LEGAL RESEARCH FOUNDATION OF NEW ZEALAND

AUCKLAND, 17 MAY 1989

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AN ADDRESS BY:

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"When I was one and twenty I heard a wise man say:
Give pounds and crowns and guineas,
But not your heart away,
Give pearls away and rubies,
But keep your fancy free.
But I was one and twenty, no use to talk to me.
When I was two and twenty I heard him say again,
The heart out of the bosom was never given in vain,
Tis sold for pain a plenty and bought for endless rue.
Now I am two and twenty and, Oh, it is true, it is true."

A. E. Houseman.

A GLOBAL EPIDEMIC

This poem, like literature about human love and human crisis, illustrates the tremendous impact that can happen in a life in the space of a second. A virus is about. From whence it came we are not sure. It has afflicted very large numbers of people.

The latest figures of the World Health Organisation, given to the conference of the Global Commission on AIDS a few weeks ago, adhered to the estimate of 5 - 10 million people infected throughout the world. They cannot be more specific. There is a great deal of under-reporting, particularly from Africa and Latin America. The number of cases of people who have presented with what is called full blown AIDS, the final end stage of the infection, and reported to the WHO is over 100,000. It is said that in the USA alone some 1.5 million people have been infected with the virus.

It is a virus which follows different patterns in different countries. In the Western communities it has attacked mainly homosexual and bisexual men and IV drug users. It is a condition which we have only been tracking now for something like 10 years. Therefore the epidemiology of it is still uncertain.

How many of the people who have HIV infection and will go on to the AIDS related complex (ARC) or AIDS itself is not entirely clear. The general opinion is building strength that virtually everybody who is infected will either die or will suffer extremely serious health consequences as a result.

In an instant, the transmission of this virus is a turning point in the health of the individual who receives it. It has very great consequences for that individual and the people that individual knows and loves. It has very great consequences for society, which is thus placed in a position of fear and concern about the transmission cycle of an epidemic. And it has very great economic consequences because of the very great costs that fall upon society as a result of the debilitation and ultimate death of large numbers of people, generally in their youth, generally in the peak of their economic activities for society. So this is the problem with which we are confronted.

GOOD LAWS RELY ON SOUND DATA

One generally assumes, speaking to an intelligent audience, that people know about the nature of this virus, the ways of its transmission, and the problems that it presents. But research continues to show a great deal of misinformation is abroad. And sometimes even in professional groups there is a great deal of misunderstanding about the HIV virus and the modes of its transmission. The professor of Public Health at the University of Michigan, Professor June Osborn, constantly reminds conferences like this that good policies, good strategies and good laws on AIDS depend always upon good data. It is imperative that intelligent people and educated people should lead their communities to an understanding that the design of laws and policies- policies within professions, especially the health care profession - and laws which are made by legislators and are made by judges - should be based on a sound understanding of the nature of this virus, not on panic or prejudice. Fortunately for humanity, the virus is not readily transmitted. It is not a virus easy to acquire. It is a virus whose modes of transmission are well known. It is not transmitted by casual contact. Therefore some of the more extreme reactions to AIDS which happened, perhaps naturally enough in its early days, of fear, cannot be justified by the facts.

I have prepared a paper for you. The fact that you are here is prima-facie evidence that you can read. Therefore, because of the expanding nature of the principles of judicial notice, I am prepared to take notice of the fact that you all look extremely intelligent people. The paper was, as the Chairman has said, prepared with an almost saintly devotion to the deadline. It is therefore before you. I feel that in the 24 hours that I have been here I have grasped certain of the legal questions which are before New Zealanders. Without in any way wishing to prematurely barge into your affairs

- at least before we are one and your affairs are my affairs - I think it may be appropriate that I simply review very quickly what I have said in my paper. I will then turn to two issues which are of concern to you immediately in New Zealand. Without intruding, I will then make a few observations that could be of use, and timely use, in the consideration of those issues.

THE CRIMINAL LAW SANCTIONING HIV SPREAD

The questions which I have confronted in my paper include the impact of the criminal law on AIDS. People say to me "does not AIDS already come within the rubric of the criminal law?" The generality of the definitions of criminal offences differ between jurisdictions. In my jurisdiction murder is defined in the Crimes Act in the following terms: "Murder shall be taken to be committed where the act of the accused, or the thing by him omitted to be done, was done or omitted with intent to kill or with reckless indifference to human life."

A person who is infected may, in having unprotected sexual activity with another, intend to kill the partner, or may not. The person may be demonstrating reckless indifference to human life if, knowing that he is infected, he continues to have sexual activity with another. However the difficulties of proving this are so many. First, the incubation period is a long one - more than a year. The difficulty of proving that it was A who caused the infection, and not some other person, would be enormous. The difficulty of proof might be compounded by the death or absence of the person responsible, or of the victim. Therefore, the call upon the general criminal law is unlikely to be successful, at least at such a level.

For that reason a number of the States of Australia have introduced specific crimes to deal with the wilful transmission of the HIV virus. In New South Wales, legislation was enacted to provide that if you, knowing that you have the infection, have sex with another person without alerting that person to your status and without securing the knowing consent of that person, you are guilty of an offence. You are liable to a penalty of $5000. This seems a rather modest penalty for such a serious consequence. The Victorians have enacted similar legislation with a $20,000 penalty. These provisions are more symbolic than of practical use. I have no news of anyone being prosecuted in New South Wales. The provision, as it stands, is a statement of society as it stands.

When the Bill for this Act was going through Parliament it was opposed, as so many of the measures in this area are opposed, on the basis that the best defence to such a penalty would be to establish the position that you did not know your HIV status. If you do not know your HIV status, then you cannot knowingly be in the position of being guilty of the offence. It is like so many issues in this area where the immediate reaction has to be questioned and seemingly obvious legal responses turn out, on closer examination, to be dubious.

DANGEROUS PRESUMPTIONS : THE ONE SHOT NEEDLE

I will give you another illustration. I was in Geneva last December at the meeting of the WHO concerned with this subject. The question of IV drug users came up. It came up because in Southern Europe and in the United States the transmissions of HIV from sexual activity are now, comparatively, falling off. The transmission from IV drug use is rising rapidly. The figures in the South of Europe and the United States of people presenting with HIV now demonstrate that approximately 30% of those presenting have acquired the virus through IV drug use. Such people include many women, for the first time coming in substantial numbers into the AIDS crisis. AIDS is now the greatest killer of young women in New York between the ages of 25 - 35. Moreover amongst these new patients the same pattern of sexual orientation exists as in the community, because IV drug use is no more common among homosexuals or bisexuals than amongst heterosexual people.

The fear is especially expressed among WHO circles that IV drug users will become the bridge to re-link the Western communities (which have always shown a different pattern in AIDS distribution) to the general pattern of AIDS distribution in Africa, Latin America and the Caribbean (where it has always been overwhelmingly a heterosexual condition). In preparation for the discussion, I was briefed before I left Australia to demonstrate a disposable needle. It seemed to me that if we could flood the world with disposable, one use, one shot needles this might be a technological way that we could reduce the sharing of needles and thus the use of needles which were infected. Both Australia and New Zealand have taken radical steps when, in the midst of their war on drugs, they have introduced legislation, or adopted policies, whereby they have introduced needle exchange. That was a very radical, forward looking and, I think beneficial step for both countries to take. The figures coming in for the Australian needles which are tested for HIV infection began at 2%. They rose at the end of last year to 8%, and they are now presenting at something like 25% infected with

HIV virus. So the level of people affected in the IV drug use community in Australia appears to be rising very significantly. The figures in New Zealand that I have seen of presentations with HIV are still overwhelmingly homosexual men or bisexual men. Only 2 - 3 out of 114 end stage AIDS cases have been attributed to IV drug use. Accordingly IV drug use is a very small percentage here so far. However the point I want to make is this: I held up the disposable needle as a means of reducing the spread of HIV.

It seemed a good idea at the time. It seems a sensible thing to a rational person. But what you have to do in AIDS, as Professor June Osborn said, is to base policies and laws on good data. When one actually goes out and speaks to people who know something about the IV drug user communities and their sub-culture, one realises quickly that there are two problems with the one shot needle. The first is that, within the culture, there has been, and still is a phenomenon of blood sharing, of sharing the needle. It is in a sense, the idea of sharing an aspect of life with somebody in a moment which, to the subculture, is precious. No room for indulgence in judgmental attitudes here. We have to be very clear that we are dealing with a very urgent and dangerous world pandemic.

The more important point, which the IV drug user community has made - and which never occurred to me - was that if you have a single needle, with a single shot and a number of people, then the disposable needle has become the problem. The users will share the needle with the one shot. When you actually get the data of what the problem is, what seemed like a good idea for tackling the problem seems, on closer examination, to be not such a good idea and indeed, very possibly, a bad idea. In AIDS we must base our laws and strategies on good data.

HUMAN RIGHTS & ANTI-DISCRIMINATION

I have dealt with the criminal law issues in the paper. I have referred to insurance law questions which are much more pressing in the United States, than they are in Australia or New Zealand because of the lack of an adequate social security system there. I have dealt with the problem of blood transfusion which has now been very substantially solved in most developed countries. I have dealt with marginalised groups, and I will come back to them as one of the two issues which I have discovered to be on the agenda in New Zealand. At the end of the paper, almost as an afterthought, I mentioned, amongst the other issues, anti-discrimination law. I did that partly because in many jurisdictions, certainly most jurisdictions in Australia (though not all), and in most States in the United States (though not all), there is already anti-discrimination legislation which may prove relevant to the struggle against AIDS.

In the United States they have the principles of the Bill of Rights, which provide in a sense, an anchor for courts in up-holding basic standards in respect, at least, of governmental conduct. We in New Zealand and Australia have no equivalent provision. Attempts to secure an introduction of basic rights into the Australian constitution came to a dead-end last year with the overwhelming defeat 70% to 30% of rather modest proposals to put certain provisions into our Constitution. I believe that proposals for a Bill of Rights in New Zealand seem to be running into the same choppy waters. Therefore, if this is the case, the subject of anti-discrimination law deserves more attention. Justice Wallace has referred to this. This is also a matter on the agenda of the Human Rights Commission. Accordingly will say a few words about that topic.

INTERNATIONAL HUMAN RIGHTS LAW

There are three arguments for introducing anti-discrimination legislation. The first is the international law of human rights.

Both Australia and New Zealand have accepted the provisions of the International Covenant on Civil and Political Rights, as well as certain other international statements of Human Rights including the Declaration on the Rights of the Disabled Person. These instruments seek to set out the basic rights that people with a disability or people with an inalienable attribute have in dealing with society and with its members. The conventional theory of the

law is that an international instrument is not, in our countries, part of domestic law unless it is specifically incorporated. But there is a growing body of opinion that says that, where an instrument states international law and the country has ratified it, judges and others should keep that background of law in mind when developing the local common law. Similarly, in interpreting ambiguous statutes, the international statements of the law should be taken into account in resolving cases of ambiguity.

This is not just an idea of mine. It is a growing body of opinion. It is being applied in many jurisdictions. Whether that is so or not, it strikes one as somewhat hypocritical for countries to adhere to international instruments and solemnly agree that they will do things to bring their laws into line with those instruments, and yet simply to be content to have those instruments somewhere in the books. The International Covenant on Civil and Political Rights contains statements of basic rights which most of us would approve of. Some of them have relevance to the issue that is before this seminar. For example in Article 17, there is the guarantee for individual privacy. That has been determined in the European Court of Human Rights at Strasbourg as being relevant to the question of laws that discriminate against people on the basis of their sexual orientation.

The cases in this regard are two. Dudgeon was a case from the Irish Republic. Mr. Dudgeon, a senator of the Irish Parliament challenged a provision in the Irish law which provided for punishment of homosexual offences. Ireland is a party to the European Convention on Human Rights and Fundamental Freedoms. Mr Dudgeon lost his challenge in the Irish Courts. He took it to the European Court of Human Rights. It was argued in the European Court that the provisions in the Irish legislation were not an invasion of privacy. But Mr. Dudgeon said "they are an invasion of my privacy, for the state to have anything to do with what I do in the bedroom with a consenting adult". The European Court of Human Rights up-held Mr. Dudgeons claim. A similar case from Northern Ireland, the case of Norris had earlier reached a like conclusion. The Irish Republic sought to distinguish Norris by saying - I put it argumentatively as befits an Irishman - "Well up there in the North they are different, they have the British, they enforce their law. We in the Republic, we have got this on the books but we don't really worry too much about it. We don't fuss about it. It's part of the moral code of our community. We should be left alone. This is just part of Irishness. Just leave us alone and don't interfere." The European Court of Human Rights found the argument unconvincing. It accepted Mr. Dudgeon's argument that the offence

to human rights is having such provisions in the books. They set a standard. They are the symbols of what is acceptable and what is not acceptable in the community. The fact that they are not uniformly enforced, with policemen invading bedrooms, was not to the point. They should not be in the books.

Northern Ireland has removed the provision from the Criminal Law of the province. I am not sure at this stage what the Republic is doing. But Ireland is a party to the European Convention. It will have to bring its statutes into line. These are the decisions of an international court which has looked at the question of the privacy guarantee and Article 17 of the International Covenant on Civil and Political Rights in a way relevant to many individuals at special risk of exposure HIV.

USE OF DOMESTIC BILLS OF RIGHTS

Because we in Australia and New Zealand do not have a legal provision such as a Bill of Rights, it is useful for us, as members of a civilised world community and as progressive countries with an established legal system, to alert ourselves of what is happening in international jurisprudence. We should make sure that we are not out of step unless for good reason. Therefore, the first point is: "What is happening in international legal developments?" I have to say to you that the developments have not been entirely uniform.

Some of you may know of the cases in the United States Supreme Court; from Georgia (the case of Bowers) and from California (the case of Watkins). Bowers was a case of consensual homosexual conduct. The Georgia statute prohibits anal intercourse, whether homosexual or heterosexual. The provision was challenged as being contrary to the 14th Amendment of the United States Constitution. Its validity was upheld in the Supreme Court of the United States by a vote of 5 - 4, a narrow vote. The case was argued on the principle that this was simply an extension of the equal rights amendment that had been applied in the case of blacks and others with a "suspect qualification". However the United States Supreme Court rejected the argument.

Mr. Watkins was in a slightly different case. He was an army officer in California, and a hero in the Vietnam War. He was homosexual and known to be such by his colleagues. They accepted him entirely. However, he was dishonourably discharged because of his sexual orientation. He challenged the Army Regulations under

which he had been discharged. The California Circuit of the Federal Court of Appeals upheld his appeal saying that Bowers was distinguishable on the basis that in Bowers there was activity. In the case of Mr. Watkins, he was being punished for what he was. This case has also been taken to the Supreme Court of the United States. The decision is awaited.

We should not be surprised that occasionally that great country (where lawyers have done so much in the fight against discrimination) should make mistakes. There are two instances which are relevant to AIDS which we can call to account. The first happened in World War I. In 1918, the President authorised the rounding up of 30,000 prostitutes on the basis that they might be a risk to the war effort. $3,000,000 was allocated for the rounding up of the prostitutes and their detention.

The second more pertinent case is the case of Mr. Fred Korimatsu in 1942. He was a Japanese-American. He was affected by a presidential order and a statute of Congress which President F. D. Roosevelt had initiated under the urgings of General John de Witt, Commander Western Division. He took the view that all persons of the enemy race should be rounded up and put in detention camps. President Roosevelt with a slip of the tongue, once called them concentration camps. That was probably a more apt description. Mr. Korimatsu and very large numbers of Japanese-Americans were rounded up and taken to camps. Mr. Korimatsu challenged the detention order and its constitutional validity in the courts and ultimately in the Supreme Court of the United States. That court, by a vote of 6 - 3, upheld the constitutional validity in a judgement written by Justice Black. He said that in such perilous and dangerous times, the President, under the war powers can do all sorts of strange things.

There were three ringing dissents. The first was by Justice Murphy. The Justices Murphy of this world tend to be dissenters. Justice Murphy said that this constituted an excess of Presidential power. If it were upheld it would condone a denigration of loyal Americans in a way that the law should not permit. Justice Jackson, who later went on to become the Nuremberg Prosecutor, said that this was an excess of the President's power. Justice Roberts, in an interesting dissent, said that if the law were upheld, there would be no telling where this sort of excess would go, beyond that which was needed for the problem in hand. If, for example, the United States were hit by an epidemic, a President

might see it as within his power to round up all suspect groups and then deprive them of their liberties as American citizens. There are many in the United States today who are pointing to the wisdom of Justice Roberts prescience in seeing the dangers of not basing our policies on good data. There was no data in 1942 to suggest that the risk to the United States from Japanese-Americans was so great that the State should round up so many thousands of them. Yet that is what was done in the United States.

IMPACT OF ANTI-DISCRIMINATION LAW

The second arguments are perhaps those that will be more pressing upon our community. The practical arguments. The object of the exercise of HIV containment is to change people's behaviour. Those of you in the audience who are lawyers will know that it is easier to pass a law than to change people's behaviour. At the waft of a legislator's hand people feel something has been done. However, behavioural modification is something we are only now beginning to study, to see what the consequence of law is. It has been amazing that for centuries we have passed laws and just assumed they work. Only now are we looking at the fine tuning to see the way in which the law operates on the ground.

The problem with the law is that it is only partially effective. It does have some effect and this is where anti-discrimination law is relevant. If you look at the international statements about discrimination against people with HIV or people on the basis of their sexual orientation you will see numerous statements for legislative and other measures to support strategies for the containment of the virus. There are for example the statements of the Ministers of Health in London in January in 1988, where an unprecedented number of them came together and urged that such anti-discrimination measures should be adopted. Then there was the meeting of the Global Commission on AIDS quite recently, which said much the same thing. The meeting of the World Health Assembly a year ago said much the same thing again. New Zealand was one of the sponsors of WHA resolution 41.24 which urges governments to take steps to protect those people who are affected by AIDS and to respect their human rights and dignity.

But this is urged not simply for the sake of observing international law. There is strong evidence that laws on anti-discrimination can reinforce community opinions. In the United States it is basically the laws stemming from the Constitution. Scratch an American, and they will speak with pride of their Bill of Rights, the first ten.

amendments, and the other amendments to the U.S. Constitution - the first ten celebrating their bi-centenary next year.

If by way of contrast you look at our societies, Australia and New Zealand, we really have come a long way in the last two decades in respect of discrimination on the grounds of gender, and, I believe, on the grounds of race. In part, this has been a result of higher standards of education and literacy of our people. In part, it has been a result of the women's movement and the assertion by women of the fact that they are entitled to be judged on their merits and not on the basis of stereotyping. But we really have made great strides. Human Rights Commissions have been established and legislation enacted to say, "These are our society's standards." They have been beneficial and useful in that regard.

In Australia we have a woman judge on the High Court of Australia. That would have been unthinkable 20 years ago. In Canada they have just recently appointed the third woman Justice of the Supreme Court of Canada. So things have happened in the sphere of gender. And, I believe, in the sphere of race, and in the sphere of religious discrimination, there has been great progress. Few would think of refusing to give a job on the basis that the person is a Catholic. These standards are laid down by law. They are laid down in community opinion. The law reinforces enlightened community opinion.

But those are just species of the same fundamental idea. What we have to understand is that people are entitled to be dealt with on their own merits, not on the basis of preconceived stereotypes. The question now is where else do human rights run.

Last week the Victorian Law Reform Commission suggested adding to their legislation three new categories:

(1) Age, so that we do not have people judged on their chronological age;
(2) Sexual Orientation; and
(3) Past Criminal Offences, which are no longer relevant.

Victoria moved rapidly, quite recently, to deal with the problem of a hospital which had refused to undertake an operation on a person with HIV. It enacted specific legislation under its anti-discrimination law, so that such discrimination was forbidden.

Victoria moved on that subject before they moved on the more generic sexual orientation.

CASES OF DISCRIMINATION RELEVANT TO AIDS

New South Wales has for many years had legal provisions which forbid discrimination against people on the basis either of physical and mental disability or sexual orientation. If you think that, in these enlightened and untroubled days, we do not need legislation of this kind then I just want to tell you of a small sample of cases sent to me by the New South Wales Anti-Discrimination Board at my request before I came here. You may think this sort of thing could never happen in New Zealand. However, just listen and see if you think these are what a civilised, educated and tolerant society should accept:

(1) A homosexual man working in the finance industry told his supervisor that he was HIV positive. His supervisor then asked him to leave the office immediately whilst he consulted the man's doctor about his medical condition. The supervisor made it clear that whether the man would be allowed to return to work or not depended entirely on the outcome of his discussions with the doctor.

(2) Two men booked a room in a country motel. When they checked in they were given a double room but shortly after the proprietor burst in and asked them to leave, claiming that he would have to burn the bedding because of the risk of AIDS and that he did not want to be seen to condone homosexuality. You cannot acquire AIDS from bedding.

(3) A homosexual man suffering from AIDS encountered intense opposition from other people towards his continuing in an educational course. He discussed his medical condition in confidence with the deputy head of the institution but the information was very quickly passed to other staff. He was finally asked to withdraw from the course allegedly because he posed a health risk to other people. The institution then obtained expert medical advice. The man was not a health risk to anyone in casual social contact. Eventually the institution allowed the student to return, but by this time he felt unable to resume studies, given that his medical condition was known amongst the staff and the students.

(4) An openly gay man was told by his employer that if he wished to keep his job he had to undergo antibody testing and produce an AIDS free certificate.

(5) A typist in a typing pool refused to touch any notes or do any typing coming from an openly homosexual member of the staff, fearing that she would thereby catch AIDS.

(6) The owner of a small restaurant dismissed a waiter who looked gay, saying that his regular customers told him that they would not eat there unless the waiter was fired, since he was a risk to their health.

(7) Fellow employees in a workshop warned a gay employee that if he used a workshop toilet they would beat him up. They said they might catch AIDS if they shared a toilet with him.

(8) Employees in a smaller office refused to answer the telephone of a haemophiliac, saying that they were concerned about the risk of acquiring AIDS from this man.

(9) A manager transferred a Melanesian worker from a front office saying that he was concerned that customers might think that the man was an African, or a Haitian and fear the risk of the spread of AIDS.

(10) A dentist enquired whether he could put a "no poofters" sign in his waiting room and whether he could ask all clients whether they were homosexual.

(11) A homosexual man was admitted to a public hospital for emergency surgery. Before the operation the man was asked whether he was homosexual and would agree to an HIV antibody test. The result of the test, negative, was returned more than 17 hours later. After the operation, until results of the test were available, he was subjected to the following treatment: hospital staff, both medical and cleaning, attended with gowns and gloves and on occasions with masks and goggles; he was isolated from other patients, and identified by a yellow wrist tag; he was served meals with utensils clearly marked "disposable"; and the cleaners discussed cleaning of the ward in front of him.

There are many other cases. They are an illustration of the fact that in respect of anti-discrimination law we have not yet, at least in Australia, reached the stage of enlightenment. In respect of the

advances we have made in connection with other suspect categories, as they are called in United States cases, we have a long way to go in areas relevant to AIDS and HIV.

DIFFERENTIAL RESEARCH AND THE UTILITY OF LAW REFORM

And we have a long way to go in a short time. In respect of AIDS the time is urgent. A paper has been shown to me by a Mr Rosser and a Dr. Ross. Mr Rosser was originally a New Zealander. Both authors are working at the Flinders University of South Australia. Their paper was designed to study the differential reaction to HIV infection amongst homosexual men in Auckland and in Adelaide. The two cities are not entirely comparable but they both have similar features. They are both cities established in colonial times. They are both approximately the same age. They are both English speaking, have parliamentary democracies, and so on.

The sizes of the samples were regarded as statistically sufficient. 81 in Adelaide and 159 in Auckland. The study presents the data which show very much higher levels of steady relationships and monogamous relationships (ie not multiple sexual partners) in South Australia as compared to Auckland, where there was much greater sexual interchange. The study also shows much higher levels of verbal and physical violence against homosexual people in Auckland than in Adelaide. The study showed almost double the number of homosexual men in Adelaide had some contact with a homosexual group than in Auckland or knew of such groups, and had had counselling in respect of unsafe sexual practices relevant to the spread of AIDS. Perhaps most significant of all, almost double the number of homosexual men in South Australia had undergone the HIV test as had undergone the test in Auckland.

It would be going too far (and statistically invalid) to say that these differences arise only because of the legal differences between New Zealand and South Australia. South Australia has always been a very unusual place, mainly peopled in the first instance by Germans who were themselves refugees from religious oppression in Germany. It has always been a rather independent place. The comparison with a great port city like Auckland is not entirely legitimate. But the figures are very different. One of the factors in the difference may be that South Australia moved in 1975 to remove entirely from the statute book all provisions relating differentially to homosexual people. Furthermore, in 1984, it moved to introduce, in the anti-discrimination law of that State,

a provision dealing with discrimination on the grounds of sexual orientation.

The general message coming from the research of Rosser and Ross is that people do not feel quite so alienated and threatened in South Australia as they do here. That is a matter to take into account in the face of this very large epidemic, where we have to get into the minds of people and get them to change their intimate behaviour at critical moments of sexual encounter or drug using. Getting into people's minds at such moments is difficult enough. Getting into their minds if they are alienated and stigmatised is almost impossible.

THE MORAL IMPERATIVE OF EQUAL OPPORTUNITY

The third reason, after legal, and practical ones, is a moral one. I recently delivered an address at Professor June Osborne's request at the University of Michigan. I spoke to the assembled medical and law schools there. They sat and listened to what I had to say about the legal issues of AIDS, much as set out in the paper to which I am now speaking. And at the end of my presentation on why the law should move to provide for the respect of human rights and for protection against discrimination, a young man rose in his place and said "You have forgotten the most important reason, with respect". When a law student says "with respect" you know they are about to say something terribly disrespectful, and so it was with this young law student. He said that Hitler could have mounted a remarkably strong argument for the medical utility of occasional medical human experimentation. He subjected Jewish, Slavic, socialist, homosexual, and other people who did not fit into his idea of the Third Reich to a number of experiments. Arguably, some of them were very useful to mankind. For example, he submitted them to experiments relating to the imposition of very high temperatures and very low temperatures and other such differential experimentation (which he tried also on mentally retarded groups - probably the most stigmatised in any community). When you put forward only practical arguments of getting into people's minds and altering their behaviour, you are applying a utilitarian principle which really is not quite good enough.

There is at the base of all human rights and anti-discrimination law a moral principle. It says that there are certain attributes of human beings which, if they cannot change them, are simply part of their "humanness". The law has obligations to protect people from discrimination on those grounds.

When I was a small child, I was asked at the Summer Hill Opportunity School in Sydney on a sunny February day "What do you want to be when you grow up?" and I wrote down "a judge or a bishop". One way or the other I was determined to get into a fancy costume. But having had such an immodest response to my inquisitor, I was obviously not destined for the austere path of the Sydney diocese of the Anglican Church . I therefore turned to the law. I have rather left moral questions to others to debate. But I went away from that conference at Michigan feeling a little disquieted. I felt that there was in fact something in what my young inquisitor had said. At the heart of the issues we are debating are issues which are emotional and controversial. They are issues which are sensitive. Upon them, good and decent citizens can have very strong opinions. But they are strong opinions because of the fact that they really go to core issues of morality - of what it is that is legitimate for the state to do and not to do. What it is legitimate to punish people for, and not to punish them for. Whether the state will march in and tell people who, say, appear Melanesian: "Go to the back room." That is not acceptable. Its unacceptability is based on scientific data, ultimately. We must discourage irrationality. It says to people who sack a gay or ostensibly gay waiter that having an irrational fear that is not based on data is not justification enough.

So in looking at the question of discrimination and HIV/AIDS, I suggest that New Zealand should look at the international law, the moral and the practical arguments.

DISCRIMINATION AGAINST IMPOTENT MINORITIES

Mr. Ronald Reagan, President of the United States for two periods, could not bring himself in the first four years of his Presidency, to mention the acronym AIDS. Not a single time in those years did he mention it. And not a single question was asked of him by the great free press of the United States of America in all the encounters - neither in the formal press conferences, nor as he went smiling to those helicopters. Nobody threw him a question about AIDS. And in that time a million of his fellow countrymen became infected.

If ever there is a story of the breakdown of the democratic process, that is it. But at the end of his Presidency, rather touched by the death of one person who happened to be a friend (Mr Rock Hudson), Mr. Reagan said "We have all got to be compassionate to the families of people with HIV and we have all got to show no

discrimination". He was pricked into this by the Watkins Presidential Commission. This had said "It is central to policies on the containment of AIDS in the centre of the epidemic that we have effective federal laws on anti-discrimination." So Mr. Reagan said 'let us all be kind'. He then left office, that avuncular, good communicator, a man who by his communication could have done so much in this epidemic. He left office urging people to be kind.

But he left also signing into law, at this self same time, provisions which were not kind and which did nothing significant for the battle against AIDS. He ordered the mandatory testing of all federal prisoners. He ordered the mandatory testing of all persons coming to the United States for immigration purposes, though not tourists, even though tourists would be a far greater risk for the spreading of AIDS than the sorts of people who come as migrants. He also ordered the mandatory testing of all recruits and all defence personnel of the United States and the mandatory testing of all officers of the foreign service of the United States. Such officers cannot speak out, as they are part of a disciplined service. The people in the prisons cannot speak. They are shut away, they are silent, and they have no organisation. They are, as Winston Churchill said, the test of our civilisation. And so it was also with aliens. They are in foreign countries. They cannot speak effectively. It is very easy with AIDS to pick on a few groups and submit them to testing. It makes a government look as though it is doing something in the face of the crisis. But how much better it would have been if Reagan had done other things earlier, and to other people.

THE LIMITED UTILITY OF HIV SCREENING

In Australia most of the States permit, by executive order, the mandatory testing of prisoners. That is contrary, and it has to be said quite bluntly, to WHO principles. First of all it is a question of whether medical professionals will do such a thing. But assuming that they are part of a disciplined service, the question is "where does it lead?"

The usual "AIDS test" is for HIV antibodies. Cannot we get that message over? The generally available AIDS test is not for the virus. A person may not present with antibodies yet may still be infected. There is a "window period" of 15 or more weeks within which a person is at a high level of infection but does not necessarily test antibody positive. Furthermore, taking the test gives rise to no treatment. It may give rise to false optimism that

a person is negative when they are positive. It gives rise to the necessity to constantly repeat the test which is expensive. The question is whether this is an effective use of our resources in the battle against AIDS. There are some who say it would be a whole lot more effective to do other things if we are serious about containment of the virus. If in prisons we provided condoms to prevent the spread of the virus; if in prisons we provided bleach so that prisoners who use needles (and let me say to you, in Australia - it may not happen here - needles are used in prisons, needles are shared in prisons) could clean them. These would be much more effective ways of containing HIV if our object really is the containment of the virus. If our object is public health, as distinct from doing something that looks good, then this is the path we will take.

Whether any of these words are pertinent to you in New Zealand is entirely for you to decide. I do not come here from across the Tasman to say these things to interfere in the slightest way in your internal affairs. I just say to you that we must all go further than supporting motions in the World Health Assembly. We must move to act out practically the strategies for public health in the face of the third disaster of the 20th Century.

REACHING DEEP INTO HUMAN MOTIVATION

Recently I discovered the poetry of W. B. Yeats. It is a wonderful poetry because it is Irish and therefore I like it. It goes off into extraordinary word pictures. Therefore, I like it because lawyers live by words. I was reading one poem the other day which seemed to me to be relevant to the problem we face in getting into the minds of people. Getting into people's minds is very difficult. It is asking a lot of the law, and of lawyers. So I'll finish my talk to you as I began it, with a poem. Poetry is of course, the great treasure house of our tongue. It expresses our deepest emotions. And it is there that we must search if we are really to succeed in the battle against AIDS:

> "Had I the heavens embroidered cloths,
> Enwrought with golden and silver light,
> The blue and the dim and the dark cloths
> Of night and light and the half light,
> I would spread these cloths under your feet:
> But I, being poor, have only my dreams;
> I have spread my dreams under your feet;
> Tread softly, because you tread on my dreams".

THE HONOURABLE JUSTICE MICHAEL KIRBY, CMG

EDUCATION: Justice Michael Kirby was born in Sydney. He was educated at Fort Street Boys' High School and Sydney University. At the University he took degrees in Arts, Laws and Economics, including the degree of Master of Laws with First Class Honours. Justice Kirby practised as a solicitor for 5 years before his admission to the Bar. In 1974 he was elected a member of the NSW Bar Council. In the same year, at the age of 35, he was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. He remains the youngest man ever appointed to Federal judicial office in Australia.

STATUTORY OFFICES: In February 1975 he was appointed the first Chairman of the Australian Law Reform Commission, a post he held until September 1984. In the years that followed, he was appointed by successive Governments to numerous statutory offices. These included membership of the Administrative Review Council of Australia (1976-84); The Library Council of New South Wales (1976-85); The Australian Institute of Multicultural Affairs (1979-83); and the Executive of the CSIRO (1983-86).

UNIVERSITIES: Justice Kirby has had a long association with universities. From 1964 to 1969 he was a Fellow of the Senate and member of the Faculty of Law of Sydney University. From 1977 to 1983 he was a member of the Council of the University of Newcastle, being Deputy Chancellor of that University from 1978 to 1983. In February 1984 he took up his duties as Chancellor of Macquarie University in Sydney. In 1987 the University of Newcastle conferred on him the honorary degree of Doctor of Letters and the University of New South Wales elected him a member of the Advisory Council of its Human Rights Centre.

COMMUNITY BODIES: He has held numerous appointments with scholarly bodies and community organisations. In 1978 he was elected a member of the Council of the Australian Academy of Forensic Sciences, a position he still holds. In 1987 he was elected President of the Academy. Between 1980 and 1983 he served as President of the National Book Council of Australia. Between 1981 and 1986 he was a judge of the United Nations Association Media Peace Prize. In 1985 he was awarded the Loewenthal Medal by Sydney University. He has also had numerous appointments with ANZAAS, the editorial boards of legal and scientific journals in Australia and overseas and community organisations. He is a member of the Council of the Australian Opera. He is also Patron of the RSPCA Australia, the Friends of the Museum of Applied Arts and

Sciences, the Overseas Service Bureau, the Australian Association for the Education of the Gifted and Talented Children and the All Nations Club in Sydney. He is a Governor of the Arthur Phillip Australian German Foundation and a Trustee of the AIDS Trust of Australia.

PUBLICATIONS: He has spoken widely on issues of legal and community concern. In 1983 he delivered the ABC Boyer Lectures on The Judges. In 1983 he was named Rostrum Speaker of the Year. He has published three books, namely Industrial Index to Australian Labour Law, 1978 CCB (2nd ed 1983), Reform the Law, OUP, 1983, and The Judges, ABC, 1983. He was joint editor of Sir Zeiman Cowan's vice-regal speeches published as "A Touch of Healing", 1986.

INTERNATIONAL: In recent years Justice Kirby has been recognised by overseas appointments. Between 1978 and 1979 he was elected Chairman of an Expert Group of the Organisation for Economic Cooperation and Development (OECD) in Paris. This Group developed rules adopted by the OECD on transborder data flows and the protection of privacy. In 1981 he was appointed senior ANZAC Fellow and made an official visit to New Zealand in that capacity. He has made invited official visits to Canada, China, India, Indonesia, Ireland, Israel, Japan, Kenya the United States and Zimbabwe. In 1983 he was appointed a member of the Australian Delegation to the General Conference of UNESCO in Paris. In 1984 he was invited to deliver one of the Granada Guildhall Lectures in the Guildhall, London. In 1985 he was appointed a Fellow of the New Zealand Legal Research Foundation. He was also elected a Governor of the International Council for Computer Communication in Washington. In July 1985 he was appointed Acting Professor in the Faculty of the Salzburg, Austria for a session on the social and legal issues of informatics. He was appointed in the same year Chairperson of the Australian UNESCO Study Group on Human Rights. In 1985 he was appointed a member of the International Consultative Commission on Transborder Data Flows by the Intergovernmental Bureau for Information in Rome. In 1987, he became a member of TIDE 2000, a group of experts on informatics, initiated by Japan. Justice Kirby is also a member of the World Health Organisation's Global Commission on AIDS.

JUDICIAL: Justice Kirby was appointed a Judge of the Federal Court of Australia in March, 1983, a position he relinquished in September 1984 upon taking up his present appointment as a Judge of the Supreme Court, Judge of Appeal and President of the Court of Appeal of the Supreme Court of New South Wales. In January, 1983, in

recognition of his service to the law and law reform he was appointed a Companion of the Order of St. Michael and St. George (CMG) in the Queen's Australian New Years Honours List. In a recent issue of the Current Affairs Bulletin on "The Intellectuals in Australia", the author stated that over a generation, the influence of Justice Kirby "might exceed that of all commentators combined" because of his contribution as a community educator and his endeavour to open up the law to public scrutiny. The same author concluded that "Kirby will be regarded as one of the heroes of Australian reform by the year 2000".