

Life as the Attorney-General: Being in the Right Place at the Right Time

PAUL EAST*

I INTRODUCTION

This rather cryptic title is occasioned by the fact that in the little over seven years that I served as the Attorney-General I was fortunate to take part in litigation which resulted in me appearing in the High Court, the Court of Appeal and the Privy Council as well as two appearances before the International Court of Justice. I was incredibly lucky with my timing and since leaving Parliament I have also being fortunate to enjoy a diplomatic appointment as well as undertaking assignments for the Commonwealth, Inter-parliamentary Union, UNDP and the World Bank in countries as diverse as Sri Lanka, Afghanistan, Bangladesh and Tanzania.

A law degree has proved a very useful background for much of this work and I wish to publicly acknowledge the support I have received from Bell Gully, the law firm where I have been a consultant for the last 12 years.

II SOME BACKGROUND ON THE OFFICE OF THE ATTORNEY-GENERAL

The office of Attorney-General is one of the oldest legal offices in English law. Its origins are now obscure but the office can be traced back to medieval times when the King, not able to appear in his own courts in person to plead his cause, employed the services of an attorney who had the responsibility of maintaining the Sovereign's interests before the Royal Courts. The first formal appointment as the King's attorney was to the King's Bench in 1312. The office of Attorney-General became a fixed institution in 1461 with the appointment of an Attorney-General of England, the earliest known instance in which the modern title was adopted for the first Law Officer of the Crown.

With the antiquity of the office, many of the Attorney-General's functions and powers at common law reach back to a time when the major institutions were first emerging. Parliament asserted its legislative functions from the 14th century but did not establish its position as the supreme law-making body until after the revolution of 1688. The origins of the courts can be traced back to the appointment of the first Justices in the 13th century

* The Rt Hon Paul East QC. This address was given at the 2016 Annual Auckland University Law Review Symposium at the University of Auckland, Faculty of Law on Tuesday 18 October 2016.

who were lay people appointed as custodians or guardians of the peace, and given judicial powers to hear and determine felonies and trespasses.

The first Attorney-General in New Zealand was Francis Fisher who was appointed in 1841. He was one of the three permanent officials of the Executive Council when New Zealand was established as a separate colony. The Executive Council, which was presided over by a Governor, comprised the Attorney-General, the Colonial Secretary, and the Colonial Treasurer. The Attorney-General became a ministerial portfolio when responsible government was granted in 1856.

Most people, if they know anything about the Attorney-General, know that the Attorney's name is in some way associated with the public interest. That association occurs in several ways. The Attorney represents the public interest in the administration of justice and can, where appropriate, take legal action to see that the law is observed and justice done. This applies to both the criminal and civil law. It is thus open to the Attorney in person to initiate criminal proceedings, although it is rare for that to occur. In practice, the criminal law is executed and enforced by the police who are not subject to political direction in performing their public duty.

III PROTECTOR OF CHARITIES

Another of the Attorney's functions that is widely recognised is that of protector of charities.

In one notable case, I came to exercise personally the Attorney-General's functions when ordering an inquiry under the Charitable Trusts Act 1957. That case involved the Cyclone Val Relief Fund. A donor had expressed concern about mismanagement of the fund and funds being unaccounted for. The news media probed how the funds were spent in Western Samoa, with publicity centred on a property owned by one of the trustees on which a house was built with funds from the charity. In cases such as this, it is important that the public of New Zealand be confident that charitable funds are applied properly. In New Zealand, we rely heavily on donations to charitable and voluntary organisations, and when serious allegations are made it is important that they are thoroughly investigated.

In the case of the Cyclone Val Relief Fund, I appointed an investigating solicitor and an investigating accountant to inquire into the management and administration of the trust.

In fact, there was only one instance of poor judgment and lack of communication which had resulted in the development of and the erection of a building on land belonging to one of the trustees. The committee had mistakenly believed that the land in question was the only site available, and the development of it was, in the end, of benefit to no one. Following the inquiry, agreement was reached between the trustee and the committee for compensation for the construction of the house and fencing.

As happened in the Cyclone Val case, a sensitively handled intervention by the Attorney-General can resolve problems without recourse to litigation or the frustrations of delay.

IV THE ATTORNEY-GENERAL AND PARLIAMENT

In Parliament, the Attorney-General is someone to whom other Ministers can turn for advice and the Attorney stands somewhat apart in that respect from other Members of Parliament. In New Zealand, the Attorney-General reports to Parliament under s 7 of the New Zealand Bill of Rights Act on any provision in a Bill that is before the House which appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights. This function is a particular example of the independence with which the duties of the Attorney-General must be exercised. This calls for a careful analysis of the implications of the Bill in question, and the exercise of finely balanced judgment.

V THE ATTORNEY-GENERAL AND THE JUDICIARY

The Attorney-General stands in a special relationship with the judges and is the link between the judiciary and the elected government. The Attorney-General exercises responsibilities in protecting the judiciary in matters of contempt of Court and in recommending the appointment of District Court Judges and Judges to the High Court, Court of Appeal and the Supreme Court.

Constitutionally, the judges can speak only through their judgments and cannot, by convention, publicly answer any criticism. The Attorney-General assumes responsibility over instances of criminal contempt of Court, whether arising in respect of criminal or civil proceedings, which undermine public confidence in the administration of justice. The judge can deal with matters of contempt that occur in Court, but once it occurs outside of the Court then it is a function of the Attorney-General to bring proceedings for contempt.

Decisions about the issuing of contempt proceedings are usually made by the Solicitor-General as the non-political law officer. These decisions need to be made carefully because issuing contempt proceedings in an inappropriate case carries with it the danger that the public will perceive the courts as being over-sensitive to criticism which they ought to be heeding. However, ill-informed or capricious criticism, publicly and widely made, with no knowledge of the special facts on which the judge has had to make a decision can be particularly damaging. Such statements can wrongly perpetuate the notion that judges are not aware of the real pressures facing society. Nothing could be further from the truth. The judges, probably more

than any other section of the community, have paraded before them, on an almost daily basis, people whose lives have suffered the trauma of criminal offending and civil disputes.

What also has to be carefully considered is the principle which protects the freedom of speech, and in particular the freedom of the press, which is recognised as fundamental to a democratic and open society. Balancing such considerations with the independence of the judiciary calls for an astute assessment as to how the situation should be handled. Often a public statement by the Attorney-General is all that will be necessary to remind the news media that unfounded attacks on the judiciary can undermine the stability of our constitution which it is in all our interests to protect.

The English Attorney-General and Solicitor-General are both politicians but they are not members of the Cabinet. In New Zealand, the Attorney-General has almost always been a member of the Cabinet, and this, in my view, is desirable because it enables the Attorney-General to give legal advice and counsel on matters that are central to the conduct of government affairs at that crucial time when they are being discussed. But judicial appointments stand apart and are not a matter for political debate.

VI THE ATTORNEY-GENERAL AND THE EXECUTIVE

The relationship between the Attorney-General and the Executive can be a complex one, given that the Attorney-General is a Member of Parliament with responsibility for the Crown Law Office. The Attorney-General's dual status as a Cabinet Minister is a significant factor when the Office is called upon to advise the Government. It is a role that calls for a certain independence, as the Attorney-General owes a duty, not only to the Government, but also to uphold New Zealand's constitution and to ensure that the Government both acts lawfully and is not prevented from acting lawfully.

There are occasions when the Attorney-General must act personally and not through the Solicitor-General. That happens, for example, in the case of the reclassification of special patients.

The Attorney's criminal justice function calls for carefully considered judgment, balancing on the one hand the needs of the justice system and on the other the mental health system. There are compelling public interest reasons that someone who has committed an offence should be dealt with under the criminal justice system: the public justly demands that offenders be called to account and punished; that they receive retribution in open court; that this may send a clear message to the community that criminal behaviour is not tolerated in a civilised society. Equally, though, there are some strong factors weighing in favour of a defendant whose mental state tenders him or her unable to plead, or to understand the nature or purpose of the proceedings. In such cases, the law recognises that the

defendant should be removed from the ambit of the criminal law until such time as he or she is in a condition to be dealt with by it.

There have been occasions when the Attorney-General's functions in relation to the overall supervision of the criminal process have taken on an international flavour. That happened with the bombing of the Greenpeace protest ship *Rainbow Warrior* in 1985. Two French agents were arrested and charged with manslaughter and arson and, on pleading guilty, were sentenced to imprisonment.¹ Later in November 1991, one of the persons wanted in respect of the bombing was arrested in Switzerland and the Minister of Justice had to consider whether to seek extradition of that person to face charges in New Zealand.² In the event, extradition was not sought and, as Attorney-General, I had then to consider whether the outstanding charges against other French nationals implicated in the affair should be stayed. It is unusual for the Attorney-General to intervene in the administration of the criminal law. In this case, however, any decision to stay the charges had to be made in the context of broader national interest considerations which made it appropriate for the law officer who holds political office to make the decision. The decision to stay the charges was one which, once taken, the Attorney-General could reasonably be expected to justify in Parliament.

The decision to intervene in the *Rainbow Warrior* case was one which had to be exercised personally and independently. I did not consult Cabinet in making the decision, but rather considered the merits of the case without political pressure. I did not regard pressing ahead with the prosecution as being in New Zealand's national interest and the factors which influenced me were closely linked to those which persuaded the Minister of Justice not to seek extradition. I therefore signed stays of proceedings in respect of the information laid against the other defendants.

By convention, the Attorney-General chairs the Parliamentary Privileges Committee. This Committee serves to protect the supremacy of Parliament as the supreme legislating body. At the heart of that protection is the privilege of freedom of speech which allows a Member of the House to state in debate whatever that Member thinks, however offensive it may be to the feelings or injurious to the character of individuals, and the Member is protected by that privilege from any action for libel, as well as from any other question or inquiry.

The statutory recognition which was finally accorded to the privilege of freedom of speech is now legend. Article 9 of the Bill of Rights 1688 declares: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In the ensuing years, a large number of cases have dealt with the courts' role in interpreting the scope of parliamentary privileges. Against this background, I appeared, in proceedings which raised these very basic issues

1 *R v Mafart and Prieur* (1985) 74 ILR 241 (HC).

2 (27 November 1991) 521 NZPD 5623.

about parliamentary privilege and freedom of speech. The Hon Richard Prebble issued proceedings claiming that he had been defamed in a Frontline TVNZ programme alleging he had been conspiring with leading businessmen and officials to sell state assets cheaply in exchange for financial support for the Labour Party.³ After the matter had been set down for trial, Television New Zealand was granted leave to file an amended statement of defence pleading truth or justification. TVNZ planned to call in evidence a wide ranging review of the policies and conduct of the Fourth Labour government. They intended to rely on the events in the House of Representatives to support the plea of justification.

Mr Prebble himself drew to the attention of the Privileges Committee the fact that Television New Zealand had pleaded words that he had used in a parliamentary debate. The Committee recognised that while it is for the courts to determine the extent of parliamentary privilege, this had led to conflict between Parliament and the courts in the United Kingdom and the Committee held concerns that parliamentary debate might be curtailed in the future if Members believed that they could be cross-examined in court at some future time over what they had said in debates. After consideration, the House granted me leave to appear before Smellie J in the High Court, to argue on behalf of the House that parliamentary privilege prevents the courts from receiving evidence of statements made in the House.

I submitted that art 9 of the Bill of Rights is an illustration of the principle of separation between the judicial and parliamentary branches of government, and is part of the scheme of mutual restraint by which neither the courts nor Parliament trespasses upon the function of the other.⁴ I submitted that what was prohibited was the use of anything said in Parliament where the result could be to call into question the accuracy, truth or circumstances of what was said, or to question the motives or intentions of the speaker.⁵ Parliamentary privilege is not an evidential matter but a substantive rule of law and the material should necessarily be excluded pursuant to the mutual constraints that both Parliament and the courts must exercise in respect of each other's proceedings.

The judge found there would be no escape from the necessity to examine the plaintiff's motives, intentions and actions of Members of the House if an inquiry were to be held, and he held that that could not be allowed to happen.⁶ He recognised that it may, on occasion, work an injustice upon a defendant, but he also recognised that to hold otherwise — to allow a plaintiff to call in aid speeches, statements and actions in the House — would be inimical to the relationship between the courts and Parliament.⁷ The smooth working of constitutional government depended upon the separation of powers and the respect of each branch for the proceedings of the other. The privilege that attaches to parliamentary

3 *Prebble v Television New Zealand Ltd* (1992) 8 CRNZ 439 (HC) at 440.

4 At 446.

5 At 447.

6 At 461.

7 At 461.

proceedings does not exist because of its personal advantage to the Members of the House but because it is essential in the interests of the citizen.

The Court of Appeal upheld the decision of Smellie J in the High Court, striking out the allegations which, if allowed to stand, might impeach or question proceedings in Parliament contrary to art 9.⁸ The Court of Appeal, however, raised the question of whether, in view of the inability of the defendant to deploy all the relevant evidence for the plea of justification, it was just to allow the plaintiff to continue with his action.⁹ The Court held (McKay J dissenting) that it would be unjust and ordered a stay of the plaintiff's action, unless and until privilege was waived by the House of Representatives and by any individual Member or former Member whose words or actions were questioned in the defence.¹⁰

Mr Prebble appealed this decision to the Privy Council¹¹ and I appeared, on behalf of the Parliament. I submitted that the true extent of art 9 of the Bill of Rights was a prohibition on the use of anything said in Parliament where the result would be to call into question the accuracy, truth or circumstances of what was said, or to otherwise comment on it.¹² It was also my view that, while the privilege of freedom of speech protects individual Members, it is in fact the privilege of the House as a whole and that, since it has a statutory foundation, the House is bound by its provisions. Their Lordships were conscious that:¹³

... to preclude reliance on things said and done in the House in defence of libel proceedings brought by a Member of the House could have a serious impact on a most important aspect of freedom of speech [namely] the right of the public to comment on and criticise the actions of those elected to power in a democratic society.

Their Lordships acknowledged that:¹⁴

If the media and others [were] unable to establish the truth of fair criticisms of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour.

But their Lordships also noted "how public policy, or human rights, issues can conflict" and identified three such issues relevant here:¹⁵

... first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third the interests of justice in ensuring that all relevant evidence is available to the Courts.

8 *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA).

9 At 525 and 534.

10 At 525.

11 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

12 See 6–7.

13 At 10.

14 At 10.

15 At 10.

Their Lordships considered that, of these three public interests, the “law has long been settled” that “the first must prevail”.¹⁶

However, the law did not exclude all reference in court proceedings to what has occurred in the House. Their Lordships noted that there could “no longer be any objection to the production of Hansard ... to prove what was done and said in Parliament as a matter of history”.¹⁷ And:¹⁸

It w[ould] be for the trial Judge to ensure that the proof of these historical facts [was] not used to suggest that the words were improperly spoken or the statue passed to achieve an improper purpose.

On the pleadings as they stood before the Privy Council, it was clear to their Lordships that the defendants intended to rely on the parliamentary matters “not purely as a matter of history but as part of the alleged conspiracy”, and that Smellie J was correct to strike them out.¹⁹ Their Lordships added that “there may be cases in which the exclusion of material on the grounds of parliamentary privilege makes it quite impossible fairly to determine the issue between the parties” and “in such a case the interests of justice may demand a stay of proceedings”.²⁰ In this case, however, there were defence relied upon a number of other matters and the exclusion of matters stated in the House would have only a limited impact on their case. For those reasons, their Lordships did not agree with the Court of Appeal that the interests of justice demanded a stay.²¹

Nazi war crimes were another issue that involved the Attorney-General in both a domestic and an international context. In May 1990, the Simon Wiesenthal Centre of Los Angeles forwarded to the New Zealand Government a list naming certain individuals who, it alleged, were war criminals. Each of the named persons had emigrated to New Zealand after World War II. At the same time, an edited list was released to the news media, deleting the names and the places of birth. Because of the small number of immigrants who came from the Baltic States after the War, the local media were able to ascertain the identities of some of the named individuals. This caused considerable controversy and a regrettable degree of attention to focus on the small Baltic community in New Zealand.

Canada, the United Kingdom and Australia were three countries who investigated the possible immigration of war criminals. At the time the matter came to be considered by the New Zealand Cabinet, one person in Canada had been brought to trial and was acquitted²² after a trial lasting 8

16 At 10.

17 At 11.

18 At 11.

19 At 11.

20 At 11.

21 At 12.

22 See *R v Finta* [1994] 1 SCR 701.

months. The Crown was seeking to appeal that acquittal. As at that time, two other prosecutions had been initiated²³ and one denaturalisation and deportation proceeding instigated.²⁴

The United Kingdom Government established an inquiry in February 1988.²⁵ The inquiry recommended that action be taken against persons resident in the United Kingdom against whom sufficient evidence could be obtained. Legislation was introduced and passed by the House of Commons but the Bill was defeated in the House of Lords.²⁶ The House doubted whether such cases could be the subject of a fair trial after the elapse of so many years.

The Australian Government passed the War Crimes Amendment Act 1988 to make it possible to prosecute war crimes, and set up a special investigations unit as part of the Commonwealth Attorney-General's department. It was an expensive exercise; in the 1990 financial year some AUD 8,500,000 in costs were charged to the public purse. One person in Australia was charged, a former Ukrainian, then in his mid-seventies.²⁷ The cost of the committal procedure and trial was estimated at AUD 3,500,000, with a similar figure estimated for the cost of the defence.

With the benefit of the experience of those countries, the New Zealand Government had to consider what its response should be. The Cabinet authorised the Solicitor-General to report and make recommendations on the war crimes allegations.

The Solicitor-General recommended that the Government should authorise investigations, at least to the point of establishing identity and whether there was cause to suspect the named persons as being involved in war crimes.²⁸ Otherwise, the named individuals would be subjected to harassment and the Government would have to accept the possibility that persons responsible for serious war crimes had found haven in New Zealand. In June 1991, the Cabinet authorised the Solicitor-General to conduct further investigations with the assistance of the police. In authorising this action, the Cabinet confined "war crimes" to culpable homicide in furtherance of a policy of the extermination of a group of persons, carried out in Germany or German occupied territory during the Second World War.

The police established a War Crimes Investigation Unit and liaised with Australian and other authorities. The police had received allegations in relation to 46 named individuals, of whom 17 were alive and resident in New Zealand. Fourteen of those were interviewed and, as a result, the police concluded there was no evidence to substantiate allegations that any of the New Zealand subjects listed were involved in war crimes. Their investigations also revealed no likelihood of any further evidence becoming

23 *R v Reistetter* (1990) CarswellOnt 1506 (ONCJ); and *R v Pawlowski* (1991) CarswellOnt 6224 (Ontario General Division).

24 *Canada v Luitjens* (1991) CarswellNat 79 (FC); and *Rudolph v Canada* (Minister of Employment and immigration) (1992) CarswellNat 633 (FC).

25 See Thomas Hetherington and William Chalmers *Report of the War Crimes Inquiry* (July, 1989).

26 War Crimes Bill 1990 (UK).

27 *Polyukhovich v Commonwealth of Australia* [1991] HCA 32, (1991) 172 CLR 501.

28 John McGrath *Report on War Crimes Allegations* (1991).

available or of any justifications to conduct further inquiries. The Cabinet resolved that the Government take no further action on the allegations received or on any future allegations, should any be received. However, the Government decided that it would grant any extradition requests made by overseas governments which satisfied the normal extradition procedures. The issue was one of high public interest which raised questions about the rights of individuals, none of whom on the evidence was guilty of involvement in war crimes. They were members of small ethnic communities who were vulnerable to unwarranted harassment.

I was extremely fortunate to be in office when the French Nuclear testing case arose. This led to two appearances at the International Court of Justice in The Hague.

A little history — the use of atomic bombs by the United States at Hiroshima and Nagasaki at the end of the Second World War lead to discussions between the United States and Russia on a possible test ban treaty. The Cuban missile crisis, when USSR installed nuclear missiles in Cuba, and the United States established a naval blockage with the missiles being withdrawn, lead to a real effort to curb nuclear proliferation. The world had averted the possibility of nuclear war and in 1963 a limited nuclear testing treaty was signed by the Soviet Union, USA and the UK. France did not sign the treaty and between 1963 and 1967 conducted atmospheric test at Mururoa Atoll. Its position was that there was no significant fallout from these tests. It was not a persuasive argument. The Norman Kirk lead Labour Government was elected with a huge majority in 1972. Prime Minister Kirk abandoned normal diplomatic channels and sent Cabinet Minister Fraser Coleman on a frigate to the test zone as a very visible protest. This was a symbolic move which attracted a large media attention. In 1973 both Australia and New Zealand brought proceedings in the ICJ contending that the tests breached international law.²⁹ In its judgment in 1974 the ICJ did not rule on that contention but as the French had undertaken not to carry out any future atmospheric tests the matter was adjourned. The ICJ added “if the basis of this Judgment were to be affected, [New Zealand] could request an examination of the situation”.³⁰ Thereafter, France exploded over 100 devices underground at Mururoa and Fangataufa before commencing a moratorium in 1992.

By 1995, France’s position was that technological advances allowed it to resume underground testing. The New Zealand Prime Minister, Jim Bolger made a public statement deploring the French decision and urging its government to re-consider it. All seven political parties represented in the New Zealand Parliament unanimously passed a resolution condemning the French decision.³¹

The Prime Minister followed up this Parliamentary initiative by writing to the President of France, President Chirac, reiterating New

29 *Nuclear Tests Cases (Australia v France) (Merits)* [1974] ICJ Rep 253; and *Nuclear Tests Case (New Zealand v France) (Merits)* [1974] ICJ Rep 457.

30 At 477.

31 (20 July 1995) 548 NZPD 8041–8042.

Zealand's position and adding that small island nations in the Pacific, which were dependent on the sea for their livelihood, found the risks associated with the proposed testing unacceptable. Aside from the possibility of accidents, they had concerns about long-term consequences for the marine environment.

Subsequent diplomatic initiatives achieved no progress. In August 1995 the Prime Minister wrote again to France this time saying that New Zealand had decided to have recourse to the terms of the 1974 judgment of the International Court of Justice. The New Zealand Government claimed that the conduct by the French Government of underground nuclear tests in the South Pacific region that gave rise to radioactive fall-out constituted a violation of New Zealand's rights under international law.

In the 1995 application to the Court, New Zealand argued that France's intention to conduct underground nuclear tests gave New Zealand a right to request a re-examination of the situation as provided for in the 1974 judgment.³² In effect the intended future conduct of France represented a breach of its undertaking in 1974.

France immediately contended that as the ICJ's 1974 decision had been solely concerned with atmospheric testing, and its announced intentions in 1995 were confined to underground testing, the provision in the Court's judgment allowing New Zealand to request a re-examination of the situation had no application. New Zealand was trying to bring a new case.³³ As France had withdrawn from the jurisdiction of the ICJ after the 1974 decision, the Court had no jurisdiction to consider any case concerning events taking place after that withdrawal.

After a preliminary meeting early in September 1995 before the ICJ President attended by counsel for the parties, the Court decided to hear argument on the question of whether it had jurisdiction to hear the case. A full hearing took place in The Hague on 11 and 12 September 1995. Later that month the ICJ delivered a judgment in which it upheld the French jurisdictional objection by a majority of 12:3.³⁴

In the early stages of government consideration of whether to go to the ICJ, the advice of the Attorney-General, the Solicitor-General and MFAT was unanimous. A case in the ICJ would not be successful because a French objection to jurisdiction would be sound. The case might not even get to an oral hearing in the Court as the attempt to bring it could be refused arbitrarily on this jurisdictional ground. There was a risk that New Zealand might be embarrassed.

The political situation was complex. The opposition Labour Party was strongly of the view that a case should be brought. This was in part because a prominent international lawyer, Mr Eli Lauterpacht QC of London

32 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* [1995] ICJ Rep 288 at 288–289.

33 *Request for an Examination*, above n 32, at 292–293.

34 *Nuclear Tests Case (New Zealand v France)* [1995] 106 ILR 1.

and Cambridge University, was urging through the media that New Zealand would have a very good case.

While the result was disappointing, New Zealand had again made a powerful case in the world arena for the outlawing of nuclear testing in the atmosphere or underground and clearly that was not lost on the world community.

Move forward a year and at the request made by the General Assembly of the UN, the ICJ found on 8 July 1996 by 7 votes to 7, by the President's casting vote, that:³⁵

... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

However, the Court went on:³⁶

... in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Following that unfortunately divided conclusion on the big question, the Court went on to unanimously find that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”³⁷

VII CONCLUSION

Those then are some of the issues which I have had occasion to consider in my term of office as Attorney-General. While the office of Attorney-General is born of an English institution, it has been shaped to become a very New Zealand one, and one that is central in many ways to our unwritten constitution.

In my view, New Zealand is very fortunate to have an unwritten constitution. That is sometimes considered as a weakness. But that same weakness is also its strength. I am sure that if the Westminster system, with its attendant court structure and other institutions, was to be devised from scratch as a working model, it would be rejected as totally unworkable. And yet it has survived over hundreds of years and has provided probably one of the fairest systems of government that the people of the world have witnessed. And I think the reasons for this is its resilience — it is not a

35 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 266.

36 At 266.

37 At 267.

system that is so rigid that the entire structure must come under enormous pressure (and possibly collapse) before it can adapt and evolve. But to maintain that strength, those within the system must respect and protect the role that is played by each of its parts, and it is the role of the Attorney-General to make sure that that occurs.