of the criminal law process. Amongst initiatives agreed to was a request to the Australian Bureau of Statistics to identify Aborigines and Torres Strait Islanders in the uniform crime and justice statistical system. Establishment of the system has, however, been a long time coming.

- In New South Wales, a bipartisan State Parliamentary report has called attention to the 'deplorable physical and psychological environment' in which most of the 45,000 Aborigines of New South Wales live. The report urged the rejection of the old policy of 'assimilation' and its replacement by 'self-determination', recognising that the dependent institutionalised status of Aborigines has not changed significantly since colonial days.

Commenting on the State report, the *Sydney Morning Herald* (20 April 1981) summed it up:

> The principle of self-determination will not be easy to put into practice. The Australian Law Reform Commission, for example, is examining the question of tribal punishments ... to see how they could be, or whether they could be, incorporated into the Australian legal system for Aborigines. It is finding the question a complex one. But difficulties like this do not alter the fact that self-determination is the only viable policy for the future. The policies of the past have been resisted by the Aborigines and have failed. ... The most effective programmes, indeed the only effective programmes, have been those 'initiated by the Aborigines themselves to meet their needs as they perceive them'. There, in that fact, should be our starting point in erasing this moral blot on our society.

interpretation reform

> Polonius: What do you read, my lord?
> Hamlet: Words, words, words.
> Shakespeare, *Hamlet*, II, ii, 195.

common law to british museum? Lord Scarman did not abandon his reforming instinct when he ceased in 1973 to be the first Chairman of the Law Commission of England and Wales. In Britain and overseas, he has continued his insistent calls for reform, sometimes in the courts, more often at the lecturing podium or in Parliament. Delivering the ninth Wilfred Fullager Memorial Lecture in September 1980 at Monash University, he urged, amongst other things, new consideration to the interpretation of statutes by the courts:

> Questions of policy cannot be kept isolated from the forensic process. They will from time to time have to be considered by the courts. The policy of a statute is relevant where a court is interpreting its provisions. ... Courts [do not] have any business to reject policy, if it be formulated within the law. ... [T]he judges must seek out and support the policy of statute law, rejecting a literal construction, if a statute's policy is better served by such rejection. ... If they do so, the common law, which is the judges' contribution to lawmaking, will survive. But, if the opportunity is not given them, or if they fail, the common law will join the collection of interesting antiquities. ... The British Museum, not the living world, will be its appropriate resting-place.
> (1980) 7 *Monash Uni L.Rev.* 1, 12-16.

In January 1980, Lord Scarman introduced into the House of Lords an Interpretation of Legislation Bill designed to implement the report of the Law Commission, *The Interpretation of Statutes* (Law Com 21). The measure was withdrawn, Lord Scarman promising to fight another day. See [1980] *Reform* 47. Now it has been reintroduced into the House of Lords on 29 January 1981. As an aid to interpretation, for the purpose of ascertaining the meaning of any provision of an Act, the following may be considered:

- cross headings, punctuation and sidenotes;
- relevant treaties or international agreements;
- relevant report of a royal commission, committee or other body presented or laid before Parliament; and
- certain EEC instruments.

In clause 2 of Lord Scarman's Bill, are principles 'to be applied in the interpretation of Acts where more than one construction of the provision in question is reasonably possible':

- that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not;

- that a construction consistent with international obligations is to be preferred to one which is not;
- in the absence of express provisions, a construction which would exclude retrospective effect is to be preferred to one which would not.

According to the London *Times* (10 March 1981) Lord Scarman defined the problem to which his Bill was addressed as follows:

> Different judges had adopted different approaches and the limited purpose of the Bill was to make certain that some aids to interpretation which could be useful could be available to judges to provide for uniform bases of principle so that they could know upon what basis to approach the eternal and never-to-be-wholly-solved problem of statutory interpretation.

Lord Bledisloe questioned whether access to other material would make proceedings more complicated and therefore more protracted and expensive. Lord Renton, whose report on the interpretation of legislation has still not been implemented, thought that the statutory declaration of the 'purposive' approach would 'have a positive advantage'. Lord Wilberforce, a Lord of Appeal, said that appeal judges were not 'a reactionary body holding up the liberal tendencies of other courts or of academics'. Indeed, he declared, the opposite was the case. Lord Gardiner, a former Lord Chancellor, said that the measure might assist towards a simpler style of drafting legislation. Lord Simon of Glaisdale, a former Lord of Appeal, said that, consistent with the Rule of Law, courts should ascertain parliamentary intent only by what parliament did say, not what it meant to say. He feared that having regard to what was intended was an attribute of a totalitarian regime, not one claiming to live under the Rule of Law. The Lord Chancellor, Lord Hailsham, said that the government was neutral on the measure. The immense complexity of modern statute law, which was now the staple diet of the courts, required that legislation be placed in its context when it was interpreted. An over literalist approach was, he said, no longer the law and no longer corresponded to the actual practice of the English House of Lords, the Court of Appeal or the best practice of the English High Court.

new australian bill. The April 1981 edition of the *Australian Law Journal* led off its 'current topics' section with a contrast between the so-called 'purposive' and 'literal' construction of statutes. The ALJ editor (Professor J.G. Starke QC) contrasted the 'literal' approach which he said was evidenced in the majority judgments in the High Court of Australia's tax decision in the *Westraders* case, (1980) 54 *ALJR* 460, with the 'purposive' approach deliberately adopted by the House of Lords in another tax case, *Fothergill v. Monarch Airlines Limited,* [1980] 3 *WLR* 209.

In *Fothergill* (p.231) Lord Scarman stated the issue bluntly:

> If therefore the literal construction be legitimate, I would dismiss the appeal. But in my judgment, it is not.

Appealing to 'commercial sense' Lord Scarman was led to a different conclusion. Lord Diplock cautioned against setting citizens upon the 'confidence trick' of having to search for Parliament's 'real' intention in words outside the legislative language. On the other hand, Professor Starke cautions 'to overlook the intention and purpose of Parliament is to do violence to its sovereign will and to be in a sense undemocratic'.

Testing the water in September 1980, Federal Attorney-General, Senator Peter Durack QC, in an address to the Australian Society of Senior Executives, raised 'as a thought' the possibility of providing for courts an explanatory memorandum to which regard could be had, although not binding, in the construction of general provisions. The ALJ editor commended this proposal as one which 'should be taken up'. Now, Senator Durack has acted. On 27 May 1981, coinciding with Federal legislation designed to strike at tax avoidance schemes, the government introduced into Parliament a Statute Law Revision Bill 1981. Amongst other things, the Bill seeks to amend the Acts Interpretation Act 1901, requiring courts to give a construction to Federal Acts in Australia which would promote the purpose or object underlying the Act, whether that purpose is expressly stated in the

Act or not. In terms, the legislation is intended to govern all courts interpreting Federal legislation. In practice, it would primarily affect the High Court, Federal Court, Family Court and State or Territory courts exercising Federal jurisdiction.

Senator Durack stressed that the measure was not intended to undermine the function of the independent judiciary in interpreting the law. However, he pointed to the debate about the approaches to interpretation and the great and ever-expanding volume and complexity of statute law today. Most significantly, he foreshadowed proposals to allow courts to take into account an explanatory memorandum, approved by Parliament, when interpreting difficult provisions of an Act. No mention was made of the wider range of material included in Lord Scarman's English Bill.

eulogy and scepticism. Lord Scarman's Bill received the approval of the House of Lords but has still to be considered by the House of Commons. Senator Durack's measure attracted a mixed bag of responses ranging from the eulogistic, through the cautious to the positively sceptical.

Eulogy came from an unexpected quarter. The Shadow Federal Attorney-General, Senator Evans, said that the Opposition welcomed the move as a 'major reforming initiative'. Australia's courts, he declared, had taken 'nightmarishly legalistic' approaches in the tax area and had almost become 'the laughing stock of the common law world'. He saw the change, coupled with the legislation to re-arm the courts against tax avoiders, as an opportunity to 'redress the balance and restore some sanity and credibility to the legal process'.

The *Australian Financial Review* described the moves as 'Fraser's legal revolution' (28 May 1981):

> Just how the judges will react to all this will be fascinating to observe. In England there has never been any doubt that Parliament is, in modern times, the final court of appeal. But the status of the High Court of Australia is rather different, since it is given independent existence under the Constitution. This has often enough led the court to presume upon its powers and overrule Parliament on very shaky legal grounds. From yesterday's new legislative proposals it is clear that the government has decided to go much further in attacking the recent decisions of the High Court than most people would have believed at all likely.

Also in the *Financial Review*, David Solomon, editor of the *Legal Reporter* (a readable review of High Court decisions and argument) predicted the small change of the Acts Interpretation Act would 'lead to a minor revolution in the law':

> These changes will lead the courts to interpret Acts of Parliament more in accordance with the obvious wishes of Parliament. The changes coincide with changes in the composition and approach of the High Court, the leading court to be affected by the legislation. For the most part the court is likely to welcome the changes. One member of the court, Justice Murphy, has conducted a long campaign, sometimes in his judgments, for the court to adopt the purposive approach. His opponent on this issue, the former Chief Justice Sir Garfield Barwick, has now left the Bench.

The *Sydney Morning Herald* was more sceptical. Under the banner 'Time Will Tell' (28 May 1981) the editorialist cautioned:

> The High Court has been under public pressure to take a less literal and more practical view of the tax law. No-one really knows how the 'new' High Court under Sir Harry Gibbs will respond. ... It is one thing to ask the courts to take a less legalistic view of the law when the only question is whether or not somebody should pay their tax. It is something else when penalties are involved. Understandably, judges tend to require a more rigorous demonstration of the Crown's case when penalties are to be imposed.

On 1 June 1981 the same *S.M.H.* editor wrote that judicial appointments, not exhortory legislation, remained the safest way the Executive Government could influence the courts to a 'purposive', rather than a 'literalist', approach.

> Judges are not known for their delight in being told how to do their job. Over the centuries, they have maintained a rigorous independence over their courts. The Federal Government's proposed legislation requiring courts to interpet laws by taking into account the intention of Parliament, not just the literal meaning of the words in them, is a bold attempt to bring judges closer to the executive's heels. Bold but probably ineffectual.
>
> *Sydney Morning Herald,* 1 June 1981. Editorial.

Reported in the Melbourne *Age*, Professor Colin Howard, Dean of the Melbourne Law School, said that the proposal was 'an attempted intrusion by government in the judicial process'. Unnamed Sydney barristers quoted in the *Sydney Morning Herald* (29 May 1981) described the proposal as 'naive', 'a piece of nonsense' and even 'dangerous'. The dangers listed included:

- adopting the philosophy which allows you to say that although an Act says A, B and C, you think it obvious that Parliament intended to say, not A, B and C but something else;
- promoting an invitation to 'sloppy' drafting of laws.

Other critics pointed to comparable legislation in New Zealand and South Australia which has had no significant recorded effect in altering the approach to statutory interpretation there. Perhaps time *will* tell. Perhaps the mood is right for an effective change in the approach to statutory instruction. Certainly, present rules tend to encourage very great detail in legislative provisions. With the growing mass of legislation, this adds to the burden upon lawyers, courts and the community.

As Lord Scarman told the House of Lords, the debate between the 'purposivists' and the 'literalists' will never end. But the last quarter has certainly seen the pace of the debate quicken.

economics and law: symbiosis

> The age of chivalry has gone. That of sophisters, economists and calculators, has succeeded.
>
> Edmund Burke,
> *Reflections on the Revolution in France*

cost/benefit law reform. The announcement during the last quarter of significant cuts in the Federal public sector in Australia and the transfer of some functions to the States represents an Australian Federal response to moves that are already well under way in Mr. Reagan's administration in the United States and Mrs. Thatcher's government in Britain. Law reformers, reporting to government and Parliament, cannot ignore the economic environment in which their proposals will be considered. The ALRC report, *Insurance Agents and Brokers* (ALRC 16, 1980) contains the clearest statement yet of the ALRC recognition of this need to take into account, in judging the need for reform and the design of any reform machinery proposed, the costs and benefits that are inevitably involved in the law reform process. Until now, the costs of reform have rarely been identified with precision and almost never weighed against the desired benefit, to judge the results of the equation. In the ALRC report, the issue of cost/benefit is confronted in many places. For example, one of the guiding principles espoused by the Commission, and adopted from the philosophy of the Trade Practices Act 1974, is that:

> Interference with competition is to be justified, if at all, by the public benefit which results from a particular form of regulation. ... Diminution of competition might increase the cost of insurance and adversely affect the range and quality of services offered and the development of the market in response to the needs of the insuring public. Reforms of regulation which might have an anti-competitive effect on the insurance industry or on any section of it, should be avoided.

In judging the particular form of regulation for insurance brokers to be recommended, the Commission had before it several models:

- pure self-regulation;
- increased criminal penalties;
- accreditation by industry bodies, relying on advertisement and persuasion rather than legislative force;
- registration and compulsory professional indemnity private insurance; and
- licensing with compulsory insurance.

The ALRC discussed the various models and the choices before it. It assessed and explained cost estimates and concluded that the costs shown were 'amply justified' to prevent some of the breaches of financial requirements imposed on brokers which, until now, had gone undetected until major losses occurred. The report established that between 1970 and