Professor Baxt
Any other comment from the panel? I would just like to say this. That in relation to the comments that Doug Meagher has made, the members of the Australian National Companies and Securities Commission have expressed their frustration on more than one occasion about the very points that Doug Meagher mentioned, and I think it is a comment that would be shared by regulators having to administer criminal statutes in this area in Australia. And, of course we are talking about the State Corporate Affairs Commission as well as the national body.

Alan Dunch (Bermuda)
I am from Bermuda as well, and I would like to address a question to Mr Walls in particular, arising from your most interesting paper.

As most of you will be aware, Bermuda derives a great deal of its gross national product from what we call our exempt company business, it is, of course, encumbent upon lawyers to act in the capacity as a director. We have, of late, been criticised from time to time for delegating directors' duties to people who are not, in fact, qualified as directors. And that has given rise to the very interesting question of whether or not, as a matter of common law, you can have something called a "de facto" director. As Mr Sykes will confirm, under the English legislation, that is now a recognised concept, but is only recognised as a result of legislation, and I would be interested, Mr Walls, to know (a) whether you endorse the concept of a common law de facto director, and if you do whether you would be prepared to say that the de facto director should be charged with the same liabilities and responsibilities as an actual qualified director.

Michael Walls
I endorse the concept through you, Mr Chairman. It is not perfectly recognised in New Zealand company law at this moment, although there have been suggestions which would make it possible to recognise it. But it does seem to me, quite apart from the exempt company situation which you mention, that there are many directors who are effectively nominee directors. There are certainly nominated directors in many companies in many jurisdictions. They are not always apt to exercise their independent judgment on a lot of issues which come before the board, and I think the people who cause them to act in some ways, or in a particular way, should be regarded as de facto directors and, yes, should be visited with the same responsibilities to the extent that they have exercised powers and responsibilities relating to directors. But I would not thereby absolve the original director from his or her own responsibility. It is a matter of shared responsibility, but both parties should be conscious of the power they wield and the responsibility that lies behind it.

David Goddard (New Zealand)
I wanted to make a brief comment in relation to Mr Sykes' qualified endorsement of the Law Commission's approach to takeovers. I should declare an interest, which is that I was one of the two draftsmen of the Law Commission's Report, the statute.

In relation to the distinction between the company and the shareholders, that was actually an issue which the Law Commission rather felt that the common law had fudged and attempted in the Report to distinguish so that in some sections, for example, section 30 dealing with consideration for issue of shares, there is a distinction between the interests of existing shareholders and of the company, and the duty in section 101 that Mr Sykes referred to is deliberately intended to be a duty owed to the company, and not to existing shareholders. That is reinforced in the enforcement part of the Act which provides that only the company can sue for a breach of that duty, and not individual shareholders. So I do not think the issue is fudged, although possibly it was clarified in a manner that Mr Sykes would not approve of.

Richard Sykes
I think what I said was that the Law Commission decided to duck the question, and I do not criticise that. I think it was eminently sensible, and I mean the explanation for ducking it was again, it seems to me, an extremely sensible reason. They said effectively: "Don't let's waste time on this. We actually deal with the question by dealing with who has the remedy and when." So if my words sounded like criticism, they certainly were not intended to be.

David Goddard (New Zealand)
It was simply made as a point of clarification. Having spoken to a few real businessmen about whose attitude you were concerned, we felt that there was a sufficiently real distinction between the body of the shareholders and the company that it was, perhaps, recognised.

Peter McKenzie (New Zealand)
Perhaps, like David Goddard, I should declare an interest, being recently appointed Chairman of our Securities Commission here. But I was very interested in the comments, particularly of Mr Sykes on the regulation of takeovers, and can assure him that although New Zealand may not have been, or may not be, particularly well served at the moment in terms of legislation in this area, that there is a Takeovers Bill ready to go, in draft form, giving effect to the recommendations in the Commission in that area.

But perhaps if I could add two thoughts there. One in relation to takeovers regulations. It appears to me that there is a need for a regime outside or alongside the Companies regime or the Companies Act to deal with takeovers, because directors' duties alone do not address the total problem, in that we have devolved, of course, at least two, sometimes more than two, corporate entities in the takeover process and there are duties owed, of course, by the directors of the target company to their shareholders, by the bidding company to their shareholders. One needs a takeover regime to encompass the whole process, and that is an area which the Takeovers Bill seeks to address, and in that respect, of course, in New Zealand we have looked abroad because of the need to see what is done in relation to the regime there to regulate takeovers in the other common law jurisdictions.

Alongside that I could perhaps make the point, too, that it seems to me in relation to takeovers regulations, that to rely alone on the fiduciary principle or on director's duties may not be enough in the sense that we then are dependent on a case by case process as the Courts grapple with the outcome of individual takeovers. A clear statement of intent in relation to controlling the takeovers regime may be preferable. I speak here, of course, of a procedure that Mr Sykes will be well familiar with, and that is the mandatory bid procedure applied by the Takeovers Panel in Britain. And that is the procedure which has been proposed here. It would mean that, rather than a case by case approach to directors' duties in the individual situation, directors of both companies or all companies in the process are immediately aware of their obligations where the threshold of, in the case of the UK Panel and what is proposed here, 30% is passed. Once that is passed, those involved know immediately of their obligations in the matter and one does not have to inquire further, if you like, into the obligations towards minority interests or other parties involved. And that clear statement, if one could put it that way, may serve better in the protection of individual interests, than the duties approach to the problem.

But moving to another area as well, which is of particular concern to us in the Commission, and that is the new legislation we have in New Zealand on the prohibition of directors, or some have called it the directors' "hit list." That is difficult jurisdiction in which the Registrar of Companies is involved, backed up by advice from the Securities Commission on the case of each recommended prohibition. Once again, difficult lines have to be drawn and we have to grapple with the question whether in individual cases we have an element of irresponsibility, whether we have an

element of legitimate risk taking. And so some of the same issues which affect us in the civil area arise there also, although one could point to difficulties in our section which refers simply to causation, and nothing more is spelled out. Much is left to the discretion of the two bodies involved.

But an interesting point, perhaps, for Michael Walls is whether of course any attention at all needs to be paid to the delegation factor under that section. Can a director be prohibited, simply because he has failed to act in the particular circumstances, notwithstanding that he may claim to have relied on the actions or advice of others?

Michael Walls
If I might just add briefly, Mr Chairman, I think the jurisdiction is a very dangerous and very responsible one. I know it is exercised responsibly, but it is something which takes place outside of public scrutiny. It could be regarded as Star Chamber. It is very dangerous and I would think the expression of caution, which Peter mentions, and the questions which he properly raises, ought to be thought about very carefully indeed by the Securities Commission before acceding to the Registrar's request for wholesale banning orders of directors.

Richard Sykes
Could I just add, perhaps rather flippantly, I am interested in which Peter McKenzie says, and I hope that the takeover code will, in future, be regarded rather more highly than it has been in the past. A few years ago I was in Auckland, and I went to the Stock Exchange because I wanted a copy of the Takeover Code, and I said to the girl behind the desk: "Could I have a copy of the Takeover Code". and she said "Oh, is that a board game?" and when I said that it was not, she rang somebody in the back office and said: "There is somebody here who wants something called the Takeover Code. Do we have that?" So it did not really seem to have much credibility around this town at that time.

Len Sealy
On the subject of banning orders disqualifying directors by executive fiat, I must myself express the same disquiet that we have just heard Michael voice. In the United Kingdom recently, there has been a major hullabaloo about certain directors of the house of Fraser, the company owning Harrods, who misled the public authorities in what were regarded as a succession of frauds. The newspapers clamoured loud and long for the Secretary of State to disqualify the individuals concerned from being directors, but the truth was that the Secretary of State had no power. The only power he had was to make an application to the Court for a disqualification order, and he satisfied himself that even with a report made by inspectors to that effect, he did not have the evidence which would justify a case being brought to Court on the basis of public policy. So I think open justice is definitely something to be fought for in this context.

Stephen Franks (New Zealand)
I was interested in Mr Meagher's very eloquent summary of the arguments against criminal penalties for directors' conduct and also in the panel's apparent agreement with that, but that seemed to me too easily assuming that civil vengeance would work, or could work, where criminal vengeance was too cumbersome or too delayed. I am concerned because it appears to me that many of the same issues arise, and I did not see anything or hear anything in the papers which, in effect, called for or supported cranking up the standards of directors' duties. A recognition of what the economic consequences might be, not only in the sense that directors and shareholders, that it is possible for companies and shareholders to specify the standard of what they want out of directors if they are concerned about that. It seems that in some respects, these calls would put on directors a higher standard of duty than contracts place on executives whose performance standards are stipulated. But I am concerned about what happens when you take from shareholders and creditors the responsibility of deciding who will conduct contracts for them, and who they will contract with and give it to Courts in hindsight, because it is just a loss shifting exercise, unless it actually changes some business conduct and stops losses occurring. If it does not change business conduct, when the loss occurs we profit as lawyers, while the Courts decide whether someone is liable. If there is insurance, the insurance spreads it across the entire business community, instead of the shareholders and creditors who are more directly involved. It there is no insurance, then to the extent that it can be met out of private resources, it is. That may satisfy the desire for vengeance, but has very little to do with genuine loss shifting. I am just concerned that it is very easy for us all to call for vengeance on those who have been lax, without recognising that in the long run, for many of these people, loss of reputation and loss of ability to mobilise resources again the same way is the traditional market remedy, and it is a remedy which is far more effective than pursuing them through the Courts where they actually acquire sympathy and where people rally around them.

Professor Baxt
That is an interesting comment, Steve. I just wondered how the Australian Regulators feel about that switch, which is apparently the way in which it has been working in Australia in the context of the reputation of directors in Australia. We just have not seen the effective use of the Courts in this area in recent times.

Ladies and gentlemen, we do not have time for any more questions or comments. I have enjoyed very much the privilege of chairing this session. We are indebted to a number of people for the success of this session. We are, of course, indebted to our speakers – to Dr Len Sealy for a very stimulating and provoking paper, Dr Orojo, Mr Walls and Mr Richard Sykes. We are indebted to you, ladies and gentlemen, for your very interesting and stimulating questions and comment, and not least, we are indebted to Mr Paul Darvell who helped put this session together. Join me in thanking them. □

Ninth Commonwealth Law Conference April 1990

Careers, lifestyles and legal practice

Julian Miles (Chairman)

Ladies and gentlemen, Colin Pidgeon has already apologised that the charismatic Geoffrey Robertson who was supposed to be chairing this particular session is not here and I am filling in. I apologise that it's simply an indigenous product of Auckland rather than Mr Robertson whom many of you would have no doubt wanted to hear from. Nevertheless with the customary modesty of all Chairmen I can say that it is not I you have come to hear but the four panel members. Now I think at least in the hour or two that I was aware before this session that I was going to be chairing it, the extent that I thought at all that the significance of this particular session is an important one is because it's talking about a dream – one of the most evasive or possibly insidious dreams that most if not all in the profession have dreamt at some stage or other, and that is simply leaving it and doing something else. Evasive I think for the members of the profession, insidious I think for their wives and husbands, who I think with some justification often feel that maybe they carry the brunt of the dream in the unlikely event that the dream is ever carried out. However, what you have here before you, ladies and gentlemen, seems to me to be four particularly impressive role models of members of the profession from around the world who have actually done just that. They have had specific careers and interests quite outside the law, have been extraordinarily successful at those as well as their profession, and they have come here today I think to tell you something of it. I say I think because in a naive sort of way a few minutes ago I said to them, I take it that you have prepared papers on this only to be met with a blank and I thought in the case of at least one of the members a slightly sheepish look. No they have not prepared anything, and are nevertheless confident that what they have to say should be of interest to you.

Ladies and gentlemen, I propose to introduce each of the speakers. The first is Gordon Lewis from Melbourne, a man who practised for many years as a solicitor and was then appointed Executive Director of the Law Institute of Victoria where he remained for a number of years. During that time he ran a legal radio programme, he wrote a newspaper column on legal matters for the Melbourne *Sun* plus a column on professional practice in the *Law Institute Journal*. He was also the co-author of a text which had the enigmatic title "Handy Hints on Legal Practice", something of which I'm confident we should not be without. And then in 1986 he was appointed Victorian Commissioner for Corporate Affairs where he remained until his present position which is Victorian Government Solicitor which he has been since June 1987. He has a number of outside interests as well which I won't bore you with but which he will tell you about if he thinks they are helpful.

Ladies and gentlemen, I have a great deal of pleasure in introducing to you Gordon Lewis.

Gordon Lewis (Australia)

Mr Chairman, distinguished guests. I spent my student days working part-time driving taxis and washing dishes and these activities proved to be far more relevant to legal practice than some of the subjects that we have been taught in the Law Faculty at that time. We had a funny subject called Public International Law that seemed preoccupied with ships colliding at sea. Do you know, I practised for 22 years without ever having two ships collide at sea?

The first solicitor to employ me suffered from a form of mental anorexia and indeed it's said about him that he would have been hard put to count to 21 without taking all his gear off. He owned two Rolls Royces, a Daimler and an FJ Holden, and for the New Zealanders present those are makes of cars. I knew from that experience that super-intelligence and great wealth weren't necessary travelling companions. I sensed that it was unlikely I would make a major contribution in either area, but after I wrecked his car on one occasion my employment came to an abrupt end there, and I practised four years in Richmond in Melbourne. Now this was a pretty tough area at the time. The Richmond police had a reputation for being pretty tough, and indeed it was said that they shouted "freeze" when arresting someone because it was so much easier to shoot a stationary object. I was in the minority in Richmond. All the other Solicitors were female and they didn't have offices and they worked mainly at night in Bridge Road. I practised there for four years. The hours were long and most nights I didn't get home until 8 pm. I had two sons who were under three and a daughter who was on the way and I never saw them.

I received an offer of partnership in Hamilton, no, not your Hamilton but Hamilton in Western Victoria which had a population of 10,000. I had twelve happy years there where I enjoyed the lifestyle, the horse racing, the golf club, cricket, my family, and I had a lot to do with bringing up my kids. I had the pleasure of kicking a footy with them at night after work. I had the pleasure of teaching the boys how to play cricket and morning and night I had the chance to help my daughter saddle and unsaddle a pony. At 40 I believe I had kept the wolf from the door and yet that I had really enjoyed life during that time.

But some of the country solicitors who are present will know there is a down-side, and the down-side in the case of Hamilton was the lack of anonymity. The size of the town made it so that the clients knew my telephone number, they knew where I lived, they could walk to see me at any time and I couldn't walk to work because there was series of booby traps of clients waiting to ask me why I hadn't done something about their affairs. I was also becoming increasingly rude to the clients; and I found myself becoming particularly irritated in

the case of answers to interrogatories in motorcar accidents when I couldn't understand why the idiot drivers would want to pause to consider whether or not they might have sounded their horn before the collision. Now this seemed to be a stupid response to me because if you had time to sound your horn there never would have been a collison.

Anyway I decided I didn't want to practise law in the country any more, and secondary education was poor. I moved back to Melbourne and I applied for and got the job of Executive Director of the Law Institute of Victoria. I enjoyed that job enormously for 12 years. Mind you I didn't enjoy it all. I hated the meetings and I hated the social functions – noisy social functions where I stood within halitosis distance of someone else and tried to lip read what they were saying above the noise. Or talk to other people who were looking around all the time for someone more important to talk to than me.

Anyway in 1980 when I felt that I couldn't go on any longer a really good thing happened I got the chance to conduct a radio programme on the law on the ABC – the Australian Broadcasting Commission. At that time legal programmes were pioneering efforts. They might be old hat today but they weren't then. The first time we ever had talk-back – I might share with you the first question we ever got in talk-back because I will never forget it. I had done a programme on liabilities of schools and school teachers and we said "We are going into talk-back now," and here's the question. I will read from the transcript.

> Hello Mr Lewis my daughter goes to a school in Gippsland, she catches two buses to school, One of them is a private bus which takes her from home to a private bus stop about 20 miles from the school, she then catches an education department bus to school. Last year one bus was early and the other late. The children had to wait about an hour at the bus stop and while they were there one of the children picked up a stone and threw it and hit Jenny in the head and she's blind in one eye. The teacher who was supposed to supervise them at the waiting bus stop had missed the early bus and wasn't there. Mr Lewis who do we sue? Mr Lewis are you still there?

The transcript shows three more unanswered "Mr Lewis?"s Anyway I got a taste for radio at that stage.

In 1986 when I thought it was time to move on from the Law Institute I joined the Government Service and after a confused year as Commissioner for Corporate Affairs I was appointed the Victorian Government Solicitor who is the Crown Solicitor really. In 1987 the ABC was short of a film critic. During a legal programme I had run I ventured an opinion that the best movie I had ever seen was the *Attack of the Killer Tomatoes* closely followed by *Godzilla meets Bambi* and of course that was enough for the ABC. They knew that I was the right person for the job. So in addition I found that as well as being Victorian Government Solicitor I was being paid by the ABC to go to the movies. For three years it's been a lot of fun. Last year I saw 191 movies.

Odd things happen at the movies. After nearly 600 movies I've seen it all. I've seen people apparently talking to themselves in the cinema who I found have got those cellular phones under their coats and are ringing home to tell Mum they will be late. I've seen a guy sitting in a cinema with the head of a silky terrier coming out of his gaberdine raincoat – at least I think it was the head of a silky terrier. I have had a young woman sitting in front of me throwing popcorn over her shoulder which kept bouncing off my glasses, and I have been kicked in the ear by a young woman's foot as she engaged in sexual acrobatics in the next seat to me with a young man who had paid his 10 bucks to either take her to the movies or at the movies. I must say that going to the movies a lot has confirmed something that I have always suspected and that is that given a chance I would much prefer to spend two weeks on a desert island with Michelle Pfeiffer than with our Chief Justice.

Sometimes I play Judges in plays. I have participated in comedy week in Melbourne where I have played a Judge for five nights. I enjoyed it a lot and I live in hope that some day someone will take the hint. A few years ago, hearing of my success as a film critic the Australian Cricket Board asked me whether I would be a Disciplinary Commissioner for inter-state and international cricket matches in Victoria. Last year my finest achievement was to fine Merv Hughes $750 for suggesting that umpire Caldicott's mum and dad weren't married. This wasn't so much really because the previous year in a game at the Melbourne Cricket Ground we had fined Ian Botham $2000. You might ask what a man's got to do to be fined $2000? Well, you have got to understand the Victorian Cricket team because its pretty weak at the moment. It's the only cricket team in the world to ever lose three matches then go into a slump. The crowds had become so small that it's much quicker now to introduce the crowd to the teams rather than the teams to the crowd. And in the event there was a group of spectators down near one fence – they actually were the entire crowd – who had been heckling Botham for some time, when Botham suggested to them that they should show more overt affection to their mothers. This cost him $2000. One Victorian batsman this year was charged with shouting obscenities after he had been given out and in his defence he claimed that he had a sleeping European wasp in his box which had awoken. Charge dismissed. But I must say in my defence that I urged him never to co-tenant with any part of his anatomy, a small container with a European wasp again.

So here I am today content with my lot in life, lawyer, cricket tribunal, film critic sometimes theatrical Judge, still in love with Jane Fonda, certainly in love with Michelle Pfeiffer and oddly after 30 years still in love with the law, What hope is there for me? Thank you.

Julian Miles

Ladies and gentlemen, the next speaker is the Honourable Rosalie Abella. She is currently Chairman of the Ontario Law Reform Commission and was admitted to the Bar in 1972. She was a Judge from 1976 to 1987 at the Ontario Provincial Court in the Family Division. At the same time she managed to be the Ontario Human Rights Commission and for some

years Sole Commissioner in the Royal Commission on Equality and Employment. From 1984 to 1989 she chaired the Ontario Labour Relations Board. If that's not enough she has also been for many years a Director of the International Commission for Jurists and the Canadian Section. She has been awarded no less than 10 honorary doctorates and has written four books and over 40 articles on Administrative Law, Labour Law, Family Law and a number of other areas. She is visiting Professor in Administrative Law, Jurisprudence and the Charter at McGill University.

Ladies and gentlemen, may I introduce to you the Honourable Rosalie Abella.

Rosalie Abella

I am not unaware that in a profession that defines as peripatetic somebody who changes law firms, that a career like mine reflects new highs of instability – but there are planned careers and there is mine. The great song writer Sammy Cohn when asked which came first the words or the music said the phone call. This undirected career has been a series of phone calls, of opportunities offered and readily accepted, assisted by a pathological incapacity on my part to say no to a risk. Because I am at a complete loss to explain the precipitous events that lead to a career in Litigation in Judging, Teaching, Royal Commissioning, Labour Boarding and Reform Commissioning. I stand before you as someone who is the beneficiary rather than the architect of a legal career. I have spent the past 18 years wandering hungrily and joyfully over the law's intellectual grid; and while I confess that I have been from time to time a bit tired I have never been a bit bored. As for what I will do next, who knows? I may learn how to cook.

From this career that has spiralled onwards and sidewards I have seen heard and learned many things. I have yet to discover an alternative to working hard and I have an unrepentant dependency on work and an allegiance to over-achievement. But I think that as we rush to create leisure and antidotes to restlessness, we should remember that there are few rules of general application and everyone's needs vary. Living longer is one thing, living happily for as long as you live is something else again. As someone still loyal to cholesterol and allergic to aerobics I for one continue to resist those who want to reduce the speed limits and argue instead for the right to rush into oblivion with as many experiences behind and with me as my energy and my temperament permit. To me the exercise is about achieving a healthy perspective on your own terms, not on terms that measure sanity, professional or personal satisfaction by the barometer of uniformity or conformity. Having argued for integration rather than a simulation let me dwell for a few minutes on what I do accept as the basic necessities of the balanced legal professional; and for me balance is the crucible of a healthy perspective.

First, I share passionately the views of those who claim that law is a profession that profits from the frailties of people and that requires us to immerse ourselves in life, in children, books, theatre, newspapers, friends and family so that we are not strangers to the world which asks us to solve its problems. As Holmes said "Life is an end in itself". Unless we are aware of the ongoing human drama that is a reality, we risk not only the possibility of regret at the misused moments, we lose our capacity to nail the gap between reality and the ideal. We need be neither exclusively Apollonian nor Dionysian, but we do need to nourish both the part of us that pays attention to the public and the part that pays attention to our humanity.

Second, someone once said of a close friend, "she has only one fault – she is perfect – otherwise she is perfect". Well, I have some sympathy for a Somerset Maugham character who said the only thing worth aiming at is the unattainable. I think we need to sort out who the adjudicator of our perfection is. If we try to please everyone we may find it to be a sedative against courage, if we try to please only some we risk criticism, and if we try to please no one we risk obsolescence. While pleasing everyone may be a placebo that prevents criticism, long after the bruise of criticism has disappeared the work remains. Like many of the people H G Wells called the intellectual Samurai Mozart in his time was criticised by contemporaries for writing too many notes. But how many of us now can hum a Salieri tune? In our professional audience will be those who admire and those who resist, but the important judge is inside us and if his or her vision sits comfortably with our work decision that may be the best voice to leave to history. In the end we may not be perfect but if we can say we did our best and that our best was our most professional then we have done the thing that entitles us to whatever share of perfection the fallible human can earn.

Three, we must keep an open mind. Chesterton said I am the man who with the utmost daring discovered what had already been discovered before. There is very little that has not already been examined and yet a great deal paradoxically left to learn. The important things to recognise are the limits on what we know so that we don't become, figuratively speaking, the blind leading those who can see. The quest for understanding and knowledge loses its momentum with smugness. Our expertise has given us tools others may lack. With these should come the confidence to listen and to ask. On the other hand it should also provide the confidence to break new ground. The words, "we have always done it this way", do not necessarily constitute valid rebuttal. Walter Lippman called tradition nothing but a record and a machine-made imitation of the habits our ancestors created, and it may not always yield the solutions we seek. Tradition after all is part of a continuum, and in its success it may be blissfully unaware of its present surroundings. It undoubtedly leads to a form of predictability, and then so far as it represents rules of civility, the desirable form of predictability. But it may also represent a reality that becomes unrealistic. The phase "status quo" can just as legitimately be a question as a preservative. I acknowledge that thinking with the majority is an excellent way to develop a reputation for wisdom, but being empathetic with the minority while not always the quickest route to success, may nonetheless be an excellent route to continued relevance.

Fourthly, when Elvis Presley died one cynic observed: "good career

move". Whither generosity? Why do we sometimes revel in the times of the underdogs, then rush to deflate them when their luck or timing or ideas exceed public expectations or our own ambition. We seem to need an homogenisation of success to make our own seem more manageable; and we enjoy more than we dare admit when the mighty, having succumbed to the yankings of the many, have fallen. What force of nature makes us so nervous about the pursuit of excellence and yet what Conradian ambivalence leads us at the same time to pursue it so vigorously. This profession has an insatible need for quality and each of us in our own way has a contribution to make regardless of title, income, gender, race or professional direction.

And so finally to success, the siren who beckons and enthrals. There is no doubt that the word has earned both in the "me first" decade of the 70s and the "me only" decade of the 80s, a pejorative label, whose menacing inspiration for the 90s is "who cares?" It's too bad because in its heyday success also meant integrity, and tolerance and ability of the finest order. There were and still are many who maintain that a Chevrolet gets you there as well as a Mercedes, and that the way you get there matters as much as whether you get there. Let us grant those who are fortunate enough to accumulate wealth and high personal incomes, the satisfaction to enjoy them; but let us remember too that success for a profession is ultimately measured by its professionalism, and by the extent to which it remembers whom and how it serves. We are asked to defend, advocate, legislate, right, formulate, judge, negotiate or teach on behalf of a public which consists of those whose lives range from the very fortunate to those who, as one writer said, come from the day's drudgery to the evening's despair. They are all our public, and it is for them we exist. We are as successful as those various publics decide we have served them. We have many scores to perform; but like my hero George Gershwin, we should make ourselves as comfortable performing the elegant *Concerto in F* as the more humble *Embraceable You*.

Let me close with a brief story since this panel is supposed to be personal, that helps explain why my own engines keep running, not by way of guidance but way of explanation.

I became a lawyer like many people because my father had been one in Europe and when I was four my family came to Canada as Jewish refugees; and because he was not a Canadian citizen he was not permitted to take the test and apply to practise law in Canada.

He never complained about it but it saddened him and inspired me. Last year the Supreme Court of Canada in a case called *Andrews* struck down the citizenship requirement for the practice of law as discriminatory. The test of discrimination that the Court used in deciding that the requirement was violative of the equality guarantees of the Charter of Rights and Freedom was one that I had written in the Royal Commission on Equality, and although my father never lived to see me graduate let alone learn of the decision or of the connection of his inspiration in my work, in that one stroke by the Supreme Court I felt that my whole crazy, unplanned and undirected career was vindicated. This is one wonderful profession, and I am very proud to be a part of it.

Julian Miles

The third speaker comes from a very different milieu than the previous two speakers. The Honourable Mr Justice Dumbutshena, the Chief Justice of Zimbabwe began his career not as a lawyer but as a teacher, journalist, author of a book called *The Zimbabwe Tragedy* and as he told me some little time ago a freedom fighter. That in itself gives you some indication of the sort of background and the sort of pressures which are unique perhaps to the Commonwealth and to that particular part of it. In 1980 he was appointed Judge of the High Court of Zimbabwe and in 1983 Judge President of the High Court to be followed a year later by the appointment of Chief Justice. What His Honour did not tell me but which I happen to know is that recently he has delivered a judgment in favour of what I suppose he would see as one of his old opponents, Ian Smith, in an important and possibly crucial constitutional issue of fact between Smith and the government over his superannuation. Not perhaps important on a factual basis, but obviously important in terms of the rights of the individual in a relatively new State. His Honour found in favour of Smith, thus I think confirming once again those traditions which we have heard so much about in the last two or three days and which I think the Commonwealth stands for.

What he also did not point out but again which I learned at lunch time, is that he is about to be given an honorary doctorate at Oxford Universtiy.

Ladies and gentlemen, His Honour is regarded throughout the Commonwealth as one of the great jurists. It is truly a privilege for us, and a privilege for me to be able to introduce him as our third speaker.

Chief Justice Dumbutshena

Mr Chairman I am greatly moved. I regard myself as a simple person. I was brought up that way. I'm a Methodist. I believe my great strength, spiritual strength comes from the fact that I am a Methodist and was raised by a mother who was a great woman.

But it has been my fortune to do many things. At present my greatest work is in the field of education where I am Governor of boards of many schools in Zimbabwe and where I head trusts that raise money for the education of our unfortunate African brothers and sisters. That is why I'm grateful.

But I started as a teacher. Well one day I was walking with a great principal, Dr Edgar Broots in South Africa and he used to walk every weekend with one of his classes and this Sunday afternoon was the turn of our Form 5 class. So he walked with me and said "Enoch, you're a good debater, why don't you become a lawyer?" I said "I do not have any money"; and he said "No, no, I'm going to raise a scholarship for you." And I applied to Cape Town University. I was accepted and he wrote to the South African Government for a scholarship and I was turned down although I was the best student in my class. So I did not go to Cape Town University and instead I acquired an Arts Degree and Education Degree and so forth. Then I taught in South Africa history and after that I went back to Southern Rhodesia named now Zimbabwe, and the salary I was

receiving was half of what I was receiving in South Africa.

I became a journalist. Fortunately I got a grant to go and work on newspapers in the United States of America. It was difficult for me to get a passport because I used to be critical of the Prime Minister of the Federation of Rhodesia. So I got a one way passport from Salisbury, Nairobi, London, New York and back the same way. When I was in America after I had worked there for some time I was given a grant to travel through West Africa, I went to Rhodesia House in London and asked for an endorsement on my passport to travel to Ghana and then Nigeria and then back to Harare and they said: "No we can't give it to you." Then a friend of mine who had been a journalist with me in Harare was now working for the *Guardian* in Manchester said to me: If you go back home will you come back, will they allow you to get out of that country?" We decided that they wouldn't, so I said I will stay in London and then I will become a lawyer, my wish that I had when I was young. Then I applied to the Middle Temple. They said; "No, you are not a student. We want a recommendation from Rhodesia House." I went to Rhodesia House and I got a letter with two lines: "We are not prepared to recommend you". And I went to the Middle Temple and I said: "Here is the answer" and they said they were not prepared to admit me.

Fortunately, a friend of mine who is here, Tom Kellock, asked me to apply to the Inner Temple and I was sure they were going to admit me. Their requirement was that I should get a recommendation from a person like now say Garfield Todd, who had then been Prime Minister of South Rhodesia. He was in London, I went to him and he said I'll get the Chief Justice of Southern Rhodesia to recommend you, and he did and the recommendation was beautiful. Tom Kellock was in the Chambers of Dingle Foote. I do not know how to say Dingle Foote. Then they said "No, no, do not go to the Inner Temple, the best is Gray's Inn." So I went to Gray's Inn.

When I went back to Southern Rhodesia it was not easy to get work. I will tell you what happened to me twice. Once an African businessman said he wanted his brother to be defended by me and his attorney said "No, no we don't deal with that one." "Well, if you do not deal with him I will go to another firm." Then they agreed to instruct me and an elderly attorney came to my Chambers and said "You see this is a serious offence, this man is charged with attempted murder, can you do it?" Well, I accepted the brief and he sat behind me during the trial trying to find out whether this native man could successfully defend his client. I did and he was acquitted. I believe he was a racist but I think a good one because after that I got briefs from his firm.

On another occasion I got a brief from another firm. A young man much younger than myself came to my Chambers and also said to me this is an important client of ours: "Can you do this case?" I did it and I succeeded, but there were ups and downs. Sometimes the police would come, the security police would come to my house early in the hours of the morning and I would be removed for interrogation because I was a dangerous person, a nationalist. One day I had a trial but I was detained during the night. Early in the morning by 10 am, the Judge who was hearing the case refused to hear it until I was released, and I was released. Then I felt that I was isolated because the rest of my friends were white advocates except one who is also present here and who is a Judge with me in Zimbabwe. I decided to get out of Zimbabwe and go to Zambia. I was driven by a friend of mine to the border between Rhodesia and Botswana and I walked during the night, I had no compass, no light, no weapon, no knife. I walked through the night until early in the morning. I felt hungry and tired and I thought of the time when I used to travel from Rhodesia to South Africa for school and there were donkey carts at that time. Now the donkey carts used to carry the watermelons and indeed a donkey cart appeared and I asked for a lift and I ate watermelons and I got to Francistown. From there I flew to Zambia. Beside the fact that I had to get a work permit, sometimes for only six months, I enjoyed my stay in Zambia and I bloomed as a lawyer and I am indebted to the people of Zambia for what I am.

I think my experience as a Judge is a unique one because it came during the beginning of independence. There were only white Judges and if there was a sensitive case the senior Judge assigned it to me because he did not think that a white Judge would be welcomed. I started with sensitive cases. I did them all.

One I want to talk about because the experience was unique. It was the case of the Air Force men. Six of them were accused of conspiracy to destroy the Air Force of Zimbabwe. Zimbabwe ordered from England six new fighter planes and they were sabotaged and destroyed and millions of pounds disappeared with them and the country was yearning for their blood. They were tried for nine weeks. I tried them for nine weeks. At the end of which I acquitted them and I have never, well – I didn't know what the reaction of the people would be – the back benches in the courtroom stood up and they cheered and clapped their hands and I was confused but it was a controversial case. I never thought then that my future would be a rosy one. I thought they were going to chuck me out, but for my sins they appointed me Judge President and since then I have done these cases and they've rewarded me by appointing me Chief Justice.

Now that is not because I am a good Judge but because Zimbabwe has an enlightened Government. No Judge in Zimbabwe has ever been approached by a Minister or by the President to ask him to do the Government a favour in a case he is handling. That is the utmost freedom in which we work. If you ask me of the three professions which would I prefer to be in I think I would prefer to be a writer. Now that I am retiring I am going to write. I said to the President of Zimbabwe, when he said to me what are you going to do, I said, I am going to grow tomatoes, and today I've got seeds in my pocket of the kiwifruit, the passionfruit and I am going to experiment in growing them in Zimbabwe and rest from the worries of deciding.

My life is no joys nor delights, but I retire with the satisfaction that I fulfilled the ambition of my country to have a judiciary that is fair and just, to have Judges to whom black and white and brown

can go, fully convinced that they will receive justice and that if they lose they will still believe that justice has been done.

Thank you very much.

Julian Miles

Ladies and gentlemen, the fourth of our formidable panel is Miss Rosemary Howell from Australia, a practice management consultant. She is yet another lawyer who practised for a number of years and who decided to move out of it, initially into the Law Institute of Victoria in some particular role which its significance she will tell us about. More importantly though, I suspect, she then moved out of that and for the last 10 years has been in the practice management field. For the last five years she has run her own company. She is a frequent visitor to New Zealand and a woman who has dedicated this part of her life in this further area, admittedly involved in the law but from a quite different perspective. She, I understand, will be telling you something about the '90s but specifically from a women's perspective.

Rosemary Howell

I think you will agree with me that the Judge is a quintessential model of a hard act to follow but I will do my best. Can you all see me all right? It's not just because I am short, although I am, but that's a question I learned to ask very early in my practising career. For those of you who have been articled clerks, I was a very green one and I was sent to appear in a Court in suburban Victoria where the wooden panelling was taller than I was and the Magistrate was ill and they went next door to get the local JP who was a short Italian greengrocer and as he sat down behind the bench he disappeared from view and when I opened my mouth, trembling, to begin my opening address he said "Will Counsel please have the courtesy to address me on her feet?" "I'm up your Worship." So they got me a fruit box from his shop to stand on, and afterwards I thought of all those clever things to say like I rest on my case, Your Worship, but I decided then and there I would learn a lesson from my life.

When I was thinking about what I could possibly contribute to today's session so that the Chairman wouldn't fulfil his promise of taking the negatives to the newspapers I decided that I have been in practice for 20 years and those 20 years have been a time of enormous social change and I thought it might be useful to share with you some of my experiences of those social changes in a life that has been punctuated by having the good fortune to always be at the right place at the right time.

Until I got to law school I really didn't understand that society expected different things from men and women. I came from a long line of suffragettes. I lived in a female-dominated household and I went to a girl's school that encouraged me to believe that I could do anything. University was a terrible shock. I was one of ten women in a class of more than 100 and in my second year of law school I was taken aside by a lecturer I had come to know and understand as we struggled in classes together. And he said to me "Rosemary, I've been watching you and you're actually a very nice person and so there is something I feel I must say to you. You're stealing a man's place and I know that you wouldn't willingly do this so I felt that if I pointed it out to you you might consider what sort of action you would take." It took me about a week and I decided to be defiant. But I think it was at that stage I inherited the guilt franchise for the entire western world. Articles was also a shock for me because in those early days in the '70s it was very hard to get a job and I got a job before all my colleagues because I happened to mention that I had been working in a fish-and-chip shop during the holidays and my Master found that more appealing than my University qualifications. I was also the first of all my friends to receive equal pay which in those days gave me an extra $2 in my hand. My Master found me somewhat lacking in gratitude. These days my children find it hard to believe there was ever a time when men and women were not paid on the same basis.

Life was really easy until I became pregnant. It was a life-threatening experience for my firm because I was required to avoid direct contact with clients. In fact they indicated a cupboard about my size from which they thought I might practise. But as I become progressively more huge and you haven't seen huge until you have seen me pregnant – my Principal decided that he would exploit the feelings of dismay and discomfort that I produced in others and he began to send me to the local Court to do the difficult pleas. The local Magistrate was clearly terrified about what might happen especially if I looked as though I might be upset so I was temporarily a hero in the office with a remarkable reputation for advocacy. At one stage I was asked to act for an Air Force pilot who was charged with negligent driving and I asked him what had happened and he told me that he'd been flying a very long shift, 12 hours testing new flights and he was late for dinner and he was terrified of his wife and as he sped home he approached some boomgates which were closed and he was going very fast and he pulled back on the wheel and nothing happened. I think it's a tribute to my advocacy and the fear of the Magistrate that the charge was dismissed.

By the time I was into my second pregnancy I had moved to the Law Institute and I was working with and for Gordon Lewis who had done something very exciting. He had established the first Management Advisory Service in the Southern Hemisphere and as part of running that service we visited more than 1000 law firms, and I've come to more than 34 firms in New Zealand which has been a great pleasure and a privilege. But I promised Gordon that I wouldn't deliver a child for a year and in order to keep my word I stretched the marriage beyond breaking point I think, but when I was pregnant for the second time I decided that I would do things differently and better and I extracted promises from my colleagues that they would not treat me differently but in fact they would treat me as someone who was well and healthy pursuing a choice. To get their own back they took me at my word and as I was walking from my house to the car to go to hospital and have the child I was foolish enough to answer the phone and this Victorian lawyer's voice said: "The Law Institute said I could ring you here. I have a small problem about file management". "I'm just going to hospital to have a baby actually, could you ring

someone else?" He said: "Oh, it actually won't take very long," and then as I was wheeled back into my room from delivery the telephone rang and a voice said: "The Law Institute said I could ring you here". So I capitulated and I had an office in the hospital the next day. I think it's fair to say that I've continued to learn from my mistakes and now that I have reached the right side of forty as my husband is generous enough to call it I am pleased to say I have also relinquished the guilt franchise.

I do see the '90s as being a period of enormous and continuing change. My own personal resolutions are that I am going to spend the '90s pursuing my own dream. My dream is to continue my life where getting up and going to the office each day is joyful, and I have promised myself the moment it stops being a joy I will leave. I'm sharing that dream with others and I'm sharing it with you and encourage you to see the '90s as a time when you can identify and realise your own dreams.

Julian Miles

A favourite ploy of Chairmen when introducing well-known local identities is to claim that so well-known are they that they need no introduction. My experience is they normally then go into quite an elaborate introduction detailing all those details that of course they assume you all know, I won't make that mistake, I will simply go straight into those details. Judge Morris practised in Auckland for a number of years and very successfully at that. Then in 1972 he resigned from his then partnership and moved to Keri Keri, a small town in the North of Auckland principally known for its ability to grow fruit. At that time it was confidently believed to grow fruit profitably – an experience that subsequently and for many lawyers has proved to be wrong. In 1980 and through no fault whatsoever of his orchard so I understand he made money. So there you are, that gives you some indication of Judge Morris's latent ability. During that time as an orange grower he got bored with that and started up what he described here in his CV as a, I think I will just call it as a kitchen sink practice which is certainly how the Judge saw it and again very successful it was. Finally though through pressures of education for his children and I suspect a certain amount of boredom the Judge came back to Auckland, and once again started up his career as a commercial lawyer. Again a further career shift in 1988 when he became a District Court Judge and once again is proving extremely successful in what must be his third or fourth career. Ladies and gentlemen I have great pleasure in introducing to you Judge Barry Morris.

Judge Barry Morris

Thank you, Chairman. Ladies and gentlemen, I'm going to attack the subject from a slightly different angle but I think I will get the same result as my colleagues have got and I'm not going to give you the secret innermost thoughts of my life because having heard from His Hon the Chief Justice I see my life of simple selfish indulgence, and I salute him as we all do for his wonderful heroism and I hope I don't therefore run to the banal or the flippant because that probably is the nature of the beast, of a Judge of first instance. Anyway, on the basis that you always leave something in it for those up in the higher Courts to give them something to do. And the other thing that intrigues me is this is the second time I have been in this type of panel discussion. The last time was the Triennial Conference that the New Zealand Law Society had in Auckland and I was on a panel which had the subject of Stress in the Professional Family, and I can see Lindsay Smellie here today, she was the convenor, Brian Blackwood who was a Magistrate as they were in those days. He was the Chair and Julian's wife Sue a journalist was a member of that panel, and I think she is still married to Julian and going along on his comet's tail as he makes his changes through life, and the fourth person was Dr Ruth Black who at that time was a Medical Officer of Health in Auckland. So here I am today in a similar type of panel discussion with a very interesting and illustrious panel and my only hope one of these days is that I will be chosen to take part in a historical perspective as embodied in the Unit Titles Act or some such thing rather than this type of panel. And I might add I found the same on the District Court Bench. I'm the convenor of the social committee which in New Zealand means that you organise the piss-ups. I think it was Rosalie who was talking about attitudes to diet and exercise. You wouldn't believe it but I'm an active runner I do 30 kms a week, I don't drink much at breakfast – and my good friend Mick Shanahan gave me this line – I have certainly conquered anorexia.

In the last discussion we had in 1978 "Stress" was the theme and the concept of pressure on many professional people was that they worked too hard. I can remember a contribution from the floor from another great African, South African Sydney Kentridge, the Barrister from South Africa, and he said he was the father of four neglected children and the husband of a neglected wife and he quoted that hardy old annual that "Law is a hard task mistress so don't get married take a mistress, and for women lawyers take a lover". We were looking at the areas of stress in family life and in particular in daily life and another contributor said things like, well if the stress of private practice is too much consider commerce, industry or Government. Today I was intrigued to see that His Hon The Chief Justice is making horticulture his final career, where I made horticulture an intermediate career and I salute him for getting his fingers in the soil and I will give him a few tips on horticulure and citrus trees before he goes back to Zimbabwe.

But most of the speakers have dwelt on or emphasised this, the topic of life style really is an attempt to identify a balanced life and that is the aim of all of us I expect. I was delighted in having read some Dr De Bono's books to hear him again talk about the importance of humour. One has these periods of brilliant self-analysis. I have come to the conclusion that's really that I'm just a fat funny man and that's all I've got so I'm glad he sees it as so important, and after all look where it got David Lange. But its very interesting as I move to use a Rugby analogy from player to referee, how one perceives the job. Not my job, your job, that is practitioners. I see the modern practice of law as an endless exercise in arm wrestling. Or to again use a Rugby analogy it is a series of endless scrums when all

the lawyers are in the front row head bashing so that every now and again you look up out of the scrum and see a position in the game that you would rather play than being up there in the front row banging your head. That really comes down to this question of, how shall I express it, periodic assessment of where one's going and what one really wants to do.

For those of you that were here yesterday and heard the session on Judicial Reasoning, I can claim that I was a partner of that litigator Donald Dugdale, before I took this job. One of the best firms in the country, thank you Don, and uh, he is the Practice Chairman. But he was Head of Litigation and I ran a sort of autonomous division of the firm on the North Shore. As long as the bottom line was OK they left us alone which was OK, but Donald had a way of assessing litigators and those of you that think you've got a career path at Kensington Swan and those of you who have gone otherwise I'll tell you why you've made those decisions because what Don looked for in people – and I emphasise that this is only a portion of personality – is the Bastard factor. This is a sort of factor or a trait of personality that all of us need to survive. It doesn't matter whether you're a litigator or what, you have to be and I use again in translation for those who don't share the subtle culture of Australasia, I'm not talking about your status as a child I'm talking about your attitude as a person and a bastard is not necessarily um a derogatory sense, great old bastard or good old bastard, but in this sense, using the nasty one if you like. So if then one is spending one's life being a bastard and head bashing in the scrum in the front row then every now and again one has to take stock of oneself, as Julian is doing and I have done and all our other speakers have done and make a change of direction.

My philosophy is if acknowledging that the law is one's trade then where within the trade does one make one's movement. Now in my view there's a great deal of Shirley Valentine in all of us, but here is also a great deal of Lauren Crapp in all of us. Now you may not think you've heard of Lauren Crapp but I suggest that all of you lawyers or those of you who aren't but who were lawyers will remember that particular client – the Lauren Crapps of this world, the arch conservatives. They're wonderful clients because they always call you "Mr" or "Mrs" or "Miss". They're loyal, they never grizzle about a bill, they never moan about anything but they are extremely conservative as a race and one day Lauren comes in and says: "Mr Morris", (he never calls you by your Christian name) "I want you to do something for me, he said I want you to change my name by deed poll." You've known him for a long time and you think, well your first reaction is to say well, good grief man, why didn't you do it years ago, you must have had a terrible life as a girl etc, but you don't because you understand the innate conservatism of the beast and you take down the instructions and you're waiting for what he's going to change his name to, he said yes I have given this a lot a thought and I'm going to change my name to Norman Crapp.

Now that's the other extreme of Shirley Valentinc. As I see it the greatest pressure is the pressure of performance measured by the degree of achievements, of set goals as determined by your practice which really means meeting budget. The old stresses remain but the requirement for balanced lifestyle is vital. How you do it is your decision. Now we in this part of the world, are lucky in the sense that, and I include Australia grudgingly in this, but seriously we have what one would call a year-round outdoor environment which makes a whole range of interests available whether they're cultural or physical or what have you. They're available and they're accessible. So that is an area of availability to us in this part of the world. But what one needs of course is a catalyst and for this there is nothing more daunting in Australasian practice than having my platform colleague Rosemary the Hatchet Howell walk in your door with a friendly "gidday" and proceed to minutely dissect your potential achievement, if you have one. Now she did this to me, now I am on the Bench.

In the edition of the *New Zealand Herald* of 12 April 1990 which was just before Easter, there was an obituary of one of the greatest New Zealand legal figures of this century, Leonard P Leary QC. He died at his home near Rotorua on the day before. He was an artillery officer in the First World War. Thirty years after, in 1948, he bought land in Massey in West Auckland and began a variety of rural farming operations on that property and of course continued to practise as an eminent Barrister. His son described LP's life thus, his ideal in life was four days a week working at the law, three days a week on the farm, he liked to do a lot of exercise and from those days on he remained active to maintain his quality of life. LP was born in 1891. He died at the age of 99 in sight of his century. In my view there is a man who led the balanced life.

It's a question of balance and I keep emphasising that. A perpetual holiday is the worst definition of health. People have always suspected solitary people, men or women without an acknowledged passion or interest. Most firms nowadays acknowledge the climate where principals and key staff will come and go from the firm and the structure of most firms now allows this as Julian is doing, as I have done; and in my own firm this was termed getting on and getting off the bus. We now have an ability which we have come to lately in New Zealand but is more advanced in other countries, of going to commerce, the Government, to academia and a little more movement laterally in that type of thing. Of course this doesn't help the sole practitioner or the small firm where the importance of the individual is greater. So a key person in a smaller firm is more of a key person if he's a smaller number, and I suppose I hope you will forgive me for saying this truism, that life is for living and as Carly Simon sings in one of her ballads, these are the good old days.

Julian Miles

Well, ladies and gentlemen, I think that perhaps it would be appropriate to draw this session to an end. I don't know having listened to that whether the dreams that you have heard are any clearer. What I think one can say with some confidence nevertheless is that the boundaries have been expanded a little and that the variety of dreams that we all have I think have also been enlarged beyond measure. □

Ninth Commonwealth Law Conference April 1990

The Profession into the 21st Century

Mr David Ward

This is the last session before the plenary session this afternoon. It is the last paper in the red book of papers. It is despondently called "The Last Barrister", and so I call upon Mr Shankardass the Senior Advocate from India to deliver his paper by way of epilogue. He read economics and law at Cambridge, he was called to the bar, he practises in Corporate and Civil Law both domestic and international, and he was President of the International Bar Association from 1986 to 1988. We look forward to hearing what you have to say.

Mr Shankardass

Mr Chairman and distinguished colleagues. In the very short time that we have I thought what I would do for you instead of referring too much to my paper is to list for you, as briefly as I can, some of the events that I believe which have occurred in the last quarter of this century, and that are bound to have a profound influence on the structure and the very nature of the profession in the coming century.

To begin with I think perhaps the most significant thing that happened was the 1976 decision of the Supreme Court of the USA in *Bates v the State of Arizona*. You will recollect that that decision upheld the right of lawyers to advertise in the context of the needs of consumers for legal services and that on the basis that that right is protected by the First Amendment, the right of free speech. Now since then the advertising by lawyers which was unthinkable 20 years ago has spread to most developed countries. I suppose it is only a matter of time before it arrives in the developing world, although I must tell you that in some places like India for example we still have rules that will not even allow us to tell anyone what we are good at. So we really have an awkward but very striking reform that might well be approaching.

The second event, ladies and gentlemen, which I thought was of great significance, again influenced by the needs of the consumers of legal services, was the decision of the German Constitution Court three years ago, striking down the lawyers code of ethics as restrictive and monopolistic and therefore unconstitutional. This event I believe is bound to have a tremendous influence on the reform that is going on both in Germany and in some other countries.

Thirdly and perhaps the most significant one of all for many of us who are participating in this conference was the body blow to the profession in England and Wales by Lord Mackay, particularly to the institution of the Barrister that I have made the subject of my paper. The Barrister that is, as we have known it and initiated it in many parts of the Commonwealth. We have had commentators tell us that the mystery that is attributed to the Inns of Court, the procedures followed by the Benchers, the Bar Council and the Council of Legal Education as well as the exclusiveness of the rights of the Barrister, have somehow earned for the Bar a reputation and public image of an elitist group with arcane customs and practices, feathering its own nest and running a very successful monopoly. The effectiveness of the Bar in its present form functioning efficiently in serving the needs of administration of justice is therefore seriously questioned, and hence the proposals to subject the profession to the discipline of the marketplace competition, which of course has struck fear in the hearts and minds of lawyers in many parts of the Commonwealth. Many of us fear what the repercussions of some of the reforms that are presently underway in England and Wales will be in some of our countries. Perhaps the most significant concern, I think, has been that if the discipline of the market place is to rule the functioning of the legal profession, what is going to happen to that great historic duty of a lawyer not only to provide legal services for payment to his clients but also to render a public service which was the original historical base on which the profession came to be. Let me say that many of us have been watching with grave concern and interest the controversy in England and Wales with regard to the reform proposals and have wondered why the Bar in that country has not shown the capacity itself or taken any initiative on its own so as to ensure that its best attributes are preserved, and at the same time provides the best in public and legal services. I for one cannot help thinking that the Bar in England still seems unable to grasp the real nature of the charge against it, that of being a monopoly.

In view of all that has gone on and the debate that has taken place I was surprised frankly to hear and, I say this with all due respect, the Chairman of the Bar said at another session of this conference on Wednesday that the Bar in England and I quote, as a small collegiate grouping helps maintain its standards and he told us about its collegiate ethos and peer group pressure. These words will convey to the critics I fear the idea that the Bar continues to believe in its exclusiveness, and that that exclusiveness must be observed. I personally again am of the view and I suggest that many of these reforms, unless there are brought about from within the profession either in England or elsewhere, will be forced upon the professions particularly by virtue of the fact that our practices are all becoming much more international. Certainly the Bar in the United Kingdom is bound to be affected very significantly by what happens in 1992 and thereafter.

The fourth event which I believe in the last few years has been of great significance has been the trend towards very high fees for legal

services. Perhaps this is attributable to the fact that large corporate clients can pay those fees, and partly because of high costs: but be that as it may the fact is that the result happens to be that middle income earning private persons find it increasing difficult to have access to lawyers and Courts and the revolt against this trend, which has already begun in the West, will slowly reach some of our countries in the developing world.

Fifthly and perhaps more significantly for us in India and some of the developing countries the law's delays is a problem which has become so significant that now there are people who talk significantly in some parts of our country in terms of the administration of justice slowly grinding to a halt. Of course their accusations and criticisms now are that the reason for this is that it is a foreign system. A criticism which perhaps some of us take not too seriously, but the fact remains that it is a system which works well for 50 million people in the UK, is a system that worked well even for 300 million people in India after independence for some time, but just does not seem to work for 800 million people who are becoming very conscious of their rights which are enshrined in our Constitution, and which they can very quickly move the Courts to try and enforce.

But apart from these five concerns and events perhaps there are two events which have occurred again in these recent years which offer hope. One of those I submit, ladies and gentlemen, is the new technology for the storage and quick retrieval of information, and therefore of information on legal rights. I only wish that I had known that there was another session that is going on simultaneously with this one I am told, which has just been announced and that is on how to use technology in Court proceedings and therefore the administration of justice. Perhaps we could have combined the two and we would have been much more optimistic about the future of the profession in the next century.

Another event perhaps again promising some positive developments is the emergence of inter-disciplinary partnerships which have already arrived in some countries in Europe. If they are able to demonstrate that they can provide comprehensively good services economically perhaps that might be the way of the future. But ladies and gentlemen, it is these upheavals and changes – the six or seven events I have suggested – that will force upon the profession in the new century very serious and significant change. In a sense my paper which takes account of the first five concludes that the 21st century will in view of all that is going on, see the last Barrister.

David Ward

Well thank you very much Mr Shankardass. Those of you who have not already read it should read his paper at the end of the red book. He has given an admirable summary of it. You may not agree with all his comments in it but it is a highly readable paper and well worth going through.

Well can I now call upon the Honourable Raphael Rattray who is the Minister of Justice and the Attorney-General of Jamaica. he was so from 1975 to 1980 and he's now bounced back again since 1989. He has been in practice at the bar for about 30 years and we look forward to hearing what he has to say.

Hon Raphael Rattray

Mr Chairman, fellow panellists, ladies and gentlemen, I would like to utilise this brief opportunity by looking at the challenges of the 1990s from the perspective of lawyers engaged in the service of the governments of their countries. Some forgotten sage once adviced us not to start today with yesterday's modern shoes. That same advice is likewise an injunction against starting tomorrow with today's liabilities.

In the context of tomorrow being the 21st century a primary challenge of today in the 1990s must be an objective assessment of where we are now. We all assume roles in the operation of the government towards its ultimate destination, which in the context of law must be the achievement of justice for the society as a whole. In meeting this challenge we would have already, consciously or not, begun to do so by our presence here, in participating in this Conference, and the continuing recognition of the need, particularly in this decade, to engage in a stocktaking exercise in order to evaluate the wealth or the poverty of all the existing practices.

On completion of such an assessment we are advantageously placed to identify what has worked well in terms of the stated objective of what will improve from adjustment and what must be dismantled. What has worked is best left well alone. That in itself is a challenge to all disciplines. Some of us find virtue in being compulsive thinkers, you may well correctly consider that I am offering this advice most directly to law reformers – a species to which I like to believe I belong. This is not to say that there can be any rash expectations that the measures which have successfully emerged at the commencement of the last decade of the 20th century will necessarily be as effective in the 21st century. Society is dynamic. Conditions change, and human expectations are subject to variation. The law and legal practice must be flexible enough to cope with this dynamism. It is however reasonable to expect some measure of continuity of existing conditions into the early years of the next century. It is a measure of recklessness to predict what lies too far beyond the uplifted veil. A note of caution therefore – if you approach a closed door, before you enter you should knock. If to a particular ball you are accustomed to score a boundary with a particular stroke do not change that stroke for the ecstasy of the flourish of a new invention. So I repeat, what has worked well is best left well alone.

With respect to what can benefit from adjustment, by extension or otherwise, it may be appropriate to remind ourselves that in the law there are certain identifiable fundamental and cardinal principles which we interfere with at our peril. Some indeed have in recent times become endangered. Concepts like the presumption of innocence, the burden of proof, the right not to incriminate oneself are now being revisited, to use the polite word. The need for the profession to preserve established traditional and ethical standards despite the widening dimensions of the profession and the encroachment of business and political influences remains critical. So too is the need for the judiciary to protect the rights of individuals,

fairly infringed by the exercise of the power of public authorities, or even of overwhelming private power. I believe that these fundamental concepts will be as necessary to the protection of the innocent person in the 21st century and the integrity of the profession as they are in the 1990s.

The challenge now is to decide what is fundamental and cardinal and what is not. Can we say, in jurisdictions like my own, where a statement from the dock is still permitted. Where the statement is untested (which is not evidence but must be given such weight as a jury deems fit) is helpful in our determination of innocence or guilt in a criminal trial. I doubt it. Is justice in any way advanced by long drawn-out preliminary examinations to determine the existence of an *a priori* case, or can our legal ingenuity devise speedier and more appropriate measures? Certainly in my own country there is a need for adjustment here. The adjustments may also be appropriate in the new procedures and the new additional purposes we can identify for ancient institutions. Is it not a desirable objective that all societies in the 21st century should be less adversary than they have been in the 20th century? If this is so, and I support this, can we not introduce into a Court processes the mediatory procedures which will result in a determination of disputes, which have not emerged from the trauma of adversary proceedings. Again I was pleased to see presented in the agenda of the Conference the subject of alternative dispute resolution, the question is, must it be treated as a separate compartment or can it be accommodated as part of the process of utilising old institutions for new and additional purposes?

Finally what must be dismantled. This perhaps is the most difficult area. We do hate to admit our failures. We could make a start with those legal measures which we have introduced in our respective jurisdictions to deal with crisis situations. They are very often meant or stated to be temporary, but take root and result in a permanent distortion. They very often relate to specific matters but are easily thereafter extrapolated into areas for which they were never intended.

A new phenomenon, which we need now to watch very carefully, is to be found in international pressures to respond not to our own but to other people's crises. Legislation reflecting our own panic is bad enough, legislation reflecting other people's panic is a case of transferred paranoia. In my own country in respect to a crisis in 1974 we established a special Gun Court to try gun crimes. In acting for this suppression of crime, the law permits police actions which should otherwise be an infringement of our constitutional protections. These measures are still with us in 1990. We still today, as in some other jurisdictions, have execution at the hands of the state as a penalty for capital crime. Speaking for myself this is some of the mud which in the 1990s I would wish to wash from my shoes before stepping across the threshold into the 21st century. I recall now that I intended to speak from the perspective of lawyers engaged in the service of governments. It is indeed impossible to divide the perspectives of lawyers. Of that I am now convinced.

Mr David Ward

I next call on Gordon Lewis who practised as a solicitor both in Melbourne for sixteen years and as a partner in a Hamilton firm.

In 1975 he was appointed Executive Director of the Law Institute of Victoria. And so that means that he ran the solicitors, or solicitors and barristers I should say, for 11 years. Then he went into the government service and since 1987 he has been Victorian Government solicitor. That does not mean *a* Victorian Government solicitor. It means *the* Victorian Government Solicitor and a highlight in his life was when he once sat next to Jane Fonda on a flight from London to New York. She ignored him totally. That does not surprise me because people only listen to lawyers when they say to them what they want to hear. Obviously Gordon did not say to Jane Fonda what she wanted to hear.

We very much want to hear what you have to say to us today, Gordon, so please now speak to us.

Mr Gordon Lewis

Mr Chairman, distinguished guests. After my experiences at Ellerslie last weekend I can't think of one valid reason why anyone should take the slightest notice of any of my predictions including those predictions about solicitors in the 21st century. But here for what they are worth are my guesses about the profession next century.

First the good news, and that's survival. Yes there will be solicitors, solicitors of both kinds thriving at the beginning of the 21st century although the quality of their lifestyles will as always depend upon the economic trends then affecting the profession. In the 21st century litigation will be even more complex with greater emphasis on intellectual property cases, trade practices disputes and disputes between governmental authorities and individuals. Environmental protection planning and conservation law will be at the forefront. In particular international litigation will become very popular with an emphasis on ships colliding at sea.

How will solicitors practise? Well before the commencement of the 21st century the trend towards huge megafirms will be arrested. There's things that are happening in Australia at the moment. We can anticipate by the year 1998 that there will only be two large firms left in Australia, one consisting of 19,960 partners and the other of 17,410. This trend will stop and indeed reverse. Unfortunately you can only keep partners apart for so long, and who they are in partnership with. They will begin to ask the question whether they would like to be left alone in a lift with that person stuck between floors for less than an hour. I suspect the answer will be a chorus of no's, and inevitably the megafirms will begin to distintegrate with people who actually like each other seeing economic and social benefit from breaking away and practising together.

I also sense from my enquiries around the profession that there are a number of young, and indeed not so young, solicitors, who are becoming tired of having decisions made for them by expert administrative partners. Lawyers are not known for their blind faith in the decision-making of others, particularly where those decisions affect their lives and their incomes. Certainly I anticipate that young practitioners will begin to ask

whether they would like to be real lawyers again instead of relatively anonymous cogs in huge corporate legal enterprises. There seems to be a real prospect of small specialist cells breaking away from the corporate giants. Four, five, six and seven – partner firms with one special skill to offer, and who will assume the role of consultant specialists to other firms as well as large corporate clients. At present in my country we are seeing a form of client intimidation. Voluntary legal services cater for the underprivileged, legal aid is available to perhaps 20% of the population and the large firms serve the rich famous and incorporated. Somehow the legal factories have abdicated their responsibilities to act as father or mother confessors to an economic middle class we can't afford to lose.

Now in Melbourne, if a client walks in off the street and says to the receptionist of a megafirm, I've got a problem involving three thousand dollars, can I see someone, he or she is wrong because he or she is about to have a problem involving four thousand dollars, including a thousand bucks in costs, win lose or draw. By the 21st century the alienation of this sector in the community will become a problem with which solicitors will have to cope. By the 21st century a form of legal litigation insurance will be in place in Australia whereby the forgotten middle class will pay for an insurance cover to guard against legal catastrophe just as they pay for their health cover today.

Time costing may be God's gift to lawyers' overdrafts and to the pleasing of demanding bank managers. Time costing may also fall out of favour by the time the 20th century ends. I think that the attack will come from two different directions, internally I believe that found employed lawyers will show greater resentment to walking the time costing treadmill. They may ask themselves whether there is a more pleasurable if less remunerative way of practising law. They may see an avenue of escape in achieving a compromise between the huge megafirms and the smaller practices which I believe will always serve a need in country and suburban areas.

Similarly I wonder whether in tougher times the pressure for an end to time costing will come from large corporate clients. So long as times are good and there is a tax deduction for legal costs, it's unlikely that there will be real objection by corporate clients to being milked like cows daily except in the dry season which equates to the Supreme Court vacation. However with tougher economic times one can anticipate that corporations will begin to query bills, demand more details, ask why so many hours were involved and otherwise scrutinise far more carefully the product provided by lawyers. Corporations I believe will quickly realise that their answer to time costing is a rejection of long term and historical marriages with the same legal firms and a pursuit of a system of tenders where perhaps on an annual basis a quotation for legal services is sought and presumably obtained from a dozen firms. By way of an aside in Melbourne last year a government instrumentality which had used the same firm of solicitors for more than 50 years with an annual legal bill of three quarters of a million dollars decided that sentiment wasn't enough. It went to tender for legal services, and in the end opted for a very relieved firm of solicitors who came out on top of the pack.

Modern technology, who knows where it will all end? Computers, VDUs, IUDs, the fax machine, presumably the mobile telephone, the TV phone, laser scanners, electronic mail, voice activated word processing systems, the robot secretary will all make the role of the solicitor easier in the next century; but at the same time more difficult. More and more it will become a question of who is the boss, the solicitor or an uncontrolled and misunderstood electronic aid. I believe that around the year 2000 the vast conglomerate of Blake Mathers, Russell McVeagh, Cairns Slane, Peat Marwick, Harcourts, Richard Hadlee enterprises will for the first time query who their senior partner, a Mr A Macintosh is. When they discover that Mr Macintosh or Big Mac as he's been known to the partners is really an Apple Macintosh computer who has been allocating 47% of the profit cost to the Salvation Army for the last decade then the future of the computer will really be in question. In Australia at the moment one must really query where the computer and the word processor is taking us. While the computer is irreplaceable, word processors have got so far out of hand that even the authors of many documents don't know just what is in them. Recently my office received a farming lease that exhorted the lessees to keep the lifts in good condition.

Advertising. By the early 21st century advertising by solicitors will be rampant. Whether or not it will be cost effective is of course another thing. But let's face it, once you've seen your face on TV or read your own glossy brochure you begin to believe your own publicity and the whole thing becomes self-generating. I predict that the low or high point will be reached in 2001 when Graham Cowley will pose as the centrefold for *Cleo* magazine with a staple through his navel.

I've got the red light here so I will delete multi-disciplinary partnerships and perhaps finish on a question of communication. If the present indifference to communication with clients continues it seems likely that by the 21st century only the computers will understand what solicitors are talking about. However on the brighter side acknowledging that the ability to write a letter or even speak to a client in a fashion that the client can understand may be important to legal practice. Universities all around the world will in the law courses be including a subject called communication. This will be a big step forward as it will represent the first acknowledgement by most university law schools that many students who undertake law courses and indeed graduate may want to practise law. My time has expired. The Conveyancing monopoly in specialisation can wait. But finally in one area the 21st century will remain unchanged, because despite computerisation, advertising, specialisation, super law degrees, the best solicitors will be those who listen to their clients, those who care about their clients, those who take a little time to explain to their clients and those who combine competence and compassion. They are the solicitors that I want to lead us into the 21st century, whether or not they have got their computers with them.

David Ward

Professor William Twining is a

professor at University College, London and he's been Chairman of the Commonwealth Legal Education Association since 1983. He has the advantage of being neither a Barrister nor a Solicitor and so his remarks are not drawn in any way from self interest and therefore will have added impact.

Professor Twining

I have five minutes in which to talk about the law school of the future. The momentous events of 1989 have suggested that there is indeed no future in futurology. There is one piece of research which I think provides a confident prediction. Naturally it is from the USA. According to present trends, by the year 2050 there will be more lawyers than people in the United States. However, I am going to be more cautious and I am going to take as my text a report published in 1975 called "Legal Education in a Changing World", a report whose time I believe has come.

Now this suggests that law schools should now and for the future be conceived and financed and reconstituted as multi-purpose centres for legal development extending far beyond what might be called the primary school model with which we are familiar, which concentrates almost entirely on first degrees and pre-qualification training. Before elaborating or not elaborating as time won't allow, on the implications of this conception, let me make some obvious points about our context.

During the next decade and beyond we can expect at least two conflicting trends. On the one hand largely because of improved communications the idea of a global village is likely to become more and more of a reality. Direct education by satellite and other forms of distance learning will increasingly transcend international boundaries, as is already illustrated in the South Pacific. On the other hand the familar North, South divide. It is probable that the rich will get richer and the poor poorer, and this is already illustrated by the increasing disparity of resources between for example African law faculties and many western law schools. Improved communication may mitigate some aspects of this disparity but at a cost including potentially dangerous forms of dependency as a result. We don't need the events of Tiananmen Square to remind us that modern media and communication and their control represent crucial issues of power. In education increased centralisation, both nationally and internationally, with the production and examination of ideas and materials may stimulate heavy handed attempts to control them by governments and others, but Tiananmen Square also suggests to us that there will be other forces at work to counter-balance these efforts, to break such monopolies.

The idea of a law school of the future as a multi-functional resource centre implies radical changes in the who, the what, the how and the why of legal education. It is fairly obvious with regard to the who, but not only will legal education be a life-long enterprise for all lawyers and Judges and people specialised in the law, but law for non-lawyers on all sorts of levels will be as it already is becoming increasingly important, and again the idea of the law teacher will not be confined to the career academic. As for the what we have heard a lot at this Conference about legal skills, about multi-disciplinary practice, about multi-national practice, about the implications of new technology and so on and so forth, and all legal education systems will have to respond to these matters. I have in my paper which no doubt very few of you have read, explored some of the implications of this, and I have concluded that these complexities may ironically lead to a revival of the classical ideas of the liberal education, the idea of highly transferable intellectual skills, taking theory seriously, and such truisms as the most important thing is learning how to learn, and self education. This will not I hope involve a return to the old arrogance of the gentleman amateur epitomised in the phrase, that a man who has a first in Greats can work up science in a week. There is much more to be said about the how, the what, the why, and so on, and the who of a new kind of institution but my time is up and I suggest that you read my paper.

David Ward

Professor Chris Weeramantry is Professor of Law at Monash University in Melbourne. He was formally a Justice of the Supreme Court of Sri Lanka. He is Vice-President of the International Association of Lawyers against Nuclear Arms and has written a number of works including *Human Rights in Japan, Nuclear Weapons and Scientific Responsibility* and *Islamic Jurisprudence.*

Professor Christopher Weeramantry

There is an old verse on the narrowness of the legal profession which bears repetition.

> The law the lawyers know about is property and land,
> but why the leaves are on the trees and why the winds disturb the seas,
> why winters come and rivers freeze,
> why honey is the food of bees,
> why faith is more than what one sees,
> and hope survives the worst disease,
> and charity is more than these they do not understand.

Now if there is one message that is flashing all around us as the profession enters the 21st century or prepares for entering the 21st century, it is that it must abandon its ivory tower attitudes and its insularity. These have been the factors that have given the profession this image of extreme narrowness and if the profession is to survive with honour it must overcome those two drawbacks.

Now I speak first in regard to ivory towers, it is essential for the profession if it is to discharge its social responsibilities in the years ahead to take a greater interest in the great social issues of our time, how many Bars for example around the world have committees that concern themselves about matters such as apartheid or environmental law or the arms race or the third world debt. These are the problems which we face when we look at the global future in the next century. In a shrinking globe all these issues are going to affect every one of us in our own little countries and if they affect us in our own little countries they will affect us in our own little practices. It is we as lawyers who can make a useful contribution in these fields. We have not made that

contribution thus far. For example, take the question of the arms race, take the question of nuclear weapons. The doctors of this world have already formed themselves into an association discharging that social responsibility and doing their best to avoid nuclear war. What have the lawyers done? It was only last year that we were able, ten years after the doctors, to stimulate the conscience of legal professions in a few countries and get going what we call an international association of lawyers against nuclear arms. Our discipline has something very specific to contribute in this regard because international law can be used to show to the rulers of this world as well as the assemblies of this world that there are relevant principles of international law which govern these activities which we as lawyers have not been pointing out actively enough.

On the social side we also have the duty, which could be described as an educational duty, of instructing both our fellow members in the profession and the members of the public on certain essentials in relation to the world order of the future. I am speaking of human rights which in a very special way will be a dominant influence in the 21st century. Unfortunately our law schools do not teach sufficient about human rights as a discipline. Our lawyers, and indeed our Judges, know very little about this. We have first of all the great task of educating ourselves in this field and secondly bringing that message to the general public. We leave the education of human rights to others. We leave education on the rule of law and on constitutional matters to others. We are the people who ought to be doing this. We ought to be going out into the schools. We ought to be going out into the public all over our countries; we ought to be speaking to adult education centres, and so on, on some of these matters which we ought to be able to speak on better than others, and where we have a duty by reason of the nature of our occupation to instruct the public. We also in the shrinking world have a duty to influence the stance of our respective countries in regard to the position they will take on the great international issues of the future. We leave that to the politicians and we, who can contribute so much, do nothing to influence the position that our countries take up in these great international bodies that sign these various treaties which reveal so much of importance for the future, so much in regard to the ivory tower attitude. Let's go out into society. The law that we are practising is not merely the law in the books but the law in the field which is a thousand times more important than the law in the books.

Now in regard to our insularity we have been very narrowly uni-disciplinary. We must be multi-disciplinary. The law touches almost every discipline. It is an interface area that is thoroughly neglected which we must cultivate. You name the discipline and there will be an interface with the law. We have neglected it. Secondly we need to consider comparative legal systems not merely our own. One of the traditional weaknesses of most legal systems, and the common law possibly is one of the great offenders in this regard, is its concentration on its own discipline and its failure to perceive perspectives available from comparative legal systems. That must be emphasised in a world where we will be living much closer to people subject to other jurisdictions.

And thirdly there is this parochial nationalism which has been the bane of legal systems thus far. We as lawyers can think only in terms of narrow national interest whereas we are going to be world citizens. We are going to be world lawyers. There are going to be so many more areas of interaction between the different legal systems of the world we have got to be universalist lawyers and not narrow parochial lawyers.

And of course there are political problems that arise from all of this. There is for example a very sharp ethical issue that arises where for example for the spread of commercial activity a great multi-national corporation trading in a poor third world country begins to exert its economic muscle in that country and to take advantage of that country. The best lawyers of that country would probably be hired by the multi-national and would be using their talents in the service of that multi-national and against the interest of their own country. There would be many a situation where a conflict arises and I think this is one of the most important areas where, especially in developing countries, lawyers have got to be aware that a sharp clash between their duty to their client and their duty to their country and their people will arise. I have seen this for example. I was in a developing country not so long ago where the lawyers advised tobacco companies to buy full pages in the newspapers and advertise cigarette smoking as a great virtue before the law came in that said you must advertise that smoking is a health hazard. The papers were full of one page advertisements before the law came in, enticing people into the smoking habit. Now somebody gave advice there along that line, and one begins to wonder whether that advice was in keeping with the ethical obligations of the legal profession. So there arise, in many of these ways, a number of new situations that confront the lawyer of the 21st century. We have to be on our guard against them. We can only meet these challenges by overcoming the narrowness and parochialism of the past. There is a great leadership opportunity awaiting the legal profession. We must not lose that leadership by default.

David Ward

Well we have five excellent and varied contributions from the speakers and they have also kept their contributions short so that we have half the time of the session available for contributions from the floor . . . So if you would like to ask a question or speak would you kindly come forward to one of the microphones and give your name and country which you represent.

Unidentified (India)

I would like to ask Professor Weeramantry that in India advertisements soliciting by lawyers are considered as personal misconduct. What is his view so far as America is concerned on this matter?

Professor Weeramantry

Thank you. Well I am not an expert on the law of the United States but I can certainly see the difficulties that arise where lawyers can

advertise, and advertise without restraint. The countervailing consideration is this, that in the midst of our vast population where a person has a particular subject for litigation it may be difficult for him to locate the lawyer who has the expertise in that area, so some kind of restricted advertising which makes available to the public information about the lawyers may be needed.

David Ward
Any other comments from the panel? I can just say that we now have almost unrestricted advertising in the United Kingdom for both solicitors and barristers, which came in really against I think the gut feelings of most of the profession, but in practice it hasn't really given rise to any problems. It may be that the situation may be different in different countries, but apart from one or two odd instances we haven't really found it a matter of great concern. A next comment please.

Mr Justice Handley (NSW)
I was for the last two years President of the New South Wales Bar and last year President of the Australia Bar. I am now a Judge — I now see things clearly. We have maintained in Australia the rules against advertising by the Bar. We take the view that the solicitor is the expert professional and he knows or can find out who is the best man for a tax case, intellectual property case, a human rights case, a particular sort of defamation, you name it, and therefore there is no need for Barristers to advertise. Indeed it is entirely inappropriate because how is the solicitor to know whether the claimed advertisements are true or not? He has to make enquiries or she has to make enquiries to find out whether Mr X is indeed the defamation expert he claims to be. If Mr X is any good he is so busy that he does not have time for any more work and does not have to advertise. The people who will advertise at the Bar are those who are self-promoting and who haven't got enough work. I would just like to say very briefly if I may within my two minutes, that I do not believe we will see the last Barrister in the next decade or two. In Australia independent bars have emerged from fused professions. In several States where the profession has been fused by law for over a hundred years, as the State has grown so independent bars have emerged. They have proved their worth without any legal monopolies. In fact they are cutting against the grain of the establishment of the profession. They have emerged and they have survived and they are growing. In a sense to me it's like an actor. The client is entitled to be represented in Court by the advocate of his or her choice. The person who is going to get up and speak in Court, that is a personal task. It's not something that you have to have a thousand partners in order to be able to do. In fact it's an advantage not to have a thousand partners if you want to do it. On the other hand there is a natural division of labour between an office lawyer and a lawyer who will stand on his or her feet. Therefore it will survive.

David Ward
Could I just ask a supplementary question on that, the independent Bars as they operate in Australia are as I understand it, Bars of sole practitioners who take cases only on the referrals of another lawyer, is that a fair definition?

Mr Justice Handley
That is a fair definition.

Hon Raphael Rattray
I would like to comment. Perhaps, there is a connection between the two, the question of advertising. I suspect that in large jurisdictions there might be a greater need for advertising than there is in small jurisdictions where people know one another and know who does what within the professions. My own inclination is against advertising. We don't permit advertising in the legal profession in Jamaica. So my inclination is against fusion. It did come to Jamaica and I was proved wrong. It has worked. So I think lawyers are conservative at heart and they tend to like to stick to methods which they know about, which they have grown up in. I feel myself that in the future, if we are looking to the 21st century, advertising is going to become much more popular than it is now in jurisdictions which don't have it at all, and also the question of a separated profession. In many countries which do have a separated profession, we had it until the early 70s, I think the world movement in the law will be to a diffused profession.

David Ward
Thank you, yes.

Gordon Lewis
I always thought that Barristers advertised through their clerks. Some of the claims made by one of the clerks in our State should have been referred to the Trade Practices Commission.

David Ward
I think experience of some firms is that advertising can actually be counter-productive because a reaction to advertising is why on earth are they needing to advertise — haven't they got any clients? So it is a bit of a two-edged sword. I would like actually just before coming to the next speaker, to ask Professor Weeramantry about one of his comments on advertising. It's not the professional advertising, but you referred to the tobacco advert, and that intrigued me because I wondered if in fact as a lawyer you feel that you have a duty to your country rather than to the multi-national client in that case. Isn't that going down a rather dangerous road of taking it one step further of feeling that your obligation is to the government rather than to the individual client?

Professor Weeramantry
It is something to which I think legal professions especially in developing countries need to give their attention. It is arising increasingly and much of the most valued legal business in those countries is business where multi-nationals are involved. Now the multi-nationals are there of course not for the love of that country but to increase their profits, and there are numerous situations where there is a clash, an obvious clash, between the public interest and the interest of the multi-nationals. Now I don't know what the solution is, but what

I am arguing for is that this be a subject of very serious consideration by the Bars in those countries, if they can work out some kind of guidelines by which, as with other ethical matters in the Bar, guidelines are given to members of the profession. it will stimulate members of the profession to think about this matter and perhaps take into consideration what they now do not consider at all.

David Ward
Thank you very much.

Unidentified speaker
I am a barrister practising in Kuala Lumpur, Malaysia. You must accept my apologies. I am not a legal philosopher and I feel a little out of place before the panel today, but I am a pragmatist probably belonging to a group which is fast becoming extinct. I would like to deal with a practical problem on which I would like the panel's views. You see, although we are going into the 21st century, we seem to be bound hand and foot by principles that were enunciated in the 18th and the 19th centuries. One of these principles of course is the rule in the Appellate Court that that Court will not interfere with the findings of a trial Court because it does not have the advantages of having seen and heard the witnesses which the trial Judge had the benefit of.

Now I believe that it is open to the legal profession to alter that rule in the 21st century by recourse to 21st century scientific equipment. What does therefore the panel feel? Is there a solution to the rule and would it think that the introduction of video-taping of witnesses' evidence would be useful to overcoming and eventually abolishing the seen and heard wall, or is there any other method in the 21st century which the panel thinks can overcome or in fact bring down that wall?

Professor Twining
About two years ago I was invited to Italy to give a lecture on Freedom of Proof, which I thought meant free evaluation of evidence. It was an invitation which I was rather intrigued by because it was from a group of so called radical Judges — a concept that I have not come across before. When I arrived I discovered that their concern about freedom of proof was not about free evaulation of evidence but about freem of younger Judges not to have their findings of fact interfered with by bigger Judges, and I was asked — luckily I had been warned — about some statistics about appeals in England. I got gasps of surprise, not because I knew the figures but because the figures were so low. In a lot of civil law jurisdictions nearly all findings of fact are reviewed or subject to appeal and Judges have to give reasons. This is part and parcel of the whole civilian inquisitorial and bureaucratic system.

I was quite impressed, I looked at some of the judgments of baby Judges as it were and I was quite impressed by the bureaucratic finesse; but I wasn't so impressed by the speed and the costs of this kind of system. So I think it would be something that would be needed to be treated with great care in the common law world.

Professor Weeramantry
May I make a comment on video-taping? I think video-taping sometimes is very useful because the cold print does not convey very often the tone in which something is uttered. To give you an example, I recall a Judge who would say when he was charging the jury in a murder trial, "Well, gentlemen of the jury this is the position of the prosecution, the prosecution says these witnesses were there, they saw the event, and gentlemen what does the accused say, the accused says he was not there". No, when it was put in that form the gentlemen of the jury of course get the message, but in cold print it looks as if the case for the prosecution has been put, the case of the defence has been put and the Judge has been even-handed. A Court of Appeal when seeing that record would not want to interfere, but had the video-tape been played to the Court of Appeal the clear message in the Judge's tone would have come across. It applies also to the statements that witnesses make. The tone in which it is said I think can be captured on video-tape much better than it can on the cold record.

Hon Raphael Rattray
In some jurisdictions including my own, I have always thought that the rule that the Judges saw and heard the witnesses and therefore are in a better position to determine who told them the truth, was a bit of a fiction. I thought so because the Judges in my jurisdiction write down the notes of evidence and they bow their heads and they look in their books, and I have often wondered what opportunity they had to see and hear the witnesses at a time when they were assessing whether the witnesses are speaking the truth or not. I think naturally video-taping, I would be very attracted to that or some method of reviewing the facts because those who practise law see very often in a very good case before the Court of Appeal that the decision is on a question of fact. I think it tends to also give Judges, perhaps not unconsciously, one way of avoiding having their judgments appealed. I think it should be a subject to review.

David Ward
All right the lady at the front please.

Anne Phillips (Palmerston North)
I'm asking a question of the gentlemen on the panel, and my question relates to the position of women in the profession. The gentlemen will be aware that women are increasing in numbers and now in New Zealand we have 50% of women who are in the profession. I notice that no one on the panel has specifically addressed the position of women in the profession and except perhaps in a general sense regarding human rights. I would like the panel's views. Many women express the view that unless there is a clear equal opportunity policy within the profession, then women do not succeed. There is what has been coined in the United States a glass ceiling, and I would like to hear the panel on those views please. Thank you.

Mr Weeramantry
I think that all I can do is apologise perhaps for not having mentioned that the third positive development that has occurred in the last 25 years, in other words after the five

events that made me pessimistic about the future the two that I mentioned as hopeful signs are technology, and multi-disciplinary partnerships. But I suppose I should have really have said women, competent women in the law, multi-disciplinary partnerships and technology.

David Ward
Thank you, have you any other comments.

Unidentified (possibly Professor Twining)
The recent Commonwealth study of access to legal education and the legal profession revealed with quite a lot of statistics that there has been truly remarkable revolution in the participation, of the balancing of the gender ratio internationally, and in many countries the number of women law students has gone up to at least 40 percent. It did however reveal the certainly more worrying thing even, with regard to legal education, that there are in some countries including my own a much higher percentage of women than men come from the classes one and two. So there are other groups including women in other income groups, and in racial minorities who may not be being represented by these figures. The figures may be somewhat misleading. I too I think would like to apologise, perhaps for not saying anything specifically about this; but this was something discussed in an earlier session this week in regard to legal education. Clearly the feminisation of legal education and the legal profession will have all sorts of profound effects, in my view.

Gordon Lewis
Yes, in my State I think women have really overcome most of the discrimination they have had to battle against for decades. I think all we are waiting for now is a numerical base to provide the launching pad for the silks and the Judges of the future. I think the next 10 years will see a dramatic appreciation of the worth of women in the judicial role for example.

David Ward
Could I just say one thing in defence of the panel who do obviously represent themselves only as one half of the human race, and that is that I did say to them that in order to keep the contributions within time and fairly short that they didn't have to say everything that they might have said, and that it might emerge in due course, that they would have the opportunity in the course of questioning to debate their additional points. And that is exactly what has happened. So I must say just in passing that my own reflection on what is happening in England and Wales, where now more than half the new entrants are women, well, two things. First of all I think they have improved the image and also the capacity of the profession considerably, but the other thing is that I think the critical thing. This is a question that we haven't yet answered adequately in England and Wales. It is the question of part time partnerships for women with family responsibilities including adequate maternity leave. The medical profession in England and Wales has already gone into that because they have had to, and you now have general practice partnerships on that basis. But there is still a reluctance in terms of solicitors actually to take that step, and it seems to me that that is the critical thing.

Mahla Pearlman (Australia)
I don't know after the last question whether I should say that's a case of non-discrimination or just discrimination in reverse, however that is not my question. My question is that in Australia the Upper House of the Federal Parliament has started an inquiry into what it terms the cost of justice. It's a very wide ranging inquiry and it is in full bore at the moment. The Law Council of Australia has put in a very large submission and is trying to meet what that inquiry may come up with. One of the many members of that committee that is going to inquire is a Senator from South Australia, a very, very strident critic of the legal profession. One of the things he is saying is that we should examine the inquisitorial system as against the adversarial system, which of course we as a common law country practise in. I wonder if the panel, especially as one of the panel mentioned taking from other jurisdictions and other disciplines and other ways of practising law, I wonder if the panel would care to comment on any things they know we might learn from other systems of law?

Professor Weeramantry
In relation to the inquisitorial system it certainly has disadvantages over the adversarial that whereas in the adversarial system the Judge concentrates on the two parties before him or her, in the inquisitorial system the Judge has to think not only of the two parties but also of the impact on society of the decison that he is going to give. The inquisitorial Judge is under a duty to be an inquirer whereas the common law Judge is not an inquirer. He is more, despite what some Judges have said, he is more in the position of an umpire trying to decide between two parties — which should win according to the rules of the game.

Now in view of what I belive is the position that every judgment is a social document which has an impact upon society and not merely upon the two parties, there is value in the inquisitorial system. This is becoming even more apparent in regard to human rights litigation. For example in Canada there is the Charter of Rights which necessitates an inquiry into the human rights questions on the basis of constitutional provision. The Judges in Canada are beginning to feel that almost unconsciously they are beginning to adopt an inquisitorial method in their human rights litigation. This is spilling over into litigation in regard to ordinary common law matters because they find that in the inquisitorial system where they are taking into account not merely the two parties but the broader perspective and the context of the dispute, they find that that method is showing results and proving more socially useful. So those are just two observations which may be useful.

Professor Twining
With some trepidation one mentions on occasions like this that there is a work of high theory. But there is an absolutely brilliant survey by a Yugoslav now in the United States called Mehan Demasca on these questions. I think the main

message that comes from this is that there is no legal system in the world that is purely inquisitorial or adversarial in its arrangements, and that one needs to be very careful to talk in broad brushes. All legal systems combine different kinds of procedural arrangements and not just those two. In many different ways, most legal systems are very complex hybrids but there are a lot of specific issues which are worth pursuing along the line of Demasca's analyses.

Mr Shankardass
Just one point on learning from other jurisdictions, Mr Chairman. I was wondering why it is that it is just within the Commonwealth countries that we have open ended arguments in Court. In three quarters of the world, certainly beyond the original trial most appeals, first, second and final appeals are disposed of on written arguments, written briefs or very controlled hearing as in the United States of America. I for one have never understood why is it that in almost all countries of the Commonwealth we have never been able to introduce that system. If someone has comment on it or an answer to it I would be delighted to hear it.

Peter Cresswell (England)
I would like to assure the first speaker that the English Bar is thriving and is not only confident of its survival but will grow stronger in the next century. There is plainly a deep lack of knowledge about the changes that we have brought about ourselves. Time does not allow an elaboration. I simply give you four headings: Funding of Entrants. Millions of pounds are now put forward by the Bar to ensure that we attract to the Bar an entire range of young. An advocacy course which we believe is the finest in the world. That is a new course. Changes to our code of conduct weeding out all restrictions that are not necessary; and professional direct access. There is also a deep lack of understanding about the current state of the government's reforms. it is perfectly true that had the Green Paper gone through providing as it did for direct lay access and multi-disciplinary partnerships the Bar would have been threatened. But we removed those measures and many others. One needs to be in touch with London by fax to know that only yesterday our Attorney-General announced that the government is to accept the principle that we won, defeating the government in the Lords, it will now be a general principle of our new legislation, a general principle that any applicant must act for any client in his field of practice without discrimination. Another change that we have secured in relation to race and equal opportunity, there will now be provision in the Act to outlaw discrimination against Barristers and to ensure equal opportunity for women. A shake up, members of the panel, is a thoroughly good thing. I am confident that we will survive and we will emerge stronger because of the quality of the specialist professional services we provide not because of restrictions.

Mr Shankardass
I must say I am most grateful for that reassurance coming from the Chairman of the Bar in England. My real point was why was it that the Bar in England and Wales had not, before the Green Papers appeared, before Lord Mackay delivered that body blow that I talked about, got itself concerned with the reforms which are now coming after the Green Papers. The inability to have brought those reforms about internally is what has been the cause of great concern to us, and I think it's the same in many parts of the Commonwealth.

Alfred Barnes (Auckland)
My question concerns multi-disciplinary practices. We have heard Mr Shankardass and Professor Weeramantry comment on that and I think I heard Mr Lewis say he had comments, I wonder if we have time to hear his comments as to the possibility of such practices? And secondly, if any other members of the panel might like to comment as to the downside, if any, for our profession and the clients, of such developments.

Gordon Lewis (Australia)
Yes, what I would have said is that I think that multi-disciplinary partnerships are inevitable. As to what form they will take or how they will encompass the problems of multi-disciplinary standards and also the conflict of interest problem – although if estate agents are involved in the partnerships it's never troubled them in my State. I think that probably multi-disciplinary partnerships will lead to a number of secretaries and directors of law societies finishing up in homes for the bewildered because one shakes one's head about how you will enforce certain professional standards; but if there's any sort of concept of one stop shopping it seems to me whether it's 5 years, 10 years, 15 years away it will come.

David Ward
Could I just make one further comment there arising from the Courts and Legal Services Bill. Peter Cresswell has dealt with the Bar side and as you may know the Law Society and the Bar Council haven't been in entire agreement on all matters. I observe a Chairman's silence on that and only say that I share the confidence that in fact the Bar, in the sense of a body of practitioners that take cases on referral and with the strength and excellence of many members of the English Bar will survive; and it will survive on merit and it doesn't need any artificial restriction – as in fact has happened in Australia and New Zealand.

What actually I think is in a sense more significant, if of long term significance in the Courts and Legal Services Bill, are the proposals in relation to multi-disciplinary practices and allied matters. What the Bill says is that the statutory restriction against multi-disciplinary practices is removed, but the Law Society and the Bar Council can continue to make rules prohibiting them. But we know perfectly well that in two years' time the intention is that those rules will be subject to review by the Competition Authority which will obviously tend to apply market forces as the test. But there are two things arising from this. One is that there is going to be a distinction between those rules which relate to litigation and advocacy, and those which relate to other legal activities. Those relating

to legal litigation and advocacy are to be approved by an advisory committee and the Lord Chancellor and senior Judges. Therefore I think they may be less inclined to adopt market forces arguments. One of my uneasinesses is that, what I suspect is not really intended as a result of the Courts and Legal Services Bill, but there may be a future division of the profession between what you might call the contentious and the non-contentious halves with different sets of rules. I think that is very unfortunate because I think that those who are involved in non-contentious business are involved in preventive medicine, and the acid test is always what would happen if this matter went to Court.

The other thing which takes us a long way down towards multi-disciplinary practice is the concept of the employed lawyer by the lending institution who does conveyancing for the institutions customer. He is employed and he also acts for his employer's customer and if that is extended to other areas as it might be in due course it can mean for instance accountants being authorised practitioners employing solicitors and barristers doing conveyancing for their clients. You're almost there at a multi-disciplinary practice by another route. I think it opens the way to outside capital in the legal profession with all those implications and I just have the uneasy feeling that all those issues were not fully thought through before the Bill was presented to Parliament.

I see the Lord Chancellor sitting there silently and inscrutably, and I have no doubt that he will continue to sit there silently and inscrutably. But if he wishes to comment of course no doubt he will.

Brian McAvoy (Auckland)

I am not a lawyer. I'm Professor of General Practice in the Medical School here in Auckland. I have read Professor Twining's paper with great interest because we here are also considering changes in both the content and the process of the teaching of medical students. But unfortunately medical schools are very conservative institutions, and I'd be very interested to hear from Professor Twining and any of the other speakers any information about how the curriculum changes that are being proposed in the legal profession are being introduced in law schools.

Professor Twining

I think in education as in other fields there is a grass is greener syndrome and legal educators beat their breasts and look at medical and other training and say they are 20 years ahead of us. I think some of the most recent innovations particularly the innovations with regard to switch of emphasis from knowledge to skill, have drawn quite heavily on training in other professions. I sometimes tease my practitioner friends by saying that the most advanced profession is nursing, because they still aren't too well in legal education contexts. I think that some of the most interesting developments that are likely to happen particularly on the solicitors' side, Mr Ward might want to comment on that, is the creation of much greater flexibility, different routes and methods of education. Not only in terms of part-time, full-time, I think it is very important with regard to access, the recognition that there may not need to be just one way of qualifying. Now to the extent to which that is suitable for medical education I can't comment. But I think an increased flexibility in the provision of basic training and then a much greater emphasis on continuing their legal education is a serious enterprise, and both things have begun to come.

Debra Weed (Australia)

In relation to the women in the law I might say there are some 1200 barristers in Victoria, and there are some 100 women practising. In the last seven years the number of women has probably doubled in Victoria, there are now two women on the Victorian Bar Council and I was lucky enough to be the third some couple of years ago. This year we have two, one who was recently appointed. It seems that women in Victoria are now achieving equality. It has taken many many years particularly at the Bar. In the law schools I understand there are some 50% of women but only 10% at the Bar. I am not sure of the numbers of solicitors but I'm sure Gordon Lewis would know. I note that Gordon hasn't lost his style since lecturing in professional conduct many years ago, I am glad the jokes are still coming.

It seems that women will achieve equality when they will be appointed to the Bench. There will be more women silks. One hopes they will be appointed on the basis of merit and not on the basis of reverse discrimination. Women have been patronised in the law. They are still being patronised in the law. It seems to me that the number of women giving papers here is remarkably few. I'm not quite sure why that has happened. Maybe they were unavailable to give their papers.

I would be interested in any comments from the panel as to where the future of women I would say lies, where the future of women rests in the Bar. I'm sure in terms of solicitors it is not going to be a problem. In relation to the Bar I think the attitude of Judges is not a problem with which women have to contend. In my experience Judges have always been either polite or otherwise to women and they show no discrimination at all in their moods, equally crusty or not. There is no difficulty with that. I think the problems with women lie with the older practitioners who seem somewhat unwilling to accept women as barristers. Certainly that applies in the area of commercial law. If one wishes to practise in crime or matrimonial law for some reason we seem to be deluged with work, but if one wishes to pursue a career in say insolvency or some other civil area there seems to be a vast degree of resistance. So I would be interested in any comments.

Hon Raphael Rattray

In the Caribbean and certainly in Jamaica the law school is graduating more women than men at this particular time, and the number of women at the Bar has increased significantly over the last few years. Some have done very well. There seems to be a greater success for women who practise as solicitors as against those who are engaged in advocacy. I have not tried to ascertain the reason for that. I can't detect any particular discrimination but it is a fact that there are a smaller percentage who

go into advocacy but the entry of women into the Bar I don't think has affected the relations between Barristers as advocates.

Mr Weeramantry
May I say that in our law school women are in equal numbers with men, and going on the results they are achieving as good if not better results than the men because they seem to be somehow putting in more effort into their studies. We see the result of this in the early stages of academic life because when we take in tutors and young lecturers we find that there are as many women if not more women than men who are coming in. So with this degree of talent there is no doubt that in the profession they will just make their way in and there can be no discrimination that can stand against them.

Professor Twining
I am not quite as optimistic I think as my colleagues on this. Certainly as far as the academic profession is concerned and not just as academic lawyers. What looked like a fairly easy path to equality hasn't so far arrived. There have been many more difficulties than had been anticipated and again I would say I think one does need to ask which women because I think there are all sorts of hidden groups of people who are not getting the opportunity, that also need to be looked at.

David Ward
Yes I resented the comment about women in commercial law because my observation of the commerical firms in London is that there women are very well accepted, and very well accepted by commercial clients. I would also just pass on a comment that a Registrar, who is a District Judge in England made to me recently, because he now has a lot of women appearing before him. He said this is characteristic. They have their points and however quickly you try to move them on they will go through all their points and they will not be hurried. But, he said, you can be sure that they have done their homework while a male advocate is more susceptible to a hint from the Bench as to what he should be moving on to, the Judge sitting back, nevertheless has an uneasy feeling that the advocate's flair is actually a superstructure upon a very insecure foundation underneath. So you may take that as compliment or insult whichever way you will.

John Roberts (England)
I stand here to confirm what Peter Cresswell said to you about the fight against discrimination of the Bar. He's been there. I was a founder member of the Racialism Committee of the Bar Council. This was years ago because of the difficulties that a lot of black lawyers found in England. By the way some of the delegates when they met me they asked me: "Are you from the West Indies or you from Nigeria?" I said; "no, I practise in England." A lot of people are determined to fight against discrimination, and this is happening at the moment with the help of the Bar Council. And I must say this, I am saying it for this reason I was the first black Head of Chambers in Great Britain.

I was the first person of African ancestry, when I say African ancestry some people must excuse me for using the euphemism, negro, pure negro, to be appointed Queen's Counsel in Great Britain and that person who made history recommending me to the Queen to the honorable position was Lord Mackay of Clashfern sitting on the other side there. I say this, because he is very much interested in seeing that there's fairness at the English Bar, and of course I must say this is when I was interviewed over the war service about my appointment. I continue to say that it took a Scot to come across the English borders. Since then a Jamaican took silk and I have not seen the list for this year yet because I left England before that list was published, but the great effort that is being made to the extent in fact I got a photograph of us here, the Lord Chancellor and myself. Two weeks before I left England, they visited my Chambers and spoke to the members. I am backing them up because I have been very watchful, a block of the lawyers look towards me you know as Daddy John.

I watch the situation and I must confess that they are doing the best they can. It's still going on and I do expect that in the 21st century by the beginning of the 21st century things would have developed because when I started there were only about 8 to 10 of us coloured barristers practising in England. Now you can count in three figures, I think between 300-400 practising in England.

One thing again about women barristers. I must tell you that I am your champion in England because at one time I was the only Head of Chambers with seven women barristers in chambers. I interview women every year and I'm quite sure that in the 21st century we will have quite a lot of women practising in England. I thank you for listening to me.

Mr Shankardass
Just to add to the list of difficulties to change things particularly in developing countries, I thought I might mention an experience I had once speaking to the Chief Justice of a small country in the Commonwealth. I was trying to persuade him of the merits of informational advertising, that that at least is important for the Bar to introduce and he was saying, do you know what my difficulties are? The Bar has already come up with that idea. So we ask four members of the bar to give us samples of the kind of informational advertising that they would like to see happen. One of the first ones we saw was from a youngster who had just come back from England. And he said, I am a graduate from King's College London. I know the latest law so come to me. Don't go to all those old fogies. □

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