> begun. Given sufficient time for the challenge to permeate throughout the community, the process may prove to be irresistible."

Of the process of law reform in Australia, the Melbourne *Age* (3 January 1980) had a few, not too sanguine opening decade comments to make. Under the heading 'Winding Road to Law Reform' the Age commented:

> "The Chairman of the Australian Law Reform Commission ... is optimistic about reforming some of the anachronistic and burdensome aspects of the legal system in the next decade. He may be too optimistic. The legal system has been going its laboured, often feudalistic way for a very long time. Proposed changes have been delayed or resisted for a variety of reasons and it is difficult to imagine the legislatures and some sections of the legal profession rushing to satisfy the reformers' wishes in so short a space of time as ten years."

Referring to the suggestion that institutional law reform to channel law reform through public debate and expert commentary into the legislative process might be one reason for optimism, the *Age* acknowledges:

> "increased public awareness of the legal system's shortcomings and ... growing support from some sections of the legal profession, especially in the area of procedural, as opposed to substantive law."

The *Age* was more cautious about the need for procedural change but agreed that the impact of computers and modern information technology would require a complete overhaul of the law of evidence, copyright, patent law, laws relating to white collar crime and so on. The scepticism about parliamentary attention to law reform, mentioned in the editorial, brings together the themes here. Professor Reid says Parliament is losing its power. Professor Wilenski said loss of political will often turns reform proposals over to precisely those who have a vested interest to oppose reform or to leave things be. Professor Sackville said that law reform references can sometimes have a less than entirely pure motivation. But once the genie is out of the bottle, the public debate will never be quite the same.

The report of the Senate Standing Committee on Constitutional and Legal Affairs, *Reforming the Law* (1979) made specific proposals for the routine processing of reports of the Australian Law Reform Commission, to avoid the perils and dangers identified by Sackville, Reid and Wilenski. The government's reaction to the Senate Committee's unanimous recommendation is still awaited. Law reformers in many jurisdictions will be watching closely the Australian suggestion for a routine procedure to process law reform reports and to beat the pigeon hole.

The Meaning Doesn't Matter?

> "The meaning doesn't matter if it's only idle chatter of a transcendental kind."
>
> W.S. Gilbert, *Patience*, I.

There are many commentators who say that one of the most pressing needs of reform of the common law is in the interpretation of statutes. Reasons often advanced, include:

- Rapid growth of statutory law in volume and detail
- Advent of the popularly elected representative Parliament, whose will should be implemented not frustrated
- Encouragement of greater simplicity in statutory language, which will only come about when judges are 'trusted' to fulfil the broad Parliamentary intent
- Bring English language laws and interpretation more into line with European and other legal systems. Continental lawyers can scarcely believe the way lawyers in our tradition confine themselves to the text and are 'blinkered' when it comes to using such ancillary material as Hansard debates and Ministerial statements.

Even in the United States, which otherwise generally follows our tradition, use of legislative materials as an aid to interpretation is largely unrestricted.

In 1969 the Law Commissions of England and Scotland proposed a modification of the rules of statutory construction. In draft clauses attached to the report, *Law Com 21 The Interpretation of Statutes,* they proposed that, in

ascertaining the meaning of legislation, matters which may be considered should include:

- Punctuation, side notes and the short title of an Act
- Relevant reports of Royal Commissions, LRCs Committees etc.
- Relevant treaties or other international agreements.
- Any other document bearing on the subject matter presented to Parliament
- Any document 'declared' to be relevant.

The proposal left it to the court to decide the weight to be given to these documents; but the intent was clear: to take the blinkers off the courts. Two new statutory principles were suggested for the interpretation of Acts:

- A construction that would promote the general legislative purpose was to be preferred to a construction which would not.
- A construction consistent with an international obligation was to be preferred to one that was not.

In 1970 a report of the SALRC, *Law Relating to Construction of Statutes,* (SALRC 9) dealt with the suggestions, first mooted in the Law Commissions' working paper. Substantially the SALRC (Chairman, Mr Justice Zelling) endorsed the Law Com proposals. The SALRC pointed out that the Australian position here is nearer to the English than the American. They relied on Chief Justice Barwick's paper, Divining the Legislative Intent, (1961) 35 ALJ 197. So far there has been no official action on either the UK or SA reports. But the controversy is not dead. Far from it. The entry of Britain into the European Communities is beginning to put new pressure on British lawyers as they daily try to explain at Brussels their very different (and to European eyes 'truly peculiar') approach to interpreting instruments. In the inaugural Lord Fletcher Lecture, delivered in December 1979, Lord Denning spoke of 'The Incoming Tide' (1979) 76 *Law Soc Gazette,* . . .

> "[O]ur most important task . . . is the interpretation of statutes and of treaties. If you read [the Treaty of Rome], if you read the regulations and the directives under it, they are all part of our law. How different they are from ours. They are in simple language, usually easy to understand, but with lots of gaps in them. The European Court are very skilled in making them work. They have what they call a method of interpretation called the 'teleological' or 'schematic' method. You look at the legislative purpose behind the statute and interpret it accordingly. It is very different altogether from our English way of interpretation. Most lawyers here think it best to go by the literal words. It is felt to be the safe thing to do. I hope that the influence of the European method of interpretation will pervade ours; so that we can look at the intention behind the legislation, so as to carry out the purpose of the Parliament so far as we can. But I am a lone voice in this."

But Lord Denning is not a lone voice. On 17 January 1980 Lord Scarman (who is to visit Australia in September) introduced into the House of Lords an Interpretation of Legislation Bill. The Bill followed the draft clauses attached to the Law Commissions' report. On 13 February 1980, the debate began. Describing the measure as 'modest both in purpose and in its scope' Lord Scarman described the two purposes of the Bill to be:

- To improve communications between Parliament and the judiciary
- To assist judges towards a clearer understanding of Parliament's intention when construing statutes.

Both in America and Europe, explanatory material is provided, committee reports are looked at and very often memoranda are produced or referred to in a statutory preamble. Judges and the public are told that they may look at such materials. In the English tradition, the strict rule against going beyond the language in its context is 'very often not observed in practice'. But judges are 'widely divergent' in their practice in the use of explanatory material. According to Lord Scarman there are three classes:

> "There are those in the strict class, who will go outside the context only to discover a mischief. There are the liberals who go far enough to use relevant reports as an aid to construction. Then, it will not surprise your Lordships to hear, there is a third class: the do-as-you-please judges, who will look either openly or secretly at whatever material they think appropriate in order to get at the purpose of Parliament."
>
> *Hansard (Lords)* 13 February 1980, 276,282

No sooner had Lord Scarman resumed his seat than a torrent of judicial anxiety was let loose. Lord Elwyn-Jones, the last Labour Lord Chancellor, feared:

> "the price to be paid for a change which might impose additional uncertainties on those who are concerned with the effect of legislation and with litigation and would lead to extra work in the machinery of government."

Lord Diplock said that two-thirds of the work of the House of Lords Judicial Committee involved disputed questions of the interpretation of statutes:

> "It is a subject with which I am familiar and which, I am bound to say, I dislike. . . . I think the public is entitled to look at the legislation and see what it says. It will be a temptation to the courts and to counsel before the courts to go into a large number of documents. . . . I would urge this House to say: do not let us have a second reading of it: this is a matter which is not a subject for legislative interference."

Lord Mishcon drew attention to the fact that legal interpretation was not simply a job for the courts. 'It is' he said 'the almost daily job of [the legal] profession in advising ordinary citizens'. But the inference he drew from this was that 'Parliament must do its job properly and the legislation must be clear and careful'. Viscount Dilhorne said that if judges had to look at preliminary reports and materials:

> "the proceedings before a court to determine the meaning of a particular sentence would last a long time at great cost to the litigants. [It would] increase to a very large degree the danger that judges may be tempted to trespass into the legislative field and to decide not what it was that Parliament intended by the words used but what, in the light of those documents, Parliament should have done; and that is going beyond the judicial function."

Lord Chancellor Hailsham then entered the fray, for the defence of the measure. 'One has to ask oneself', he said, 'why it has lingered in the pigeon holes for so long'. Lord Hailsham dealt sternly with Viscount Dilhorne saying that his 'noble and learned friend' belonged to the 'literalist school'. He even accused him of being 'false to his lineage'! Lord Dilhorne is a descendant of the famous Lord Coke, who belonged to the liberal school.

> "[T]he fact of the matter is that there has always been this battle between the literalist school which says that the function of judges must really be to construe the grammar of the section and not to look outside to see what it was intended to do, and what might be called the positive or mischief school, which says that you must try to find out what Parliament meant to do and give effect to it. . . . One at least of the reasons why other countries manage to legislate in shorter and more intelligible language than England is that they take greater care about the preparation of their statutes. They have what are called in France the travaux preparatoire. (sic) . . ."

At the end of the debate Lord Scarman withdrew the Bill, presumably to fight another day. He foreshadowed a 'comprehensive measure' which would contain proposals relating to the preparation and drafting of legislation as well as its interpretation. Commenting, the *New Law Journal* (21 Feb 1980) concluded:

> "There were hopeful indications that the Lord Chancellor is prepared to consider anew the Renton Committee *[The Preparation of Legislation,* 1975] proposals and the way will be open in the next session for Lord Scarman to introduce the more comprehensive Bill. . . . Advocates of statutory law reform and critics of the rules of statutory interpretation — their difficulty is only made clearer by the semantic exchange between the Lord Chancellor and Viscount Dilhorne to see that difficulty exists — may now take some small comfort that after so long the whole subject of legislation will receive wider debate."

What about Australia? When the ALRC proposed a law on drinking driving, it included a clause permitting the courts to have regard to its report in interpreting the law. The Bill was adopted. But the clause was deleted. Europe may force the pace of change in Britain. Will there be a catalyst for change in Australia?

Child Abuse and Child Care

> "Children begin by loving their parents. After a time they judge them. Rarely, if ever, do they forgive them."
>
> Oscar Wilde, *A Woman of No Importance,* 1893

The ALRC is continuing its inquiry into child welfare laws for the Australian Capital Territory. The Commission has divided its reference into several projects:

- Young offenders
- Neglected children
- Uncontrollable children
- Child abuse