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AUSTRALIA'S DEBT TO LORD SCARMAN*

The Hon Justice Michael Kirby AC CMG**

After he died on 8 December 2004, Lord Scarman's life was remembered in this Journal¹. An obituary by Mark McGinness recorded his career and paid tribute to his many achievements. Honouring recently deceased Law Lords was not unknown when they were members of the Privy Council and thus part of the Australian Judicature. It has become less common since the last Australian link with that imperial court was severed in 1986².

Leslie Scarman was indeed a distinguished English judge. However, that was not what made him special. His singular

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** Justice of the High Court of Australia. Chairman of the Australian Law Reform Commission 1975-1984.

¹ M McGinness, "Lord Scarman", Obituary (2005) 79 ALJ 525.

² *Australia Act* 1986 (Cth) (UK), s 11.

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contributions to Australian law lay in the part he played in introducing institutional law reform as a regular fact of legal life and in his early endorsement of the concept of human rights law in a culture traditionally hostile to that idea. There was a unity in his legal philosophy. It continues to have an impact, including in Australia.

The impact in Australia arises from the way in which we copied both at a federal and State level³, the law reform agency that he helped to establish in England. And because Australians are again beginning to consider the need for⁴, and possible shape of, general human rights laws⁵, his contribution to that debate in the United Kingdom has lessons for us.

For most Australian lawyers still alive there were two engaging English judges in the last part of the twentieth century, Denning and Scarman. There were important differences between them. As a judge, Scarman was more traditional and less creative. He saw the way to overcome obstacles to justice in the law "not by departure from

³ See B Opeskin and D Weisbrot, *The Promise of Law Reform* (Federation, 2005) 40-41, 434.

⁴ A human rights statute has been enacted in the Australian Capital Territory: *Human Rights Act 2004* (ACT) and has been proposed in Victoria. The new Premier of New South Wales, Mr Morris lemma, has indicated his interest in considering the idea of a human rights law which his predecessor had firmly rejected.

⁵ See eg G Williams, *The Case for an Australian Bill of Rights - Freedom in the War on Terror* (UNSW Press, 2004); *Al-Kateb v Godwin* (2004) 119 CLR 562 at 594-596 [73].

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precedent but by amending legislation"⁶. He was fearful of too much judicial invention in the courtroom. He thought that this could lead to "confidence in the judicial system [being] replaced by fear of it becoming uncertain and arbitrary in its application". He was anxious lest this would render "society ... ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today"⁷. Denning had no such qualms. He saw creativity as an essential aspect of the judicial function in common law countries.

Scarman's eventual appointment to the House of Lords, where judicial choices must legitimately, and often, be made to re-express the old law and to make it suitable for new times, made little difference to his outlook. As a judge he normally remained conventional. Indeed, he criticised Lord Denning's creativity which he clearly found distasteful and even, on occasions, dishonest⁸. He kept his personal liberalism in firm check or channelled it carefully as, for example, in his decision on the law of blasphemy in the *Gay News* case⁹. Thus, in *Sidaway v*

⁶ *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1 at 19.

⁷ *DuPont Steels Ltd v Sirs* [1980] 1 WLR 142 at 171-172 (HL).

⁸ *National Westminster Bank Plc v Morgan* [1985] 1 AC 686 at 707 where he accused Denning of "deliberately avoiding reference to past authority" in his reasons in *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 336.

⁹ *Reg v Lemon (Whitehouse v Gay News Ltd)* [1979] AC 617 at 658.

*Governors of Bethlem Royal Hospital*¹⁰, he declined to fashion a new principle of informed consent for medical treatment, although final courts in Australia¹¹, Canada¹² and elsewhere were to experience no such hesitations.

For this restraint Scarman was sometimes criticised as an 'unreliable liberal', who failed to use his proper authority as a judge - especially in the final court - to push the law in the directions that modernity and justice could sustain¹³. Yet in a sense, it was Scarman's very disinclination to exhibit creativity from the judicial seat that propelled him towards the two great instruments of reform with which his name will always be associated. I refer to the English Law Commission and his pioneering advocacy, from as early as 1974¹⁴, of acceptance of the European idea of a charter of fundamental human rights. It was by parliamentary law reform, and by judicial creativity specifically authorised by parliamentary law, that Scarman thought English law should develop; and basically not otherwise.

¹⁰ [1985] AC 871 at 876. See also *Gilllick v West Norfolk AHA* [1986] 1 AC 112 at 186 and S Lee, *Judging Judges* (1988), "Lord Scarman" at 154, 157 (hereafter "Lee").

¹¹ *Rogers v Whitaker* (1992) 175 CLR 479.

¹² *Reibl v Hughes* [1980] 2 SCR 880 at 894-895; (1980) 114 DLR (3d) at 13. In *Rogers*, the High Court of Australia declined to apply *Bollam v Friern Hospital Management Committee* [1957] 1 WRL 582; [1957] 2 All ER 118 or to follow *Sidaway* [1985] AC 871.

¹³ Lee, 154 at 155.

¹⁴ *English Law: The New Dimension* (Hamlyn Lectures), London, Stevens and Sons, 1974. See at 16-18.

The Law Commission that Scarman helped to establish endures. It became the model for law reform agencies throughout the Commonwealth of Nations, including Australia. It still is. Yet his dearest wish was to live to see a comprehensive law of human rights enacted in the United Kingdom. That wish was granted in the form of the *Human Rights Act 1998* (UK). That Act came into force in 2000 and many cases now demonstrate its growing impact. By endorsing, and ensuring the success of, these new institutions and procedures, Scarman put an imprint on the present and the future face of the law. It was a huge contribution. My purpose is to examine and celebrate it.

SCARMAN'S LIFE

Early life and war years: Leslie Scarman was born in 1911 in Streatham, London. As chance would have it, this was only a few miles from Brixton, a suburb of London that would later play an important part in his life. He was educated at Radley College and at Brasenose College, Oxford, where he achieved a double First. In 1936 he was called to the Bar by the Middle Temple.

The advent of the Second World War saw him enlist in the Royal Air Force. After a time at a desk in Abingdon, he was appointed to Bomber Command in North Africa. He worked under the future Air Chief

Marshall Tedder. He was with Tedder and General Eisenhower when General Jodl surrendered the Germany Army at Rheims¹⁵.

Returning to the Bar in London, Scarman began to build a successful practice¹⁶. He was inspired by the stories of the great advocates of the past. However, realising that he lacked the theatrical flourishes of his heroes, he turned his attention to the purer delights of law. It was to be a happy choice. As an advocate, he declined to embrace well meaning, but mistaken, judicial suggestions that he regarded as wrong in law¹⁷. He demonstrated, as he later would as a judge, a fidelity to the law that sometimes made him appear conservative and uncreative. In 1961 he was appointed to the English High Court. On paper it appeared a conventional appointment¹⁸.

Law reform: It was Lord Chancellor Gerald Gardiner, in the Wilson Labour Government that took office in 1964, who saw in Scarman the perfect lawyer to launch his bold new idea: the Law Commission. Law reform was a major objective of Gardiner and of the government. It provided a parliamentary strategy for improving the

¹⁵ *Ibid.*

¹⁶ *Ibid.* He reportedly showed consummate skill in dismembering expert witnesses: Lord Bingham of Cornhill, Obituary, Memorial Service, London, December 2004, 1.

¹⁷ S Sedley, Obituary of Lord Scarman, *The Guardian*, 10 December 2004. (hereafter "Sedley, Obituary").

¹⁸ Lee, 160.

whole body of the law. What was needed was a permanent institution, not merely a reactive activity when fires were already burning¹⁹. The task before the new Commission was daunting²⁰:

"English law today is contained in some 3,000 Acts of Parliament, the earliest of which dates from the year 1235, in many volumes of delegated legislation made under the authority of those Acts, and in over 300,000 reported cases. ... The result is that it is today extremely difficult for anyone without special training to discover what the law is on any given topic; and when the law is finally ascertained, it is found in many cases to be obsolete and in some cases to be unjust".

For Scarman, these features of the law were "plainly wrong". The Law Commissions were thus established to keep "the law as a whole under review ...". In the place of individual decisions by separate government departments, agencies and inquiries, the new body would submit a programme and assist Parliament to modernise, simplify, consolidate and, where appropriate, codify the law.

Scarman had a brilliant first team of Commissioners: Professor L C B Gower, Mr Neil Lawson QC, Norman Marsh and Andrew Martin QC. They were optimistic that the new approach to statute law revision²¹ would "not only reduce appreciably the number of Acts remaining to be

¹⁹ Sedley, Obituary.

²⁰ *Proposals for English and Scottish Law Commissions* (January, 1965), 2.

²¹ Law Com No 2 (1965).

consolidated, but also facilitate consolidation of statute law by getting rid of ... unnecessary provisions which tend, as things now are, to make consolidation difficult"²².

If the vision of root and branch cleansing of the statute book was unduly optimistic, doomed to defeat by the ever-increasing number and size of laws made by and under Parliament²³, the aim was certainly a noble and worthy one. At the helm was a lawyer displaying rare gifts. Scarman was a "listener-judge"²⁴. He was strongly in favour of consultation. This attitude of bottom-up government in the place of top-down rule had its source in Scarman's respect for the dignity, rights and insights that human beings can offer to lawyers charged with shaping the law. He listened not just because it was courteous but because it was often productive.

According to the Hon Elizabeth Evatt AC, then a young Australian researcher working in Scarman's team, Scarman's listening capacity was a key to his success in the Law Commission²⁵. It allowed him to

²² *Ibid*, 6.

²³ G Calabresi, *A Common Law for the Age of Statutes*, Harvard 1982, 1; J Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2004) 35 *Ottawa Law Review* 163 at 164.

²⁴ See eg Lee, 189.

²⁵ Letter to the author from the Hon Elizabeth Evatt AC, 31 December 2005. She says: "He was universally admired and respected by all the staff who found him inspiring when he delved into their topics."

absorb the strongly expressed, and sometimes conflicting, views of his colleagues and to derive from them a conclusion that all would accept. His humour, grace and charm were qualities that Elizabeth Evatt was herself to bring to many high offices in Australia and beyond – including as President of the Australian Law Reform Commission.

Public inquiries: In 1969, Scarman was asked to conduct the first of four major enquiries, from which he earned public recognition and cross-party political respect. This was an inquiry into troubles that had occurred in Belfast and Londonderry. The inquiry took two years. It necessitated all of the skills of listening, discussion and negotiation that he had refined in the Law Commission. It took him far from courtrooms into schools and community halls. His report was widely praised²⁶. It resulted in the arrival of British troops to keep order in the Province.

A second inquiry took place in 1974. It concerned a riot in Red Lion Square in London after rival left-wing and right-wing demonstrators had clashed over immigration rules²⁷. In 1977 he conducted a third inquiry into the Grunwick trade union dispute. But it was his fourth and last major inquiry, in 1981, into riots that had broken out in Brixton, that captured the greatest attention and earned him most acclaim²⁸.

²⁶ *Report on Northern Ireland (1972)*, Cmnd 566.

²⁷ *Red Lion Square Disorders of 15 June 1974 (1980)*, Cmnd 5919.

²⁸ *The Scarman Report: report of an Inquiry by the Right Honourable the Lord Scarman (1982, Penguin, Middlesex)*.

The achievement of the Brixton report was Scarman's outreach to groups and individuals angry and unrepentant over the unrest. Some lawyers and judges at the time questioned Scarman's appearances on television. Yet looking back, most would now say with Lord Bingham of Cornhill, "I can see ... that he was utterly right"²⁹.

The Brixton report constituted a powerful performance. It was watched within and outside Britain³⁰. It stamped Scarman's personality on the consciousness of the British public to a degree that few judges have attained before or since³¹. Apart from anything else, it helped to show a new face of the British judiciary to ordinary citizens. Not simply remote establishment figures learned in the law; but human beings concerned about feelings of injustice and marginalisation and determined to do what they could to ferret out wrongs and set them right.

There are critics of the involvement of serving judges conducting inquiries that have political overtones where those judges are likely to come under attack and suspicion³². Australians know that serving

²⁹ Quoted in McGinness (2005) 79 ALJ 525 at 527.

³⁰ *Ibid.* There were analogous legal inquiries in Australia. See, eg, Australian Law Reform Commission, *Complaints Against Police* (ALRC 1, 1975) and *ibid*, *Complaints Against Police (Supplementary Report)* (ALRC 9, 1978).

³¹ Sedley, Obituary.

³² Lord Morris of Aberavon QC discussing the Scarman inquiries (648 HL Debates 883 (31 May 2003)) noted in J Beatson, "Should

federal judges cannot be compelled to perform such functions for the Executive. Indeed, they are now severely limited in the functions they may agree to perform³³. However, extraordinary events sometimes call forth extraordinary responses. In his inquiries, Scarman showed a sure hand.

The judge: After his service in the Law Commission, and in public inquiries, Scarman was appointed successively as a Lord Justice of Appeal (1973) and as a Lord of Appeal in Ordinary (1977).

In many cases, in the Court of Appeal, even in the remarkable era in which Lord Denning presided, Scarman made his mark. He wrote lucid and powerful prose. The same skills of verbal communication that strengthened the reports of the Law Commission and his inquiries, were deployed to great effect. His reasons are still read.

Scarman's command of administrative law may be seen in the *Barnsley Council* case³⁴. His awareness of the deep principles of the

Judges Conduct Public Inquiries?" (2005) 121 *Law Quarterly Review* 221 at 252.

³³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

³⁴ *Reg v Barnsley Council; Ex parte Hook* [1976] 1 WLR 1052 at 1058; See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 509.

criminal law³⁵ and the rules of court procedure³⁶ have proved influential. His expositions of the law of evidence³⁷ have been useful. Unsurprisingly, his opinions on statutory interpretation, a subject of close concern to the Law Commission, have proved persuasive to later generations of judges, searching for a purposive, or functional, approach to that task in the place of the strict literalism of earlier times³⁸.

In a recent case in the High Court of Australia, *Coleman v Power*³⁹, a question arose as to whether legislation should be construed as its language would have been understood by the parliamentarians who enacted it or as a law speaking to contemporary citizens who were bound by its terms. One party invoked the former approach, encapsulated in the maxim: *contemporanea expositio est optima et*

³⁵ *R v Preece* [1977] QB 370 at 375-376. This was applied in *Crampton v The Queen* (2000) 206 CLR 161 at 186-187 [61]-[62] and 194-195 [91], [95].

³⁶ *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 498-499. This was applied in *Williams v Spautz* (1992) 174 CLR 509 at 522, 529, 553.

³⁷ *Reg v Kane* (1977) 65 Cr App R 270 applied in *The Queen v Chin* (1985) 157 CLR 671 at 686.

³⁸ *In re James (An Insolvent)* [1977] Ch D 41 at 72. This was applied in *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128 at 149 [55]. See also *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 239. This was applied in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 338. Cf *Ahmad v Inner London Education Authority* [1978] QB 36 at 48, applied in *Coleman v Power* (2004) 220 CLR 1 at 96 [246].

³⁹ (2004) 220 CLR 1 at 95-96 [246].

fortissima in lege. That approach has support in Australian authority⁴⁰. My own view was that the statute in question, one concerned with insulting behaviour and public order, was to be read in accordance with its ordinary and current meaning of the present age, given its purpose and the significant changes that had occurred in community values affecting such matters.

In *Ahmad v Inner London Education Authority*⁴¹, Lord Justice Scarman explained a reason for adopting such an interpretation "derived from the living language of the law as read today"⁴². He was there construing a provision of the *Education Act 1944* (UK). He made it clear that that task was to be accomplished "not against the background of the law and society of 1944 but in a ... society which has accepted international obligations"⁴³. This was the approach that I followed in *Coleman v Power* as, effectively, did a majority of the High Court in that case.

As I know from experience in an intermediate court, which in my case than Scarman's there, the most creative aspirations of all save perhaps a judge like Denning, are tamed by the ever-present prospect of

⁴⁰ See eg *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322-323.

⁴¹ [1978] QB 36.

⁴² Cited *Coleman* (2004) 220 CLR 1 at 95 [245].

⁴³ [1978] QB 36 at 48.

a further appeal to a final court. The judicial eagle may want to soar. However, reality and duty keep it tethered. When, in 1978, Scarman was elevated to the House of Lords, he joined a most formidable Bench: Wilberforce, Diplock, Salmon, Edmund-Davies, Russell of Killowen, Fraser and Keith. It was then that Scarman, the judge, was greatly tested. In the company of titans, he made a mark.

Amongst his most influential decisions in the House of Lords were those in the field of administrative law, the *Civil Servants' Union Case*⁴⁴, and one on constitutional law concerning broadcasters' contempt, in *Attorney-General v British Broadcasting Corporation*⁴⁵. That decision and the later one in *Home Office v Harman*⁴⁶ have influenced the development of the law of contempt in a world that is now more accepting of public discussion and criticism of authority⁴⁷.

By this stage Scarman was a judge of great experience. He wrote with assurance on a whole range of legal concerns. His exposition of

⁴⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Lord Scarman affirmed, at 407, that "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter". This was applied in *DPP (SA) v B* (1998) 194 CLR 566 at 599 [62].

⁴⁵ [1981] AC 303 at 360. This was applied in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 539 per Mason CJ, Wilson and Dawson JJ and at 572 per Brennan and Toohey JJ.

⁴⁶ [1983] 1 AC 280.

⁴⁷ See eg *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

contract law in *Woodar Investments Pty Ltd v Wimpey Ltd*⁴⁸ has proved influential in Australia⁴⁹. His criticism of the law of privity of contract and his suggestion that the House of Lords might reconsider the cases "which stand guard over this unjust rule"⁵⁰ encouraged the High Court of Australia to re-express the law on that topic. Many of his statements on the law of damages proved influential in Australia. His elaboration of the law of equity in the context of the specially protected status for married women⁵¹ in *National Westminster Bank Plc v Morgan*⁵², although quite traditional, encouraged me⁵³ to seek a new and broader foundation for a protection that would address, amongst other things, an expanding class of vulnerable relationships rather than the category of married woman as such. For me the old category today included people in *de facto* married relationships and same-sex couples.

⁴⁸ [1980] 1 WLR 277.

⁴⁹ *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 117, 165.

⁵⁰ *Woodar* [1980] 1 WLR 277 at 300.

⁵¹ See eg *Gammell v Wilson* [1982] AC 27 at 77. This was applied in *Fitch v Hyde-Cates* (1982) 150 CLR 481 at 491, 498; *Lim Poh Choo v Camden and Islington Area Council* [1980] AC 174 at 193. This was applied in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 639, 677 and in *Todorovic v Waller-Jetson Hankin* (1981) 150 CLR 402 at 419, 442, 466. See also *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 173. This was applied in *Johnson v Perez* (1988) 166 CLR 351 at 375.

⁵² [1985] AC 686 at 708.

⁵³ In *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 406 [66]. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441.

Scarman's statements on the law affecting infants and children⁵⁴, particularly in *Gillick's case*⁵⁵ in relation to a doctor's prescribing contraceptives for a girl under the age of sixteen years without the consent or knowledge of her parents, also proved highly influential in Australia⁵⁶. The power of Scarman's exposition may be seen in the following extract⁵⁷:

"The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process, is to search the over-full and cluttered shelves of the law reports for a principle, or set of principles, recognised by the judges over the years but stripped of the detail which, however appropriate to their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work ... If the law should impose upon the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change".

Scarman was conscious that changing values must somehow find reflection in the law. But he was quite cautious - an approach reinforced

⁵⁴ See eg *In re W* [1985] AC 791 at 795-796 applied by Brennan J in *P v P* (1994) 181 CLR 583 at 631.

⁵⁵ *Gillick* [1986] 1 AC 112 at 184.

⁵⁶ *J v Lieschke* (1987) 162 CLR 477 at 452; *Secretary, Department of Health (Marion's Case)* (1992) 175 CLR 218 at 237, 316-317; *WACB v Minister for Immigration* (2004) 79 ALJR 94 at 107-108 [72]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 79 ALJR 43.

⁵⁷ *Gillick* [1986] 1 AC 112 at 183.

by his years in the Law Commission and in conducting sensitive public inquiries.

An illustration of this caution in altering the law can be seen in an important technique that Scarman accepted for preserving the principle of open court hearings whilst protecting, in some circumstances, legitimate expectations of confidentiality. He endorsed the so-called "*Leveller* expedient", named after the case in which it was described⁵⁸. This involves substituting a pseudonym, using initials, or writing the name on a document that is within the control of the judge and not publicly disclosed. There are cases where disclosure will be required in the public interest⁵⁹ or to assist a party in the presentation of its case, as for example to confront an accuser and so to help demonstrate a party's innocence of an offence⁶⁰. But for most cases, the *Leveller* expedient is practical and works well.

⁵⁸ *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 469, 470. This was applied in *Cain v Glass [No 2]* (1985) 3 NSWLR 230 at 246; *John Fairfax and Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 472; *Witness v Marsden* (2000) 49 NSWLR 429.

⁵⁹ See eg *In a Matter of an Application by Chief Commissioner of Victoria Police* (2005) 79 ALJR 881 at 895 [83].

⁶⁰ *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 218, 229, 232 applied in *Cain v Glass [No 2]* (1985) 3 NSWLR 230 at 246-247 per McHugh JA.

Although Scarman's decision in the *Sidaway Case*⁶¹ held back from embracing a robust new principle of informed consent, it nudged English law a little way in that direction, anticipating further steps taken in later decisions that Scarman, the judge, did not feel that he could take⁶². In Australia and elsewhere, his reasons in *Sidaway* were considered carefully in the elaboration of the stronger principle endorsed in *Rogers v Whitaker*⁶³. That principle has been applied in Australia ever since⁶⁴.

Scarman's pragmatic approach to matters of practice and procedure in the law can be seen in many decisions. In *Maynard v West Midlands Regional Health Authority*⁶⁵, he wisely counselled appellate courts about the disadvantages they face when reconsidering a trial on the transcript record. Conventionally, those disadvantages had been explained in terms of the trial judge's unique ability to assess the credibility of witnesses from their appearance in court. But it was

⁶¹ *Sidaway* [1985] AC 871 at 882. See comment in *Rogers v Whitaker* (1992) 175 CLR 479 at 489.

⁶² See eg *Bolita v City and Hackney Health Authority* [1998] AC 232; *Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53 at 59; *Chester v Afshar* [2005] 1 AC 115 at 42 [9], 143 [15], 163 [88], 166 [99].

⁶³ (1992) 175 CLR 479 at 483-484.

⁶⁴ *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 275 [19], 297 [81] and *Rosenberg v Percival* (2001) 205 CLR 434 at 439 [6], 453 [62]; 476 [140].

⁶⁵ [1984] 1 WLR 634 at 637.

Scarman's alternative reason for caution that assumed a greater importance. This is the difficulty of recapturing the "feeling" of a case from selected passages of transcript, typically quoted on appeal, when compared with the trial judge's position: absorbing all of the evidence and considering it as it unfolds in sequence⁶⁶.

There are many other cases in which Scarman's reasons in the House of Lords have proved significant, as an exposition of the law, including in Australia. In administrative law there is the decision in the *Federation of Self-Employed Case*⁶⁷. In constitutional law there is the *Dupont Steels Case*⁶⁸. In criminal procedures, involving the provision of a permanent stay of proceedings that are greatly delayed or otherwise unfair, Scarman's reminder⁶⁹ that the community expects all trials to be

⁶⁶ See J Mortimer, *Character Parts*, (Penguin Books, 1987), 204-205; cf *Fox v Percy* (2003) 214 CLR 118 at 126 [23]. See also *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [89] and *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572 at 581 [43].

⁶⁷ *Reg v IRC; Ex parte National Federation of Self Employed* [1982] AC 617 at 650; see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 81.

⁶⁸ *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 79 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355 [13], 369 [47].

⁶⁹ *Reg v Sang* [1980] AC 402 at 454-455.

fair proved timely and influential in Australia⁷⁰. So did his warnings about the limits on judicial interference in prosecutorial decisions⁷¹.

Although glimmerings of creativity were to be found in some of Scarman's judicial work, for the most part he was fairly conventional, even in the House of Lords. Generally speaking, he did not accept suggestions that the law should be restated by the courts in ways significantly different from the past. Perhaps the clearest instance of this approach may be seen was in his response to the case of *Gay News*, prosecution for blasphemous libel for suggesting that Jesus Christ, in His lifetime, was a homosexual who engaged in promiscuous sex with the Apostles and other men.

According to the trial judge's charge to the jury, no specific intent to blaspheme was required. The House of Lords⁷² was evenly divided on whether that was correct in law. Lord Diplock and Lord Edmund-Davies held that proof of specific intent to blaspheme was obligatory. Viscount Dilhorne and Lord Russell of Killowen were of the contrary view. History seemed to be on the side of the latter. However, the

⁷⁰ eg *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29, 33, 52.

⁷¹ *Ridgeway v The Queen* (1995) 184 CLR 19 at 27, 81; *Williams v Spautz* (1992) 175 CLR 509 at 520, 529.

⁷² *Reg v Lemon* [1979] AC 617. For later cases see *Gay News Ltd v United Kingdom* (1982) 5 EHRR 123 and *Reg v Bow Street Stipendiary Magistrate; Ex parte Chowdhury* [1990] 3 All ER 986.

developing principles of the criminal law and modern notions of free expression appeared to favour the former view.

Scarman cast the decisive vote. He sided with history and the traditional expression of the law of blasphemy. The conviction of *Gay News* and its editor was thus confirmed. Scarman expressly stated that it was not open to the Law Lords, acting judicially, "to extend the law beyond the limits recognised by the House⁷³ ... or to make, by judicial decision, the comprehensive reform of the law which I believe to be beneficial".

Of course, this decision has to be judged in the context of judicial and social attitudes of 1979, not those of a plural Western democracy twenty-five years later. As I well know, attitudes to homosexuality in the 1970s were still generally primitive and punitive in Australia, as much as Britain. Scarman assumed the honesty and sincerity of the publisher's motives. However, he adhered to the old expression of the offence of blasphemy that dated back to the seventeenth century. For Scarman, it was for Parliament, if anyone, to change the ingredients of the offence. It was not for the courts - even the nation's final and supreme court.

The responses to Scarman's shackled approach to the judicial restatement of the law were mixed. Some regarded this, and other

⁷³ *Bowman v Secular Society Ltd* [1917] AC 406.

decisions in which he sat judicially, as demonstrating, in a judge of the final court, a deep conservatism which no amount of liberal talk could excuse⁷⁴. For people of this view, cases like *Gay News* amounted to a betrayal by Scarman of the responsibility and choices inherent in work in a final court. Others saw Scarman's position as principled, avoiding "judicial activism" and limiting the ambit of invention from the judgment seat⁷⁵.

Professor Simon Lee classed Scarman as a "great judge" of his time precisely because he put his skills to good use - as much in his inquiries as in his judicial decisions - exhibiting "a shrewd appreciation of the role of law in society - of the policy factors". But there is no doubt that Scarman had a much more restrained notion of judicial creativity than was to develop after his judicial service. Ironically, this development was itself almost certainly one consequence of the creative impetus of law reform and human rights that Scarman helped to release in the law. Creativity there would be. But for Scarman it would flow only from sources that he regarded as legitimate.

Most of us exhibit inconsistencies in our makeup. On particular issues and in particular cases, we may show alternatively inclinations to stability and change: with unyielding application of the old law and,

⁷⁴ See remarks of Mr Ken Livingstone cited McGinness (2005) 79 ALJ 525 at 526.

⁷⁵ cf R Dworkin, *Law's Empire*, (1986) 244.

elsewhere, creative choices to overcome clear injustices⁷⁶. In this, Scarman was no different from the rest. At various times, his rhetoric, powerful as it was, reflected both moods. Yet, more than for most, there was a fundamental unity in his judicial approach. Generally, Scarman thought it enough for a judge, even in the highest court, to find and apply the old law. For Scarman, change was needed. However, his view was that, normally, this was the responsibility of Parliament, assisted by a body such as the Law Commission. To enlarge the judicial role, something additional was needed. The adoption of fresh approaches to statutory interpretation⁷⁷ and the incorporation of fundamental human rights in English domestic law were, for Scarman, the prerequisites to greater judicial innovation.

Looking back, it may have been the very caution in Scarman's concept of what it was to be a judge of our tradition that set his more liberal instincts searching for new and principled ways to contribute to creativity through law reform, through purposive interpretation and

⁷⁶ M D Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Hamlyn Lectures 2003) (London, Sweet & Maxwell, 2004) at 29.

⁷⁷ *In re James (An Insolvent)* [1977] Ch D 41 at 71. This was applied in *Attorney-General for the Commonwealth v Tse Chu Fai* (1998) 193 CLR 128 at 149 [55]. See also *Air India v Wiggins* (1980) 71 Cr App R 213 at 218; *Morris v Beardmore* [1981] AC 446 at 455. This was applied in *Coco v The Queen* (1994) 179 CLR 427 at 454; *R v Entry Clearance Officer; Ex parte Amin* [1983] 2 AC 818 at 836. This was applied in my dissent in *IW v The City of Perth* (1997) 191 CLR 1 at 52. See also *South West Water Authority v Rumble* [1985] AC 609 at 617. This was applied in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

through judicial exposition of fundamental rights and freedoms⁷⁸. Certainly, these were the innovative directions that he took in the law. As a judge he was skilled in the synthesis of legal doctrine. But it is usually for analysis, exposition and restatement of the law that he is respected. For inventiveness, we are obliged to look elsewhere.

THE PROMISE OF LAW REFORM

Spread of the law reform idea: Scarman's contribution to law reform extended far beyond the United Kingdom. The President of the Australian Law Reform Commission, Professor David Weisbrot recently described what happened in institutions built in Scarman's image⁷⁹:

"Institutional law reform commissions first made their appearance in the United Kingdom in 1965 and quickly spread throughout the Australian States and Territories; New Zealand and the Pacific Islands; Canada (federal and provincial); Hong Kong and South Asia (India, Pakistan, Sri Lanka and Bangladesh); the Caribbean (Jamaica, Trinidad and Tobago) and Eastern and Southern Africa (South Africa, Namibia, Malawi, Lesotho, Kenya, Uganda, Tanzania, Zaire and Zimbabwe)⁸⁰ .

⁷⁸ J Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes" (2004) 35 *Ottawa Law Review* 163 at 168-170.

⁷⁹ D Weisbrot, "The Future of Institutional Law Reform" in B Opeskin and D Weisbrot, *The Promise of Law Reform* (hereafter *Promise*), 18.

⁸⁰ Footnotes omitted. The footnotes refer to Chapters 1, 17, 28 and 29 of *Promise*.

The force behind the imitation of the Law Commission in most countries of the Commonwealth of Nations, was not simply a late imperial mimickery of an interesting British invention. It was an appreciation, perceived at roughly the same time, of a serious defect in the inherited systems of law-making and governance and a respect for the way in which Scarman and his colleagues had gone about responding to that defect.

What would we say today, forty years on? Has the promise of law reform, as initiated by Scarman, been fulfilled? Have the brave predictions of those early days been sustained? In 2005 these were the questions faced by participants who assembled in Sydney to mark the thirtieth anniversary of the Australian Law Reform Commission - established ten years after the English Commission was set up.

Assessment of law reform: The reflections of the Australian reformers are now collected in a book *The Promise of Law Reform*⁸¹. It records that the process of establishing law reform bodies has continued and, indeed, has stretched beyond traditional common law societies into civil law jurisdictions, such as Quebec and to non-English speaking countries such as Indonesia, Rwanda and Thailand. Some Commissions (as in Ontario and Newfoundland) have been abolished.

⁸¹ Federation Press, Sydney, 2005.

Yet the institutional response to improvement of the law remains very much alive and even entrenched around the world⁸².

Obviously, many things have changed in the intervening years so that institutional law reform could not but change too. One change, for the good, can be seen in the attitudes of the judiciary, Parliament, the Executive and the legal profession. In the early years, there were many in the Australian and British judiciary, especially, who were hostile to institutional law reform. Sir John Young, then the Chief Justice of Victoria, expressed the view in 1978 that there was altogether too much change in the law. He and others of like mind looked with undisguised suspicion on "those who are paid to be reformers"⁸³.

A measure of the changes in professional attitudes since those days may be seen in the growing judicial citation of law reform reports and papers. In 1995, in Canada, the total number of judicial citations of the law reform bodies of Canada was little more than ten. The Australian Law Reform Commission was cited in about thirty cases. Yet by 2004, the Canadian citations had jumped to 160; those of the ALRC had risen to almost 600⁸⁴. Using law reform reports and papers as an

⁸² E Singini, Foreword in *Promise*, v.

⁸³ J Young, "The Influence of the Minority" (1978) 52 *Law Institute Journal (Vic)* 500.

⁸⁴ See Figure 14.6, "Judicial citation of Law Reform Work" in B Opeskin "Measuring Success" in *Promise*, 203 at 219.

accurate summary of the current law, a font of criticism of its content and for a discussion of the policies of the law has now become commonplace in judicial as well as other legal writings.

Similarly, lawmakers are now much more conscious of the utility of law reform bodies. Where complex and sensitive questions arise, it is not uncommon for judges and parliamentary committees to recommend the referral of particular issues to the Commission. Sometimes the Executive Government finds this an attractive solution, particularly where public consultation and thorough examination of complex legal subjects need to be undertaken in order to secure legislation that is right⁸⁵.

There are no lawyers of today's generation in Australia and most parts of the Commonwealth of Nations who have not grown up with busy and productive law reform bodies as part of the regular and familiar legal machinery of the state. Scarman realised, from the first, the importance of keeping the law reform agency as something distinct from the ordinary governmental legal bureaucracy. If this were not done, and if the independence of the Commission were not preserved, most of the justification for a law reform agency would be lost.

There are many changes in law reform today when compared to Scarman's day and indeed the time when I served as first chairman of

⁸⁵ A recent example was the reference of the modern law of sedition to the Australian Law Reform Commission.

the Australian Law Reform Commission. The belief in major "block buster" law reform reports, with comprehensive draft statutes addressed to large topics of social concern, has declined in recent times. A more modest view is now generally adopted concerning the capacity of legislation to change society and to solve its problems⁸⁶. Alterations to the composition of the public sector, down-sizing and privatisation, together with the out-sourcing of former public services mean that legislation may not always now be the favoured vehicle for law reform. The introduction of change will today often require a more complex interaction of strategies and practices⁸⁷. Sometimes the proper response to a law reform problem may be a recommendation that the law be left unchanged⁸⁸.

Decline in Olympian aspirations: In retrospect, the Olympian expectations attributed to law reform agencies established after Scarman's model, can seem naïve and unrealistic. How could any small group of mortals, with extremely modest resources and very many tasks,

⁸⁶ Weisbrot, in *Promise*, 30. See also M D Kirby, "Are We There Yet?", Chapter 30 of *Promise*, 433 at 438.

⁸⁷ Weisbrot, *Promise*, 35-36; Kirby, *ibid*, 439.

⁸⁸ The ALRC in its report on the civil justice system in Australia did not recommend major changes to the adversarial system. See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000) noted Kirby, *Promise*, 438.

ever have a real chance of reforming the *entirety* of the law when the target itself is always expanding at an ever increasing pace⁸⁹?

One participant in the Australian meeting was Sir Edward Caldwell, who worked with Scarman on family law projects and who returned to the Law Commission in 2002 as Senior Counsel. He describes the bold ambition that Scarman outlined for revitalising the entire body of the law. Yet Sir Edward observed⁹⁰:

"It is perhaps slightly surprising that Lord Scarman, with considerable experience both in the preparation and interpretation of legislation and writing nine years after the establishment of the Law Commission, should still have such Utopian views of the promise of law reform and of the contribution to fulfilling that promise to be made by law reform agencies".

Scarman's optimism was widely shared at the time. However, the resources and the capacity to deliver could never match the aspiration. In fact, legislation and case law have expanded exponentially, now supplemented by immediate access on the Internet to the case and statute law of many jurisdictions. Faced with contemporary realities and the enormous expansion of statute law, including in Australia, some of Scarman's reforming optimism must now be seen as seriously over-confident, even possibly unreal.

⁸⁹ Kirby, in *Promise*, 449.

⁹⁰ Caldwell, in *Promise*, 40 at 41.

Despite that, there remain projects that law reform agencies are still best at delivering. Amongst projects of this kind are those concerning the impact on the law of biotechnology. This was one of the early tasks assigned to the Australian Law Reform Commission⁹¹. The topic remains an important feature of that Commission's current programme⁹². It is the kind of work that inter-disciplinary commissions, led by lawyers, can perform well⁹³. When the new Chief Justice of the United States, Chief Justice John Roberts, assumed office he was told, accurately, such subjects were likely to be the main future challenges for the law. The experience of the High Court of Australia tends to confirm that prediction⁹⁴.

⁹¹ *Human Tissue Transplants* (ALRC 7, 1977). See Kirby, in *Promise*, 439.

⁹² Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) and Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health* (ALRC 99, 2004).

⁹³ Dr Francis Collins, head of the Human Genome Project, described the work of the ALRC on the law and genome as "a truly phenomenal job that put Australia ahead of the rest of the world". Quoted in D Chalmers, "Science, Medicine and Health and the Work of the Australian Law Reform Commission", Chapter 26 in *Promise* at 374 at 381.

⁹⁴ See eg *Cattanach v Melchior* (2003) 215 CLR 1. See also *Harriton v Stephens* [2006] HCA; cf M D Kirby, "Ten Years in the High Court" (2005) 27 *Australian Bar Review* 1 at 21.

Defective implementation of law reform: The foregoing changes and adaptations to institutional law reform leave one crucial defect in Scarman's machinery. It is as serious today as it was in his time. Indeed, it is clearer now because the past four decades have given sharpened emphasis to it. I refer to the failure, anywhere, to establish a satisfactory link between the institutional law reform body and the lawmakers with the power to convert proposals for legal reform into action.

Perhaps that problem is incapable of a happy resolution, given the advance in the intervening decades, in the imperium of Executive Government (indeed of Prime Ministerial and Premier power) and the jealousy with which the reins of control over legislation are maintained by the chief political actors, advised by key officials⁹⁵. In some jurisdictions, governments have given undertakings to announce their responses to law reform reports within a specified time. The New Zealand Law Minister undertook to do so within six months of the tabling in Parliament of reports of the Law Commission of New Zealand⁹⁶. There is a similar arrangement in the United Kingdom; but it works imperfectly. Earlier Australian Ministers flirted with like notions,

⁹⁵ See eg the chapters in *Promise*, above, written by J Hannaford, M Payne and L Glandfield above as well as R Sackville, "Law Reform Agencies and Royal Commissions: Toiling the Same Field?", Chapter 19 in *Promise*, 274.

⁹⁶ See J B Robertson, "Initiation and Selection of Projects", Chapter 7 in *Promise*, 102 at 111-114.

interposing a prior examination of ALRC reports by a Parliamentary Committee. However, most such promises melt before the sun of the political agenda of the Executive government. Thus law reform reports are sometimes rejected for what is called "insufficiently demonstrated *public* benefit." All too frequently this is code language for a perceived lack of *political* benefit to the government.

Often, in the Australian context, the chief obstacle to the implementation of law reform reports is a log-jam created by the governmental decision-making process. It has not kept pace with the needs of contemporary governance. Even in the case of obvious necessities of reform, reports can lie fallow, not for reasons of political opposition but because of indifference and institutional failures⁹⁷.

All democrats want Parliament to succeed as the chief organ of lawmaking. However, the lesson of the forty years since Scarman established the English Law Commission is that Parliament has not reformed itself to rise to this function systematically. Where Scarman failed to solve the serious institutional flaw in his new design, it should not be surprising that his successors have enjoyed no greater success, anywhere⁹⁸.

⁹⁷ See for example reform of the *Bankruptcy Act* 1966 (Cth), s 82 recommended in Australian Law Reform Commission, *General Insolvency Inquiry* (ALRC 45, 1988), Vol 1, 16 noted in *Coventry v Charter Pacific Corp Ltd* (2005) 80 ALJR 132 at [140]-[141].

⁹⁸ Kirby, in *Promise* at 445.

HUMAN RIGHTS

Hostility to bills of rights: What of the second pillar of Scarman's achievements in reshaping the law to an acceptance and application of notions of fundamental human rights? He was not alone in this achievement. But it did require a very important shift in the thinking that was traditional in lawyers raised with the ideas of the common law. To be accepted, a new approach to judicially enforced human rights needed safe, reliable and respected supporters. This is what Scarman gave the human rights movement in Britain - a land, like Australia, generally suspicious of such notions⁹⁹.

For such lawyers, rights normally comprise the residue left by the absence of lawful restrictions, whether expressed in the Constitution, legislation, subordinate legislation or judge-made law¹⁰⁰. This has been a central and long-standing difference between the highly pragmatic, problem-solving character of the common law and the civil law systems.

⁹⁹ A Lester and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004), p 4 [1.09].

¹⁰⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 applying *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283; cf S Gageler, "The legitimate scope of judicial review" (2005) 26 *Australian Bar Review* 303 at 304.

It was probably in and after the Second World War, that Scarman, and so many others, had seen at first hand the full extent of the oppression and acts of genocide that led the British government to ratify the *European Convention on Human Rights* quickly¹⁰¹. Once that Rubicon was crossed and the countries of the new Commonwealth, in their independence constitutions, began to follow the basic rights doctrines as expressed in the United States Constitution, it was probably inevitable that Britain itself would eventually follow suit.

Scarman's contribution: Scarman's Hamlyn Lectures of 1974: *English Law - The New Dimension*¹⁰² contained a powerful and influential call for this course to be adopted. He proposed the establishment of a Supreme Court of the United Kingdom with the power to give effect to fundamental rights. Scarman saw how public law was, by now, inadequate to the needs of modern governance. His ideas captured the imagination of young lawyers. Like many such ideas, it took decades to prosper. But prosper it did.

Scarman's lectures were the more influential because of the great legal offices that Scarman had already attained by 1974 and by his

¹⁰¹ The United Kingdom was the first State to ratify the Convention: see A Lester and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004) p 6 [1.16].

¹⁰² Stevens and Sons, London, 1974 ("*New Dimension*").

authentic credentials as a judge who was sensitive to social forces but cautious about the judicial capacity to fix things up¹⁰³.

Scarman placed his Hamlyn Lectures squarely in the regional context of the United Kingdom's adherence to the European Communities in 1972 and the broader global moves for the protection of human rights that he saw as in the lineage of the English *Magna Carta*¹⁰⁴. Oliver Cromwell had promised a new *Magna Carta* for Britain. That promise was lost with the overthrow of the Commonwealth. It was only partly recaptured in the *Bill of Rights* of 1688¹⁰⁵. Now, by many examples and illustrations, Scarman explained the need to arm contemporary judges and officials with new tools to solve the multitude of individual and social problems that were presented to the law.

Scarman saw that the lessons of recent history, the changing composition of society and the systemic failings of Parliament and the other organs of government made it imperative to introduce new mechanisms of governance. Particularly when fear and prejudice are evident, the common law and majoritarian parliamentary rule

¹⁰³ *Ibid*, 1.

¹⁰⁴ *New Dimension*, 14.

¹⁰⁵ *Ibid*, 17-18.

represented for Scarman an inadequate conception of a modern democracy¹⁰⁶.

The changing mood: What brought Scarman to such unorthodox and challenging conclusions? Was it his experience in the War? Was it his frustration in the planning cases he had argued as counsel, illustrating the gaps he witnessed in administrative law? Was it his years in the Law Commission, hearing submissions from countless ordinary citizens, telling of the injustices and inefficiencies that they experienced in the law as it operated in practice? Was it his release from the strictures that oppressed him in the courtroom? Was it his reflection on the serious flaw in the parliamentary solutions to law reform that damaged the success of the first of the pillars that he had propounded – reform through legislation advised by the Law Commission?

It was probably all of these things. What is astonishing, and most admirable, is that Scarman came instinctively to a perception that some Australian lawyers still resist but which is reinforced by any serious reflection upon the way we are now governed. It is the way we are governed that called forth the need for a new dimension of law. Scarman's special contribution was that he saw the new need clearly and boldly and persuasively expressed it. He was one of the first in the judiciary to do so.

¹⁰⁶ Ibid, 15. I am indebted to the Hon Elizabeth Evatt AC for this insight.

MODERN GOVERNANCE

Recognising institutional change: The formalities of Australia's constitutional arrangements, and also those of Britain, no longer accord with the theories with which most Australian lawyers grew up and were taught at university. Even the basic institutions of government are no longer what they once were.

Thus, in Australia, the written Constitutions do not contain any mention of the primary political actors – the Prime Minister or Premier, the Cabinet, the political advisers, the political parties and the modern media¹⁰⁷. In Britain, without any comprehensive written constitution, the defects of constitutional design have become, if anything, even clearer. Hence Scarman's search for something better. It was a search that took him to the model adopted two centuries earlier in the United States and more recently in Europe. This involved a written text enshrining a charter of fundamental human rights but operating in a world where human rights had, by now, become an established part of international law.

¹⁰⁷ None of these institutions or persons is mentioned in the Australian Constitution. The constitution in s 62 does refer to the Federal Executive Council and in ss 64, 65 and 66 refers to the federal Ministers. This is the closest it gets. There is no reference to the Leader of the Opposition. Nor are the political parties referred to save in s 15 (Senate - Casual Vacancies). See *Mulholland v Australian Electoral Commission* (2005) 220 CLR 181 at 273-274 [268]-[270].

Three decades after Scarman's call for a law on human rights in Britain, we can see more clearly the changes that have come over our institutions. The changes require us to rethink "the relationship between common law and statute, and that between the judicial and political process"¹⁰⁸. The future directions were not so clear in 1974. This only makes Scarman's foresight the more remarkable. The changes to which I refer are as true of Australia as they are in the United Kingdom¹⁰⁹.

Diminution of the Crown: The role of the Crown has diminished. In Australia, even the old courtesies are now often neglected. Federally and in the States the head of government has taken over many functions formerly performed by the head of state or her representatives. This grandeur and apparent standing above politics are added to the head of government - an invaluable political resource. In the Australian Capital Territory there is no representative of the Crown at all in the structure of government. The Crown's symbols, offices, oaths of loyalty and facilities have been changed despite the rejection by the Australian electors of the proposal to change Australia from a constitutional monarchy to a

¹⁰⁸ P Cane, "Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law" (2005) 25 *Oxford Journal of Legal Studies* 393 at 416.

¹⁰⁹ cf Lord Hailsham, "Elected Dictatorship", 30 *Parliamentary Affairs* 324 (1997) and Paul Kelly, *Rethinking Australian Governance - The Howard Legacy*, Cunningham Lecture for the Academy of Social Sciences in Australia, 6 November 2005.

republic¹¹⁰. Even the traditional entitlements "to be consulted, to encourage and to warn"¹¹¹ are not always respected now¹¹². Reality often defies appearances and ancient constitutional traditions. The role of the head of government everywhere has been enlarged. The process escalates whichever political party wins the Treasury Benches.

In part, this seemingly irreversible change has come about because modern electronic media focuses attention on the chief political office-holder. Journalists are endlessly fascinated with the political games that are played. Such activities are vivid and exciting. Even the role of cabinet has been diminished to varying degrees by the functions played by key ministers, counselled by their political and media advisers. Political staffers are a new phenomenon of very great power.

Role of head of government: Officials who once worked in the ministries have been shifted into the political offices of the Prime

¹¹⁰ *Constitutional Alteration (Establishment of Republic) Act 1999* (Cth).

¹¹¹ cf E McWhinney, *The Governor-General and The Prime Ministers* (2005), Ronsdale, 166.

¹¹² In Australia the previous convention of delaying announcements of appointments until approved by the Governor-General in the Federal Executive Council (or by the State Government in Council) has been overlooked. In Britain, the proposed abolition of the office of the Lord Chancellor which had endured for eight hundred years was not advised to the Queen before the Bill was introduced in Parliament. The office has survived but stripped of many of its functions. See Lord Windlesham, "The Constitution Reform Act 2005: Judges and Constitutional Change" [2005] *Public Law* 806 at 815-816.

Minister, the Premiers and the Ministers. The senior public servants have, in many cases, lost their permanence. Their influence, and their capacity and inclination to resist their Ministers are diminished in proportion to their declining power and influence¹¹³. Parliament's powers to control the Executive are diminished by the Executive's powers to offer promotion and patronage to Members of Parliament. The resignation of Ministers for wrong-doing within their Departments now seems to be virtually a dead constitutional letter. The most that happens, and that quite rarely, is that a public servant is dismissed, or disciplined, if the public and media outcry is loud enough there may be a royal commission or inquiry. Ministerial responsibility, in the Westminster sense, has been eroded almost to vanishing point.

Changing role of Parliament: In Australia, even the traditional¹¹⁴ and constitutional¹¹⁵ role of the Parliament, as a body with specific functions to permit or refuse appropriations for the ordinary annual services of government, has been lessened by the adoption of new ways, copied from Britain, of expressing appropriations. These are ways less susceptible to detailed parliamentary scrutiny and control¹¹⁶.

¹¹³ A F Mason, "Democracy and the Law: The State of the Australian political system", *Law Society Journal (NSW)*, November 2005, 68 at 69.

¹¹⁴ *Brown v West* (1990) 169 CLR 195.

¹¹⁵ *Constitution*, ss 53, 54, 55 and 56.

¹¹⁶ *Combet v The Commonwealth* (2005) 80 ALJR 247 at 304-306 [257]-[274]; cf "The Senate: Now and Then" in *The Australia Institute News*, No 45, December 2005, 9.

Occasionally, back-benchers snatch a prominent part in the political dramas. However, this too is exceptional. It usually depends on chance events. So unusual is it that it tends to become a story in itself, whatever the issue that is involved. Freedom of information legislation contains more and more exceptions protective of governmental secrecy¹¹⁷. The Human rights body, the Ombudsman and the Auditor-General continue to pay their vital roles - the first two, especially, struggling with inadequate resources.

The powers of lobby interests have enlarged. The lobbyist is now a professional operator, paid by outsiders to gain the attention and favour of those with governmental power or influence. The media has changed. All too often it feeds on emailed releases. Media both mirrors and creates political moods. Commonly, it avoids searching analysis and promotes a culture of personality and infotainment¹¹⁸. There are notable exceptions; but the contemporary mix-up of fact and comment and the advent of some tabloid media as players in the political game have changed many of the old traditions. Here is another extra-constitutional source of power that has expanded greatly and globally in recent times.

¹¹⁷ P Birkinshaw, "Government and information - the limits of law's empire" (2005) 6 *Amicus Curiae* 3 at 10-11.

¹¹⁸ In consequence there is growing reported mistrust of electronic news and declining sales of the print media: see D T Z Mindich, *Tuned Out: Why Americans Under 40 Don't Follow the News*, OUP, 2004.

As we enter the twenty-first century, the very notion of the "sovereignty" of Parliament has become a somewhat inapposite description. Certainly this is so in a country like Australia that divides the sovereignty of the people amongst a number of institutions, federal and State, that make the written laws¹¹⁹. In Britain, talk of the sovereignty of Parliament is still quite popular¹²⁰. However, there is a marked disparity between the *theory* of representative and responsible government and the *reality* of elections held at three, four or five year intervals when a single popular vote is portrayed as authorising everything that follows in the elected government's lawmaking. Sir Anthony Mason, recently concluded that the notion that Parliament is responsive to the will of the people, except in the most remote, indirect and contingent way, must now be regarded as "quaint or romantic"¹²¹. The need is for a modern "form of democratic government that will prove workable over time"¹²².

¹¹⁹ Reflection on this position has led Lord Justice Sedley to propound a bipolar sovereignty in Parliament and the courts, with the Executive government answerable to each: S Sedley, "Everything and Nothing – the changing Constitution" *London Review of Books*, 7 October 2004, 10 at 12.

¹²⁰ See the debate in J Laws "Law and Democracy" [1995] *Public Law* 72 at 81-92; S Sedley, *Freedom, Law and Justice* (Hamlyn Lectures 1998), 10; and E Thomas, *The Judicial Process* (Cambridge, 2005), 49-52.

¹²¹ Mason, above n 113, 69.

¹²² S Breyer, *Active Liberty: Interpreting our Democratic Constitution*, Knopf, NY, 2005, 134.

Changes affecting the judiciary: On this landscape the judiciary is a last independent resource for the protection of basic rights. But even the judiciary is now targeted by politicians and media for their own ends in ways that would not have happened even in the recent past. We have witnessed in the United States the high politicisation of judicial appointments. In 1996, the Acting Prime Minister of Australia stated that future appointments to the High Court of Australia would be of "capital C Conservative[s]"¹²³. If rights are not expressed in the Constitution, or defined by Parliament, the judiciary may be powerless to defend minorities, especially vulnerable and unpopular individuals and groups¹²⁴.

It is into this world of contemporary governance that Scarman's ideas of law reform an enforceable statement of fundamental rights were projected. In Britain the *Human Rights Act* 1998 (UK) was enacted, fulfilling Scarman's dream. In Australia, there is desultory talk of a Bill of Rights, much of it hostile¹²⁵. Some movement has occurred¹²⁶. But

¹²³ See N Savva, "Fischer seeks a more conservative court" *The Age* (Melbourne) 5 March 1997, 1.

¹²⁴ See eg *B v Minister for Immigration and Multicultural Affairs* (2004) 219 CLR 365; *Muir v The Queen* (2004) 78 ALJR 80 at 784 [23]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 604 [109].

¹²⁵ See eg J Allan, "'Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*" (2005) 24 *Uni of Qld Law Journal*, 1.

¹²⁶ The government of the State of Victoria has announced the intention to propose the enactment of a "statutory charter of rights and responsibilities": *Australian Financial Review*, 21 December 2005, 8.

Australia's federal politicians of both major political groupings are generally either luke-warm to the notion of legally protected fundamental human rights or strongly opposed. Opponents talk repeatedly of the perils of "judicial activism" and the threat to democracy. To this talk it is necessary to reply, as Lord Bingham did¹²⁷:

"Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts".

Lord Bingham's statement appeared in an important decision of the House of Lords upholding the rights of persons of foreign nationality, detained without trial and unconvicted but accused under counter-terrorism legislation¹²⁸. It would not have been possible for the decision of the House of Lords in that case, or many others, to have been reached, or the statement made, without the *Human Rights Act*. The enactment of that law came just in time. It was the response of the United Kingdom Parliament, in part, to the new British relationship with Europe but, in part, as Lord Chancellor Irvine acknowledged at the time, to the repeated urgings of great British jurists such as Scarman. It is at least open to question whether Scarman's second pillar would have

¹²⁷ In *A (FC) v Secretary of State for the Home Department* [2005] 2 AC 68 at 109-110 [41] citing *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 [27].

¹²⁸ *Anti-Terrorism (Crime and Security) Act 2001* (UK).

been put in place after 11 September 2001. Yet now it is there. It is protective. Its influence is likely to expand with each passing year.

The human rights debate: Suggestions for the adoption of a national constitutional or statutory Bill of Rights in Australia, to temper the "decline of the previous high standards of liberal constitutionalism"¹²⁹, are brushed aside. In this respect Australians are, as Scarman observed when he visited Australia in 1980, "more English than the English"¹³⁰. However, we are now like the English as they were before the *Human Rights Act*, not as they are today. Effectively, Australia is now the only Western democracy that must face the challenges of the present age, and the changes in the institutions of government, without a charter of rights to temper political autarchy with occasional judicial interventions to uphold the fundamental rights and freedoms of the individual.

Like Lord Denning and most common lawyers¹³¹, I was previously opposed to the adoption of a bill of rights. I defended parliamentary law-making and electoral accountability. However, the changes that have

¹²⁹ Mason, above n 113, p 68.

¹³⁰ L Scarman, "Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown?" (1980) 7 *Monash University Law Review* 1.

¹³¹ J Mortimer, *Character Parts* (above n 66), 203. Many details of his early life draw on Scarman's conversation with John Mortimer, published in the latter's *Character Parts*, 198.

come over our governmental institutions and practices in the past thirty years – under successive governments of different political complexions – make the *mantra* about democratic law-making seem increasingly unconvincing.

Scarman's insight requires that Australians now ask themselves whether we are the only nation in step? Do our elected parliaments operate so effectively that we have no need for judicial protection of the basic rights of the people – putting those rights beyond political assault or erosion? There will be more debates in Australia upon these questions until, ultimately, we take the step taken in all equivalent nations - just as Scarman successfully urged in Britain.

A LASTING LEGAL LEGACY

Human rights provisions are not a panacea for all the defects of the law or of our system of government. Scarman never suggested that they were. Nor, when they exist, do such charters provide judges with a free hand to do whatever they like. Typically, they are expressed in words that bind. Around those words has accumulated a large body of jurisprudence to guide the judges, whenever a provision is relevant. They afford no antidote to the defects and omissions in technical

aspects of the law that have no bearing on the stated rights. They do not provide an answer to every problem of law reform¹³².

This said, in the context of the very significant changes that have occurred in the way Australia, Britain and other countries are governed, statements of binding human rights moderate the risks and defects of the institutions and practices of law-making as they have now evolved. Sir William Wade put it well¹³³:

"Subject as it is to the vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good administration. As liberty is subtracted, justice must be added¹³⁴".

It is not given to many judges, indeed many officials, to leave a lasting, and probably permanent, mark on a nation's basic legal institutions. To contribute two such marks requires an extraordinary spirit. It suggests a person with special gifts of intellect, persuasiveness

¹³² R Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the High Rights Act 1998" [2004] *Public Law* 33 at 46; M Cohn and M Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18 *Canadian Journal of Law and Jurisprudence* 333 at 356.

¹³³ W Wade, *Administrative Law* (6th ed, 1988), 7. See also I Harden and N Lewis, *The Noble Lie - The British Constitution and the Rule of Law* (1986), 86; J Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998), 3-31.

¹³⁴ cf *Plaintiff S 157/2004 v The Commonwealth* (2003) 211 CLR 476 at 494 [13].

and human empathy. These are the qualities that Leslie Scarman deployed throughout his life. They have affected the development of law in the United Kingdom. They continue to influence, if only by example, the development of the law in other countries of the common law, including Australia.

It is too early to attempt a full assessment of Scarman's role in charting the new dimension of the law of our tradition. Yet we can say with certainty that his influence endures because he addressed fundamental issues. Law reform and basic human rights stand on a stronger foundation in the United Kingdom because of Scarman's foresight and action. The law reform idea has taken root. If it still remains flawed in its delivery, his second idea, that of legally enforceable human rights, was Scarman's answer to the need for a judiciary with replenished powers, able to attend to injustices that Parliament had created thoughtlessly, overlooked or ignored.

Institutions to advance law reform and human rights grew out of Scarman's conviction that law and its agencies must adapt to the real world of modern government but in ways founded ultimately in democratic legitimacy. It was in this way that his thinking about law displayed a fundamental unity. To the end, his caution as a judge arose from his deep English conviction that new mechanisms were needed, but that they had to be authorised by Parliament, acting with the authority of the people. Those mechanisms duly came. The Law Commission. The *Human Rights Act*. He breathed life into the first. He

foresaw the necessity of, and promoted, the second. For each, he was an early herald and then a powerful advocate.

For the work of this large spirit of the law Australians must be grateful. He made a difference. He had flaws, as everyone does. But his achievements encourage and inspire us. And his greatest achievement was to perceive the growing defects in the constitutional arrangements of Westminster democracy as it is practised today and to facilitate two ways by which we might repair and redress them. Australians should reflect on what Scarman did and said. He offered us important lessons. In return, we honour and salute him as one of the most influential judges of the common law of the twentieth century.

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LAW REFORM, HUMAN RIGHTS & MODERN GOVERNANCE -

AUSTRALIA'S DEBT TO LORD SCARMAN

The Hon Justice Michael Kirby AC CMG