JOINT WHO/AUSTRALIAN

INTER-REGIONAL MINISTERIAL MEETING ON AIDS

WESTMEAD HOSPITAL, SYDNEY, AUSTRALIA

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The Hon. Justice Michael Kirby CMG**

AIDS IN THE REGION

Hardly a day goes by but news is broadcast of new initiatives to control the spread of the AIDS infection in our region.

* Last week the BBC news carried the story of a demonstration in New Delhi, India by African students protesting at the announcement that they would have to undergo "discriminatory" tests for AIDS anti-bodies. A demonstration was organised at the Maldivian Embassy. It was followed by the announcement that all foreign residents, seeking work permits and remaining in India for more than a year would require a certificate that they were negative to the AIDS anti-bodies.[1]

* Also last week, China's State airline, CAAC, was reported to have refused to fly an American suffering from AIDS home from China. The patient, Mr. Brent Anderson was later evacuated on a United States military flight flown specially to Kunming in South-West China from the

Philippines. CAAC had said that it would fly Mr. Anderson from Kunming to Shanghai; but only if he chartered his own plane or booked six rows of seats on a regular flight. Qantas and other airlines from other regions have asserted that there is no danger of AIDS being transmitted to other passengers on a flight.[2]

* The Health Minister of the Republic of Korea, Mr. Rhee Hai Wan said last week that tourists visiting South Korea for the Olympic Games in 1988 would have to carry health certificates declaring that they were free from AIDS.[3]

* The Philippines previously announced mandatory testing for all persons with resident status. However, when it was realised that this would include diplomats, volunteer peace corp workers, missionaries and others, the plan was quietly dropped.

Law of its nature is local. It responds to local needs. It reflects local culture. It grows out of local institutions. That is why it is impossible to lay down universal rules. Countries which have shared a legal tradition (such as the countries of the common law) can continue, with special advantage, to share intelligence on common problems. They can do so usefully because they still share like institutions, bureaucracies, manners of expressing the law and attitudes to the limits of the law. But in a region as diverse as ours there are reasons for special care in laying down universal rules for legislation on AIDS:

* The view taken about the legitimate role of the State and its control over individuals will differ greatly from one jurisdiction to another.

* Perceived self protection, in countries having relatively low exposure to the outside world (and hence to the AIDS infection) will need to be balanced against the desparate obligation in others to maintain the influx of tourists. Where tourists are vital to the local economy, proposals for regulations which would frighten away tourists must be considered most carefully. They may succeed in stemming the tide of AIDS. But they may destroy or gravely damage the infrastructure of the economy in the process. This would be a particular concern in countries such as the Philippines and Fiji.

* The source of the AIDS infection may also differ from one jurisdiction to another. Thus, although the spread of the infection through contaminated blood used for transfusions is now a relatively low risk in countries such as Australia, it is a relatively high risk consideration in other countries. Where interviews of donors and screening of blood products is not in force or cannot be introduced, the risk of the spread of AIDS through this reservoir of blood must be considered. Laws and policies must be addressed to the real sources of the problem in each country - not to a universal model which is inapplicable, or less relevant, to local concerns.

* Similarly, responses to the AIDS epidemic must take into account the economic situation of each jurisdiction as well as cultural norms. Thus, major programs promoting the use of condoms and removing the legal restrictions on the sale of condoms in public places may be unacceptable in countries where condoms are generally considered

inappropriate because of cost, religious or other impediments.

* A further consideration relevant to the region is the extent to which the source of local infection is not just tourists and foreigners entering the country but also one's own nationals. For example, a number of the countries of South-east Asia have major programs for the supply of overseas labour. Thus the Republic of Korea and Thailand export contract manpower to many countries. In developing policies requiring the presentation of certificates of anti-body testing, such countries, in particular, must consider the impact such a requirement would have by way of retaliation. Would it diminish the relatively free flow of persons throughout the world which has been such a phenomenon of recent years? To what extent would it limit the mobility of the elite of developing countries? Precisely because of their mobility, it is likely that such persons will be subject to a greater risk of exposure to the AIDS virus. Those who embark upon programs of compulsory testing must reflect upon the risks of retaliation and of the imposition of costly requirements which will fall as a burden on local health resources and, possibly, manpower exports and elite mobility.

* Finally, some jurisdictions will find it extremely difficult to deal with the problems of AIDS precisely because of laws which are presently in force. Yet such laws may be relevant to the target groups whose confidence must be secured in behaviour is to be changed

and the AIDS epidemic contained. The target groups include notably homosexuals and intravenous drug users. In many countries of the region, eg Singapore, laws exist to forbid and punish homosexual activity, prostitution and drug offences. In such countries it will be difficult now to advance and develop policies targeted at those groups who have in the past been forced underground by present laws. Such laws have not succeeded anywhere in stamping out entirely the stigmatised activity. Many observers, at least in Western countries, would regard it as undesirable and oppressive nowadays to attempt to do so. Finding the right compromise between the maintenance of current policies and laws and adapting those policies and laws to the special new challenge presented by AIDS is a major dilemma which faces lawmakers as we approach the 1990s. Are we to supply condoms in prisons or to continue asserting that sex (with its current risk of lethal infection) does not occur there? Are we to refuse to supply clean syringes to intravenous drug users in order to combat the scourge of drugs? Or are we, as in Australia and New Zealand, to proceed to do so in the name of the higher value of saving life and preventing the spread of AIDS to the heterosexual community through drug-using "vectors"? If we supply clean syringes at pharmacies, should we also do so in prison - given that experience suggests that drugs sometimes exist there and that sharing unsterile needles is a sure way of spreading the infection to a captive and dependent population? These are some of the problems which are presented to lawmakers

in this country and in other countries of the region. Many papers at the recent Washington conference demonstrated the field of law and social policy that will be affected by the advent of AIDS, including in insurance law[4], human rights and discrimination[5], tort law[6], (or the law of civil wrongs) and criminal law.[7] I have written elsewhere of the check list of responses which are available to society when it faces a pandemic of this proportion.[8] The measures available range from quarantine, compulsory detention, mandatory testing and reporting through public health measures to control places of sexual activity and the provision of laws against discrimination. Finally, there is the view that the law should generally endeavour to keep out of such a complex subject. This has been urged both because of its limitations of the law in achieving behaviour modification and because of the danger that foreseeable laws will tend to stigmitise and punish rather than to support public health measures designed to contain the spread of the AIDS virus.

THE FIVE COMMANDMENTS

Judges will respond to problems coming before them concerning AIDS in the way judges of have responded to new problems presenting in our legal systems over the centuries. In the absence of specific new laws they will, for the most part, reason to their conclusions by a process of analogy based upon earlier precedents. Let us hope they will reach their conclusions with compassion, and with an understanding of the interests which are at stake. Those interests will sometimes involve a competition between the respective interests of the person with AIDS and of a community which must be protected from the further spread of this lethal condition.

But what of the legislators and administrators? How will they respond in our region? There is no certainty that they will react, in every case, guided by logic and wise reflection. Sadly, some adventurers will react, seeking to aggrandise themselves, by playing upon community fear and prejudice. In democracies especially, but also in other political systems, there will be pressure for politicans to be seen to be doing something in the face of this new, frightening, growing epidemic. There will be pressure for them to do something - almost anything. If you are in any doubt about this, you should examine the history books and consider the ways in which even apparently civilised communities responded in the past to epidemics which had nothing like the potential of AIDS to cause international panic and alarm.[9]

For nearly ten years before to my present judicial appointment I was the Chairman of the Australian Law Reform Commission. In that time I had the opportunity to study the science of jurisprudence in operation. It was part of my task, in proposing laws for the Australian Government and Parliament, to consider the ways in which reforming legislation could actually operate to achieve the desired goal. In that study I had to consider, virtually every day, the differential impact of the sanctions and remedies which are available to the law maker pursuing a given goal. It must be said that often even well-meaning legislators pass statutes with little attention to the precise way in which legislation must be framed in order to achieve its defined goal. Passing laws is, of course, the easy task of law makers. Targeting laws accurately upon identified objectives and translating enactments from the cold pages of

statute books to actual operation: that is the difficult task.

With our current predicament in respect of AIDS in mind, and drawing upon my experience in the Law Reform Commission, I propose to propound five commandments for AIDS legislation. Like Moses, I would probably propound ten but there is not enough time. I am limited by the time clock to five only. Some might say that it is a pity that Moses was not under similar constraints.

LAW IS LOCAL BUT AIDS REQUIRES INTERNATIONAL CO-OPERATION

Possibly the most significant feature of this meeting gives rise to the first commandment. We come from different parts of the world. AIDS spans every continent. It threatens humanity. The collection of so much concentrated talent is reassuring. The international approach which has been adopted in scientific and technical sessions, as well as in the social sciences, is encouraging. Increasingly, science and technology and the diminishing distances of the world force upon humanity an international approach to legal as to other questions. But it must never be forgotten that laws are very much bound up with local culture and civilisation, with history, language, local institutions and traditions. What works in one place may not work elsewhere. The sanctions available in one jurisdiction may not be available in another. We can certainly learn from each other's experience. We can develop, as the World Health Organisation already has[10] an international check list of legislative and administrative responses to AIDS. But the first Commandment is that we must remember that law is local. It must not be assumed that measures adopted in one place will necessarily work or be suitable elsewhere. Having said that, I

must add two qualifications. First, because of the intercontinental character of the AIDS epidemic, local legislative and administrative responses will be ineffective unless supported by an international perspective and international cooperation and action. Once again the World Health Organisation must adopt a leadership role for the protection of humanity. As in transborder data flows for the protection of privacy, local legislation to contain the spread of AIDS will be ineffective unless supported by international action. Therefore, whilst remembering that laws are local, we must equally recognise that, in our present predicament with AIDS, we should develop our legislative and administrative responses with full knowledge of, and in harmony with, the responses of other countries, particularly our geographic neighbours.

The second qualification is a practical one. Some countries by reason of their size, the movement of their populations, their economic and other influences will inevitably influence developments beyond their borders by their legal responses. These will almost inevitably have an impact on their neighbours, if not on the rest of the world. The United States of America is clearly a country in this class. If mandatory testing of all immigrants were adopted in the United States, will there not be great pressure for retaliatory action against United States citizens seeking to move to other countries? If mandatory testing of migrants is considered appropriate, may it not lead inexorably, by its own logic, to mandatory testing of all international travellers? The ripple effect of legislation in one jurisdiction, particularly a large

and important jurisdiction, must be carefully weighed in designing the legal responses to AIDS. Otherwise precious human rights, including the right of free passage throughout the world, which contributes daily to human understanding and peace, may be sacrificed in futile or ineffective gestures against AIDS. However well intentioned, those gestures may produce a snowball effect of great damage to human freedoms without significantly contributing to the containment of the spread of the AIDS virus in the world.

So the first commandment is to remember that law is local but that the challenge of AIDS is international and intercontinental. Nation states and local jurisdictions should pause in enacting laws, remembering that the international nature of the problem will inevitably produce international consequences where local laws are enacted hastily and without due consideration. In the AIDS pandemic, we are all members of the one world.

MOBILISE THE LAW TO PROMOTE PREVENTION

The second commandment is that the primary thrust of all legislation, at least at this stage, should be to mobilise the law to promote the prevention of the further spread of the AIDS virus. There are three reasons for this stance. There is no present cure nor any vaccine available now or in the immediately foreseeable future to combat the AIDS virus. The condition of AIDS is potentially lethal in a proportion of the persons exposed to it. That proportion is apparently growing with the passage of time and as demonstrated by greater knowledge of the impact of AIDS. The law, whether in sophisticated or primitive communities, traditionally protects

human life. Therefore the thrust of the law should be to protect human life by promoting measures which contribute to the containment within those presently affected of this highly lethal virus.

But how is this to be done? Of the three prime means for transmission of the virus one, through blood transfusion, has now been, in large part, controlled or at least minimised in most developed countries by effective administrative procedures (and some laws) introduced to screen donors and their blood. Countries in the region could study these developments with care. But that leaves transmission of AIDS by sexual activity and by intravenous drug use.

So far as sexual activity is concerned, many papers for the Washington conference demonstrated the success, and the failure, of efforts to secure behaviour modification following wide-spread publicity of the lethal character of the AIDS virus and of the consequent need to adopt precautions and to change some sexual practices to avoid or minimise the risk of transmission of the virus.[11] It is, of course, extremely difficult to modify established practices as important for human identity and self image as sexual conduct. But it must be changed not only to prevent sero-conversion of those not yet exposed to the AIDS virus but also to protect the general public from the wider transmission of the virus through sexual contact. There are some obvious, but possibly painful, laws which will have to be changed. Laws which restrict advertising of contraceptives, particularly of condoms, must go. Media practices which, for delicacy, prevent candid advertisements on this subject, in language which consumers will understand, must

be modified. However acceptable and understandable those practices were in earlier times, they are now a positive contribution to death; and that must be understood. Laws which forbid the sale of condoms at supermarkets and general stores must be repealed. Management practices which discourage such sales must be modified. It is more important to prevent the spread of the virus of AIDS than to protect the delicate feelings even of decent citizens, who do not wish to see these life saving objects on store shelves. In this time of crisis, the defence of life requires that delicate feelings must give way to the necessities of the moment. Retail organisations and individual vendors have a moral responsibility to make it easy for sexually active people to purchase condoms. Papers at this conference demonstrate that one of the impediments in the use of condoms in the general community is the embarrassment and fear which young sexually active people have in securing these products. If we are serious about containing the spread of the AIDS virus, we must face up to that reality and address its solution.

Condoms should, in my view, be made available in prisons. In Australia, some prison authorities have declined to make them available. But it is unrealistic to deny the existence of sexual activity in our prisons. The prison population is vulnerable to AIDS. It is in a dependent position. It is the responsibility of the State. Prisoners are there as punishment, not for punishment. They are certainly not there to acquire the lethal condition of AIDS. Prison practices, and if necessary laws, should be changed to promote the containment of the virus and to prevent its spread, including by the ready availability

of condoms.

As to intravenous drug users, it is, I believe, to the credit of Governments in Australia and New Zealand that they have announced an intention to introduce schemes for the exchange of used needles and syringes for clean ones, at pharmacies. Of course such practices are entirely inconsistent with the concurrent "war on drugs". Equally, it would be preferable if young people could be persuaded to turn away from drugs. But we do not have the time to luxuriate in that wishful thinking. It is plain that an increasing source of the spread of the AIDS virus is through intravenous drug users. It is also clear that this is producing the major vector for the spread of the AIDS virus into the heterosexual community of developed countries. The proportion of persons presenting positive to the HIV anti-body test who are intravenous drug users is rising. So is the proportion of heterosexuals with AIDS. Although it is painful decision for Governments to make, given international efforts against drug abuse, in the end the bottom line is reached. If it is considered that life is more important even than preventing the use of narcotic drugs of addiction through intravenous injection, some compromise must be reached. That is why the Governments of New Zealand and New South Wales, Australia have taken the radical but, in my opinion, necessary step to institute the system for the exchange of needles and syringes. I do not pretend that this is an easy decision to make. But in my view, in our present predicament, it is the correct decision. Whilst there is life, there is hope. If a drug user acquires, through sharing needles, exposure to the AIDS virus, the chances are that he or she will spread it

further, will spread it through needle sharing and sexual intercourse into a wider community and even, possibly, die as a result of the exposure. A serious approach to the prevention of the spread of AIDS requires serious and radical measures.

I have referred to the "bottom line". We are approaching that critical moment in many of our countries. Here is the question that must be asked. Is it more important that we stop the spread of AIDS by measures which will be unpalatable to many citizens which tackle the primary ways through which the AIDS virus is spreading? Those ways are through sexual contact and sharing of needles by drug users. Of course, there will be some citizens, even decent and religious citizens of our countries who will say that it is preferable that we sacrifice a few promiscuous homosexuals and illegal drug users rather than run the risk of promoting sexual promiscuity amongst young people (by talk about condoms) or by apparently condoning drug use (by systems of needle exchange). I realise that in some places, conservative and church-going members of the community will face that equation with equinimity. They will prefer to let people die rather than to take measures targeted on containment of the AIDS virus. But as the mounting toll, caused by the spread of the virus, becomes more plain and as a realisation is reached of our duty, in common humanity to all our citizens, to protect them from exposure to this new and lethal condition, I believe that politicians of courage will be supported by an anxious community to take radical legislative and administrative measures, so long as they adopt as their guiding principle the protection of human life and the containment of AIDS. So the second commandment is that the law

must be targeted on prevention of the spread of the AIDS virus. Rules and practices which inhibit the attainment of that target must, however, painful it will be, be modified and repealed. Nothing else will protect humanity from the awful consequences of the rapid spread of a virus which is insusceptible to a presently available or foreseeable cure.

AVOID INEFFICIENT LAWS

The third commandment is that we should avoid enacting laws which are relatively inefficient in attaining their designed objects. Cost effectiveness and efficiency are watch words of the present times of economic constraint. The study of the costs and benefits of laws, even of the common law, is now a frequent requirement in the highest courts of many countries. Once it was said that justice was beyond price. Nowadays, judges and legislators realise that every law has a price. The object to be attained must be weighed against the price.

Where, as in the AIDS epidemic, human life is at stake, obviously the price which our communities will be willing to pay will be high. But that does not relieve law makers, whether judges or legislators, of the obligation to weigh carefully the efficiency of the rules they devise. Because of the danger of panic and community fear, it is inevitable that pressure will exist for legislators to enact laws in order to be seen to be doing something. Many citizens remember the compulsory x-rays for tuberculosis.[13] They ask why similar universal mandatory testing should not be introduced. However, such tests (and other mass tests of mandatory screening) were appropriate where they led somewhere: where they led to a cure. Even in the case of compulsory mass testing for tuberculosis, a point was

reached where public health authorities realised that the numbers of cases presenting, and the isolation and cure of such cases, was far outweighed by the public costs involved in the mandatory screening process and by risks which the screening process itself entailed. That is why in most societies such mandatory screening has now been terminated. So it is, I believe, with AIDS.

Mandatory testing has the advantage of appearing to do something. It seems to be a normal response to a public health problem. But where does it lead in the case of AIDS? Sadly, it cannot lead to a jab of vaccine, a curative pill or a quiet respite in a sanatorium to get over the condition of AIDS. The cost and experimental nature of the AZT regime, and other presently available treatments for AIDS, are such that it cannot be believed that mandatory widespread testing is directed to channelling those found positive to the HIV test into such expensive and still experimental programs of treatment. Far from leading to cure or treatment, the danger of widespread mandatory testing for AIDS is that it will lead on to discrimination which may, in many cases, be quite unfair to those found to have been exposed to the AIDS virus whilst at the same time entirely failing effectively to protect the general community. Without strict and effective laws and practices to prevent the spread of the knowledge of a positive result to the anti-body test, the risk must be run in current conditions of anxiety and alarm, that those found positive will suffer discrimination heaped upon natural anxiety and possibly illness. Even in those few jurisdictions where relevant discrimination laws exist, it is difficult, if not impossible,

in current circumstances, to prevent discrimination against people with AIDS happening in practice. In any case, discrimination laws generally operate slowly to change community attitudes. They have few remedies available to them. They are often not invoked by the people most vulnerable to discrimination. Most jurisdictions of the United States, Australia and other countries do not effective laws to prevent discrimination to persons who have been exposed to the AIDS virus.[14] In the United States, only the State of Wisconsin has enacted a specific law on this subject.[15] In an area so sensitive, democratic legislatures work slowly. It is imperative to understand that, in confronting the issues of AIDS, time is not on the side of those already exposed to the virus or at risk of such exposure and consequent discrimination.

But what of mandatory testing targeted on special and limited groups, such as prisoners, the military, marriage applicants and migrants? Is it not reasonable to test them? The answer to these questions again requires attention to the cost effectiveness of the proposed response. It also necessitates consideration of factors non economic in character. Effectiveness may be destroyed if, five minutes after the blood sample for testing is taken, the subject is exposed by sexual, drug or other activity to the AIDS virus. Unless there is to be costly repeated tests, one clearance at one time tells nothing except the result of the test at that time. There is even the proportion of false negative and false positive responses to complicate that assertion. Testing heterosexual couples proposing marriage is similarly fraught with problems. What of exposure between the test and the marriage? Is this is a cost

effective use of public resources, given that on current statistics, heterosexual couples are still a relatively small proportion of those exposed? Where does the test lead? What if the couple, notwithstanding the test persist in their desire to proceed to marry and procreate? Is it seriously suggested that the State should forbid them by law from doing so?

Testing migrants also seems reasonable. They may bring in the virus from their country to yours. But when examined, this response too seems ineffective. Migrants may, by self selection, be less likely to engage in promiscuous sexual activity or drug use than tourists with a lot of time on their hands. The logic which drives a country to test all would-be migrants will drive it to test all entrants. The impediments to international travel of visas and security checks at airports would melt into insignificance in comparison to the institution of an international regime for testing every one of the millions of world travellers every day to find whether they have been exposed to the AIDS virus. Is it seriously suggested that this should be done?

Recently the Health Minister of the Federal Republic of Germany rejected such a proposal. Rightly so in my opinion. Again it must be asked - where does such a test lead? The visitor may be sero positive but have no intention or opportunity to pass on the virus. The risk for closing down the travel opportunities to hundreds of thousands of people - enhancing discrimination against them on the grounds of previous exposure to the AIDS virus - would cast a blight on them as well as adding enormously to the administrative costs and imposing a heavy strain on already hard pressed testing

facilities. There is, additionally, the consideration that, unless it is contemplated that such tests will lead to quarantine measures, such large scale mandatory tests for the AIDS virus seem pointless. They may have some epidemiological value. But otherwise, in the target groups so far mentioned, they would appear to involve disproportionate public costs for little real gain. There is, as well, an additional consideration. In many countries the populations of the military, prison and migrant groups will tend to be highly representative of poorer groups in the community and ethnic minorities. The spectre is thus presented of mandatory testing which is targeted at these minorities, who already suffer various forms of discrimination, but without leading to an effective cure and without countervailing reinforcement against discrimination and adverse consequences to those testing positive.[16]

Finally, there is the consideration that if the public sector acts in a discriminating way against particular groups with whom it has a relationship, the risk will be run that encouragement will be given to the private sector to act likewise. Why not test all public employees, simply to allay fears? Why not test all proponents for insurance? If the Government adopts policies, practices and laws which require testing as preconditions of service or privileges, an example is set which will heavily strain the public and private health resources. It will do so without contributing significantly to the policy which must have primacy at this time. This is the containment of the AIDS virus so far as possible to the persons already exposed to it and the prevention of its spread

elsewhere to persons not yet infected. This is where resources should be spent. It is where laws should be focused. Not on politically popular but sadly illdirected and ineffective laws for mandatory testing which lead to no cure and only raise the spectre of further discrimination.

So the third commandment is to avoid laws and practices which lead nowhere or which are relatively inefficient in achieving the primary target of a rational present policy for the containment of AIDS.

DESIGN LAWS TO MINIMISE DISCRIMINATION

The fourth commandment is that laws should be designed to deal with AIDS but in a way which avoids or minimises discrimination against those who have been exposed to the virus. Society has a right to protect itself. That is a fundamental rule of any organised society. In confronting the AIDS epidemic every society has the right to protect its members. Indeed society has a duty to protect its citizens and those under its laws from becoming exposed to a condition which is potentially lethal and for which there is no present cure. These are self evident truths.

But when we talk of "society" we include in it the people who are already exposed to the AIDS virus or who may potentially be so exposed. Equal justice under the law means equal justice to all persons in the law's protection. Rights matter most when they are to be accorded to minorities, particularly unpopular or stigmatised minorities. It is relatively easy to accord freedom of religion to a member of one of the largest and oldest established churches. But our constitutional promise of freedom of religion is really tested

only when it is demanded by a member of a small, unpopular religious community whose use of it may be obnoxious to the majority of society. So it is with AIDS. The demand for equal protection by homosexuals and intravenous drug users may not seem attractive to many members of the community. But according the equal protection of the law to such persons in respect of their exposure to AIDS is the test of the seriousness with which our societies adhere to the Rule of Law.

In times of panic it is easy to discriminate against groups, particularly where they are already the subject of stereotyping and community fear and ignorance. Unfortunately, AIDS has presented at a most inopportune time to reinforce such community attitudes. In some jurisdictions laws are already in place to counteract discriminatory attitudes and practices. But these are the minority. That is why it is important to understand that the demand to "protect society" includes the demand of a just society to protect all its members. People who are sick, especially people who may be mortally ill, have a right to look to a civilised community to protect them and to support them. People who, though not yet ill, may or may not become so, have a right to be treated on their merits as individuals and not categorised with loathing and fear by reference to a stereotype, largely media created. Anyone who considers that our communities are above such cruel responses should ponder upon the way in which earlier epidemics of the plague and smallpox were treated in times not so far past.

I do not pretend that it is easy to find simple solutions to the issue of discrimination on the grounds of AIDS. Institutions to search for those solutions and to educate a

community in wise and dispassionate ways are necessary. The competing interests must be weighed in each case. Ready examples which spring to mind lie in the field of insurance. If insurers may insist upon the disclosure of smoking habits (which statistically increase risks of mortality and morbidity) may they not equally insist upon answers to questions about sexual orientation, submission to the AIDS anti-body test and the results of such a test? It is true that the answers to these questions may be statistically relevant for the assessment of the insurer's risk. It is certainly true that a positive result to the HIV test would be stastically most relevant to an insurer's deciding whether to accept a risk and how to fix a premium. But there are examples in the law of many countries where, to prevent discrimination considered unfair, insurers have been forbidden to ask questions or insist on data which, though logically relevant to their risk, involve the inherent reinforcement of unacceptable discrimination. The point is not an easy one. Why should a group of policyholders have to underwrite the very considerable public and private costs of medical care of a person already known to be (or possibly already) exposed to the AIDS virus? Perhaps on such issues a compromise may be found. Perhaps it is reasonable to require disclosure of the results of any anti-body test taken, if positive, but not to require such a test to be taken. Or to ask whether it has been taken. If it became known that insurers were asking whether proponents for insurance had submitted to the anti-body test for AIDS it would either discourage the taking of the test voluntarily or promote dishonest answers or the use of fictious names when submitting to the test.

These problems take on a special dimension in countries such as the United States of America where there is no general publicly funded universally available scheme of health care. But even in countries, such as Australia, where such schemes exist they bring in their train their own problems. To claim benefits under such schemes detailed information about tests undertaken must typically be given and recorded in central government computers. Practices and even laws to preserve the confidentiality of such data may be passed. But it is not beyond imagining that, in some circumstances, such information could haemorrhage to the great damage of individuals: even those who have been found not to have been exposed to the AIDS virus.

This consideration reinforces the fourth commandment. In enacting laws and adopting practices relevant to AIDS it is essential that consideration should be given to the preservation of privacy and to the protection of individuals affected from discrimination. This is not only because it is morally right to do so. It is also because sensitive attention for such considerations will, in turn, promote the effectiveness of legislation on AIDS precisely because such legislation has the confidence of the target groups who feel vulnerable, not only for their health but for their employment and position in society. Groups and individuals who have already been the subject of discrimination feel especially vulnerable. For them AIDS is simply the latest instrument to re-inforce the prejudice which society feels against them. Sadly, in some cases, that feeling is justified by the facts.

AVOID THE OVERREACH OF THE LAW

The fifth commandment is that great care should be taken to avoid the overreach of the law. Many citizens have a touching faith in the capacity of their legislatures to enact criminal laws which will instantly change behaviour which they consider anti social. There will doubtless be many calls for laws to penalise persons who pass on the AIDS virus. Such laws may indeed already exist in many jurisdictions either in the criminal law or in public health laws passed to deal with earlier epidemics.[17]

Doubtless the criminal law will have an occasional part to play in dealing with the consequences of AIDS. But its part should be in the minor league. Our experience in such areas as alcohol prohibition, the control of ponography, prostitution and drug use should teach us that the criminal law in particular is not only relatively ineffective as a mechanism for modifying the behaviour stigmatised. It is also likely to produce in its train consequences which are very damaging for society and for its respect for the law and legal institutions. Where there is no complaining victim, it is very difficult for the criminal law to operate with effectiveness. Instead, attempts to rely upon the criminal law tend to produce the corruption of public officials, the growth of "underground" activities, the sense of persecution and oppression in those the subject to such laws, a growing sense of cynacism about the law in general and lack of respect for the law in broad groups in the community. We must avoid making this mistake in our response to AIDS. The transmission of the virus in AIDS is more likely to be prevented by instruction in school class rooms

about condoms than by the enactment of criminal laws which would be difficult successfully to prosecute and which, in any case, would generally operate when it was too late, ie after someone had been infected with this lethal condition, and possibly after serious illness or even death had overtaken the accused.

This commandment applies equally to tort law. Doubtless there will be attempts to use the law of tort (civil wrongs) to secure damages for a person who claims to have acquired the AIDS virus from another. Already there are many such actions against voluntary blood banks in the United States.[18] There has been one such case already in Australia.[19] The essential social purposes of tort are to provide means for the distribution of losses and to reinforce greater care in the future. Expensive litigation will be a relatively ineffective and certainly most costly mechanism for providing redress to persons who have been exposed to AIDS, their families and dependants. Such litigation could be ruinous to blood transfusion agencies, especially in the United States.

Given the size of the problem which already exists and the dimension of the problem likely yet to come, the economic consequences of AIDS will plainly be enormous. The death at relatively young ages of very large numbers of persons in all our countries and the intensive, highly expensive attention to the maintenance of relatively young people in hospitals and at home, the loss to the economy of the skills and labour of such persons and the burden on the family and community resources will be so enormous that only the community as a whole will have the means, in the long run, to provide any just kind of

redress. Again I do not say that individual cases will not exist where civil actions are appropriate. But courts provide relatively costly, slow and inefficient means for dealing with the AIDS pandemic and the distribution of the economic consequences thereof. Attention will need to be paid to those economic consequences and to the demands on our public health infrastructures. These will clearly exceed any comparable burdens on our economies and our compassion, save for those imposed in time of war.

A CRITICAL EQUATION

The conclusions to be derived from these remarks are simple. The obvious primary policy which must be adopted, both on an international and on a domestic scale is the policy of containment and prevention of further spread of this infection. That policy should be the primary target of legislation and of judicial decisions. It should be the focus of administrative practices. The scarce public resources which are available to tackle the growing problem of AIDS throughout the world should be conserved as far as possible for research leading to a cure or preventative vaccine; to education to prevent the further spread of infection and to support for those who are already ill and dying.

There is a grim equation which is at work here. It must be recognised.

* Factor one is the rate of the spread of the infection, particularly into the majority heterosexual community. This factor above all is likely to affect political responses to AIDS.

* Factor two is the countervailing speed with which the scientists may develop an effective cure to, and a preventative vaccine against, the effects of AIDS, including in respect of the mutations of the virus which have now become apparent.

* Factor three is the political pressure which has already built up for action by the law makers against the spread of AIDS. In cold political terms the politicians in all our countries in the years immediately ahead will increasingly find it politically difficult, propelled by public alarm and panic (fed often by a cynical media) to respond with rationality and with balanced, temperate laws.

* Factor four is the extent of the willingness of our political leaders to face up to the very hard choices which will need to be made if there is to be <u>real</u> containment of AIDS, as distinct from showy, oppressive and ineffective laws. Some of the choices will be politically most unpalatable, if politicians are to be serious about targeting laws and policies with the only way that is currently useful in mind, namely to prevent the further spread of the AIDS virus and to contain it as far as possible to those who sadly are already infected.

<u>CONCLUSIONS: A CAUSE FOR OPTIMISM</u>?

Is there any room at all for optimism about AIDS? In ten or fifteen years time will we be able to look upon this time with any sense of achievement or any proper sense of satisfaction about our response, collectively and as individuals, to the AIDS phenomenon? There is no gainsaying

that many of the reports to recent conferences on AIDS[20], bring messages which are sombre, if not frightening. Worst of all are the data indicating:

* the apparently rapid spread of the AIDS virus to the heterosexual population.
* the apparent difficulty in securing alterations in behaviour necessary to protect the groups most at risk to exposure to the virus.
* the continuing high levels of sero conversion in such groups.
* the continuing rise in the rate of death of persons exposed to the AIDS virus, studied over time.
* the persisting difficulty, despite many marvellous advances, in providing a vaccine, a cure or even treatment for AIDS which is entirely satisfactory and non experimental.

So there is much which, if we are to be candid, fills us with a sense of foreboding and even pessimism.

But there are two considerations which throw a beam of hope. The first is demonstrated by the way in which the whole international community, in many disciplines, is coming together in response to this unique challenge to our species. It is demonstrated at the highest level by the endorsement, by leaders of the leading industrialised Western countries at their meeting recently in Venice, of President Mitterand's call for an international alert to the ethical issues raised by our national responses to AIDS. With so many political, economic, ideological and other differences in the world it is at least reassuring that, when faced with a common predicament, we can

in very large measure respond with a common affirmation of our determination to protect humanity. We may take heart from that international response for our future triumph over AIDS. Indeed, we take from it a message of optimism about the future survival of humanity itself.

Secondly, it is possible that out of our legal and administrative responses to AIDS, uncomfortable and difficult though they will frequently be, may come a greater honesty about subjects which have hitherto been clouded in dishonesty, prejudice and discrimination. I refer to our social responses to human sexuality and to drug taking. The law's contribution to these subjects has not been an entirely honourable one. Much prejudice and great suffering has been occasioned over the centuries, and is still occasioned today, by foolish laws on these subjects. Sad as it is to say it, it is possible that, in responding to AIDS, our countries will be forced to face up to realities and urgently to adopt more realistic, honest and sensible laws and policies in respect of these subjects. We may be forced to do so simply to contain this epidemic and to prevent its economic, social and human costs from spreading still further. To say this is not to underestimate the difficulty of securing such legal reforms. But we should be optimistic. Out of earlier epidemics in many lands came the modern public health laws, the clearing of slums and, ultimately, the recognition of the need for a body such as the World Health Organisation. Out of the AIDS epidemic, at frightful cost, may come equal achievements.

It is vital that scientist and social scientist, politician and media reporter, AIDS patient and ordinary

citizen should all recognise the challenge to our species which is presented by AIDS - but also the opportunity. In ten or fifteen years time, when we look back on this grim moment, each one of us will wish to feel that we have played our part, however, small it may be, to contribute, in a decent but vigorous way, to the response to this threat to humanity. Ask not for whom the AIDS bell tolls. It tolls for us all.

FOOTNOTES

* This is a modified version of an unpublished paper delivered to a Roundtable at the III International Conference on AIDS, Washington, USA, 2 June 1987.

** President of the Court of Appeal, Supreme Court, Sydney Australia. Commissioner, International Commission of Jurists, Geneva. Chancellor, Macquarie University, Australia. Trustee of the AIDS Trust of Australia.

1. BBC, Radio News Desk, 14 July 1987.
2. Sydney Morning Herald, 16 July 1987.
3. Sydney Morning Herald, 17 July 1987.
4. See B. Schatz, "Legal and Ethical Analysis of Insurance Underwriting For AIDS" in Papers, 5 June 1987.
5. See eg D.I.Schulman, "Municipal AIDS Discrimination Laws as Public Health Education Tools for Preventing HIV Transmission" in Papers, 5 June 1987.
6. See eg D. Barr, "AIDS: Transfusion and Litigation" in Papers, 5 June 1987.
7. For an Australian perspective see R.N. Howie and P.J. Webb, "Legal Response to AIDS" (1985) 18 Aust J of Forensic Sciences 44, 46 ff.
8. M.D. Kirby, "Aids legislation - Turning up the heat? (1986) 160 Aust Law J 324.
9. W.R. Albury, "Historical Reaction to "New" Diseases" [1985] 18 Aust J of Forensic Sciences, 5. See also P.H. Curzon, Times of Crisis, 1985, Syd Uni Press.
10. See eg S.S. Fluss, unpublished paper for Roundtable discussion, Papers, 2 June 1987. Note also World Health Organisation, "Tabular information on legal instruments dealing with AIDS and HIV infection", May 1987, mimeo.

11. See eg G.J.P. van Griensven, "Effect of HIVab sero diagnosis on sexual behaviour in homosexual men in the Netherlands" in Papers 1 June 1987; B. Willoughby and Ors, "Sexual Practices and Condom Use in a cohort of homosexual men: evidence of differential modification between sero positive and sero negative men" in Papers, 1 June 1987.

12. See eg Mathews v Eldridge 424 US 319 (1976) applied in Johns v Release on Licence Board & Ors, unreported, CA (NSW) 7 May 1987.

13. See eg Public Health Act 1902 (NSW), s 29A (compulsory x-rays for tuberculosis).

14. See eg G.J. Tillett, "Anti discrimination legislation and the reduction of social disruption caused by AIDS", a paper delivered by G. Tindall in Papers, 5 June 1987.

15. N.J. Kaufman, "Ethical dilemmas inherent in HIV anti body testing legislation: One year retrospective" in Papers, 5 June 1987.

16. This point was made by B. Schatz. See n 4 above.

17. As to the position in Australia see R.N. Howie and P.J. Webb, above, n 7.

18. Discussed in D. Barr, above n 6.

19. Loker v St. Vincents Hospital & Anor, unreported, SC (NSW) 11 October 1985.

20. III International conference on AIDs, Abstracts Volume, June 1987.