

LEGITIMATE AND SPURIOUS INTERPRETATION
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STATUTORY INTERPRETATION & HUMAN RIGHTS
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On 31 March 1717 Benjamin Hoadly, the Bishop of Bangor, delivered a sermon before George I of Great Britain entitled “The Nature of the Kingdom of Christ”. His text was John 18:36, “My Kingdom is not of this world”. His sermon ignited what became known as the Bangorian Controversy, named after Hoadly’s see. The appellation was conferred apparently without irony, although the central message of his sermon was that there was no biblical justification for *any* form of Church government, which presumably excluded bishoprics. He proclaimed that Christ had not delegated his authority to any representative, no doubt including all bishops. His theological position proved attractive to George I and George II, who acted as his patrons and protected him from his episcopal colleagues.

In the course of denying the right of any person to intercede between the ultimate source of sovereignty and the individual worshiper,

Bishop Hoadly proclaimed a theory denying any right of interpretation.

He said:

“Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.”¹

American realist interpretation scholars who are fond of quoting Hoadly² do not make it clear that the bishop was concerned only with a text which reveals the word of God and which, accordingly, cannot be amended. He expressly excluded secular legislation, which can be changed if interpreted wrongly. Nevertheless, as in the case of a written constitution, that ability may sometimes be more theoretical than real.

The dictum of Bishop Hoadly reflects views sometimes expressed by those who emphasise the purity of other sovereign authority, whether parliamentary sovereignty or the sovereign people. We can refer to this as the Bangorian school of statutory interpretation. It is reflected in the Benthamite approach, common in civil law jurisdictions, that understanding legislation is a simple mechanical task. That has never been the common law tradition.

Notwithstanding the fulminations of parliamentary drafters, who often proclaim the obviousness of their intent and the clarity of their words which a court has misunderstood, the process of statutory interpretation has always been regarded as raising real issues that require analysis. Unlike the civil law we have never had a “Low Court” tradition, equivalent to the “Low Church” tradition represented by Bishop Hoadly.

The contrast in approach appears, perhaps most notably, by comparing typical judgments of common law courts with those of civil law courts. In the former, reasons are set forth in full. In most civil law jurisdictions, though there have been changes in this respect in some over recent decades, the reasons for judgment are curt, by reason of the pretence that all that has to be done is a mechanical application of the words of a code. This comparative lack of transparency in the true process of reasoning that led to a result, explains to a significant degree why the bureaucratized judiciary in many civil law countries does not have the status, nor the respect of the public, to the degree to which we have become accustomed.

Even the three basic rules of traditional formulation: the literal rule, the golden rule and the mischief rule – which, as I have said in my first

lecture have contemporary echoes in textualism, contextualism and purposive interpretation, respectively – were each regarded as legitimate. They did not, indeed could not, lead to the same result. The choice of which rule to apply often involved a dialectic process in an intellectual tradition which can be traced back over five centuries.

The Austinian Approach

As I indicated in the first lecture, the salience that human rights considerations have acquired over recent decades represents the resurgence of natural law and the partial demise of legal positivism. In the nineteenth century when legal positivism replaced the remnant of natural law thinking in the English common law tradition, one of the battlegrounds was statutory interpretation.

In his *Lectures on Jurisprudence*, the foundational text of legal positivism, John Austin denounced what he called “spurious interpretation”.³ To make his position quite clear he further characterised this approach as “bastard interpretation”. He said:

“There is a species of interpretation or construction (or rather of judicial legislation disguised with the name of interpretation) by which the defective but clear provisions of a statute are extended to a case which those

provisions have omitted ... [T]his species of interpretation or construction is *not* interpretation or construction properly so called ... [A]dopting the current but absurd expression, the judge *interprets* the law *extensively*, in pursuance of its reason or principle.

The so-called interpretation ... is widely different from the *genuine* extensive interpretation which takes the reason of the law as its index or guide. In the latter case, the reason or general design is unaffectedly employed as a *mean* for discovering or ascertaining the specific and doubtful intention. In the former case the reason or principle of the statute is itself erected into a law, and is applied to a *species* or case which the lawgiver has manifestly overlooked.”⁴

The approach to statutory interpretation to which Austin was responding had come to be referred to as the “equity of the statute”. This was a doctrine pursuant to which the courts sought to effectuate the will of Parliament by extending the operation of a statute in accordance with the justice of a particular case.⁵ Insofar as the doctrine operated to restrict the scope of a statute, that approach can still be seen to be

applied today. However, insofar as the doctrine was used to extend the scope of the statute, that is a matter of some controversy which I will discuss below.

The doctrine of the equity of a statute reflects the historical origins of the institutions of government in the British system. Originally the King met in Council and there was no distinction between legislative, executive and judicial functions. Over time the Council, originally comprised of the nobility only, developed into the Parliament as we know it. A committee of councillors, wielding the executive power, developed into the Cabinet as we know it. The judicial power came to be exercised by specialist judges, rather than by the King in Council and the prerogative courts like Star Chamber and High Commission disappeared or, like Chancery, were judicialised. The very word “court” reflects the origin of the judicial function amongst those in the immediate presence of a King.

Over the centuries, when statutes were in fact quite uncommon, Parliament was regarded primarily as a court in the modern sense. That clearly has changed. More significantly, for most of those centuries, judges were regarded as a manifestation of executive authority. Indeed

judges often drafted the statutes.⁶ As a thirteenth century Chief Justice, Ralf de Hengham, once berated a pleader:

“Do not gloss the statute; we understand it better than you, for we made it.”⁷

The doctrine of equity of the statute reflected this admixture of functions and, as has recently been comprehensively established,⁸ it is quite inconsistent with a separation of powers of the contemporary character, whether as strict as Article III of the US Constitution or Chapter 3 of the Australian Constitution, or of the more flexible kind which applies, for example, in the United Kingdom and in the Australian States.

Although reference is made to the equity of the statute approach in Blackstone’s *Commentaries*, by his time the emphasis was plainly on judicial interpretation in the contemporary sense. Judges sought to identify the intention of the legislature.

One American author on statutory interpretation has classified judicial approaches to interpretation in the following manner:

- Textualists who give precedence to the literal words of the text;
- Purposivists who employ purpose to clarify an ambiguous text;

- Strong purposivists who rely on purpose to depart from a clear statutory text.⁹

All three categories, nevertheless, find their rationale in what the author describes as the “faithful agent theory”. He went on to distinguish the revival of interest in the “equity of the statute” of a traditional character, which had some residual support at the time of the creation of the United States, not least in Blackstone’s *Commentaries* which were so influential at the time. If there was an inherent judicial power to adapt legislation at the time of the formulation of the Constitution of the United States, this would be a form of interpretation attractive to originalists, who have in the past tended to be strong textualists. The author sets out a convincing refutation of this theory.

The traditional equity of the statute approach has had a residual influence on the law of statutory interpretation. Justice Gummow has identified a number of principles of interpretation as continuing the equity of the statute approach under different terminology.¹⁰ Justice Finn of the Federal Court has expressed a similar opinion¹¹ and, his Honour notes, the statutory requirement to prefer an interpretation which promotes the purpose or object underlying an act may be seen as reflecting at least in part a similar process.

The resurgence of interest in human rights does raise again the Austinian distinction between genuine and spurious interpretation. This is reflected in debates about judicial activism, in debates about whether to adopt a bill of rights and in debates about the judicial implementation of a bill of rights. The determination of when interpretation has become “spurious” is a matter upon which reasonable minds can and will differ. It is, however, a real issue.

About a century ago Roscoe Pound developed and commented upon the Austinian concept of spurious interpretation and its contemporary relevance makes it worthy of extensive quotation:

“The difficulty calling for interpretation may be (a) which of two or more coordinate rules to apply, or (b) to determine what the lawmaker intended to prescribe by a given rule, or (c) to meet deficiencies or excesses in rules imperfectly conceived or enacted. The first two are cases for genuine interpretation. The third case, when treated as a matter of interpretation, calls for spurious interpretation.

The object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words wherein the rule is expressed ... Employed for these purposes, interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context, are resorted to, there can be no question. But when, as often happens, these primary indices to the meaning and intention of the lawmaker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under the guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the lawmaker meant by assuming his position, in the surroundings in which he acted, and endeavouring to gain

from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the lawmaker indirectly. ...

On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process ..."¹²

Pound characterised spurious interpretation as an anachronism in an age of statutes and also as inconsistent with the separation of powers.

The current version of the equity of the statute approach manifests itself as "dynamic interpretation". A principal United States proponent of this approach described it thus:

"Because they are aimed at big problems and must last a long time, statutory enactments are often general,

abstract and theoretical. Interpretation of a statute usually occurs in connection with a fact-specific problem (a case or an administrative record) which renders it relatively particular, concrete and practical. As an exercise in practical rather than theoretical reasoning, statutory interpretation will be dynamic. It is a truism that interpretation depends heavily on context, but the elasticity of context is less well recognized. The expanded context of cases and problems engenders dynamic interpretation. Because statutes have an indefinite life, they apply to fact situations well into the future. When successive applications of the statute occur in context not anticipated by its authors, the statute's meaning evolves *beyond* original expectations. Indeed, sometimes in subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute's meaning often evolves *against* its original expectations."¹³

This "dynamic" approach has been noted with approval in Australia.¹⁴ Lady Justice Arden has applied a similar, but not identical, distinction by way of characterisation of the effect given to s 3 of the

Human Rights Act of the United Kingdom by the English cases I discussed in the second lecture.¹⁵

Her Ladyship said:

“[25] What does the interpretative duty mean in practice? Significantly, in relation to the interpretation of legislation under the *Human Rights Act* 1998, we move from an Agency Model to the ‘Dynamic Model’. The judge is not simply looking at the wording and trying to apply it. He is looking at the wording critically. He is considering whether it complies with the Convention. This approach works on the basis that what Parliament intended was that statutes should have the effect of operating in conformity with human rights unless the contrary conclusion could not be achieved as a matter of interpretation. But, in truth, it is no longer a matter of looking at Parliamentary intention. This is highlighted by the fact that new approach applies to legislation whenever passed. At the highest level of generality, the court is acting as the guardian of human rights and constitutional rights. Its role is a dynamic one, and hence I call the model in this context the Dynamic Model.”

Her Ladyship goes on to discuss the implications of what she calls the Dynamic Model for the role of the judiciary.

This development in England raises many of the issues to which Roscoe Pound referred a century ago. It appears that in jurisdictions from which Australians once drew guidance, including both the United Kingdom and Canada, the dominant view may differ from ours. In Australia the debate is still continuing.

The Limits of Interpretation

The application of the principles listed in the Common Law Bill of Rights, the subject of the first lecture, and the application of the rights compliant interpretation provisions, the subject of the second lecture, raise analogous, indeed probably identical, issues about the judicial role. Determining the boundary between interpretation and legislation arises in both respects.

The English case law on their rights compliant interpretation provision, discussed in the second lecture, goes beyond what most Australian judges would regard as “interpretation”. English judges are, of course, well aware that there is a constitutional boundary beyond

which they should not travel. They recognise that interpretation cannot become, in substance, amendment of legislation.

Lord Nicholls identified the issue in the following manner:

“[38] ... Section 3 is concerned with interpretation ... and, indeed, section 3(2)(b) presuppose[s] that not all provisions in primary legislation can be read Convention compliant by the application of section 3(1). ...

[39] In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.

[40] Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. ... What one person regards as sensible, if robust, interpretation,

another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.”¹⁶

In Lord Bingham’s judgment in *Sheldrake*, quoted in my second lecture, which synthesised the English authorities, his Lordship indicated clearly that there were limits to the deployment of s 3 and outlined a number of formulations identifying those limits, including:

- “Inconsistent with a fundamental feature of legislation”;¹⁷
- “Incompatible with the underlying thrust of the legislation”;¹⁸
- “Change the substance of a provision completely”;¹⁹ and
- “Remove the very core and essence, ‘pith and substance’ of the measure Parliament had enacted”.²⁰

To an Australian judge, those are not restrictive criteria. Because of the express reference to the purpose of Parliament – either by express subsection in the current ACT formulation or in terms of ‘consistency’ in the Victorian and new ACT formulation – Australian provisions differ in a critical respect from that of the UK. What is regarded as “interpretation” in England would not necessarily be so

regarded here, even under the rights compliant interpretation provisions. English case law must be deployed with care.

In the first lecture I identified a range of processes which come within an orthodox statement of the interpretive task:

- Deciding the meaning of ambiguous or obscure words;
- Deciding whether to read down general words;
- Deciding whether implications are to be drawn from a text;
- Considering whether to depart from the natural and ordinary meaning of words by adoption of a strained construction;
- Deciding whether or not a statutory definition does not apply on the basis of an intention to the contrary;
- Giving qualificatory words an ambulatory operation; and
- Reading words into a statute by filling gaps (more controversially).

In the time available I propose to discuss three of these processes as they often arise in the application of the principle of legality and of rights compliant interpretation provisions. These are: strained construction, reading down general words and reading words into a statute.

Strained Construction

There are numerous references in the authorities to the permissibility of adopting, in particular circumstances, what is described as a “strained construction” of statutory language. Bennion, in accordance with the requirements of the approach of his text as a “code”, identifies strained construction with any approach which fails to implement a clear grammatical meaning or one of the possible grammatical meanings.²¹ An appropriate statement of strained interpretation in a purposive context is that of MacKinnon LJ who said:

“When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the legislature. It may even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention requires.”²²

In Australia the most systematic statement of circumstances in which a strained interpretation is appropriate is that of Justice McHugh, first in the Court of Appeal of New South Wales and then in the High Court.²³ I will deal separately with the processes of reading down

general words and reading words into a statute. His Honour identified circumstances in which a strained construction has been adopted as including:

- Where the operation of the statute appears to be absurd, capricious or irrational;²⁴
- Where terminology has been inadvertently used;²⁵
- Where words have been omitted, particularly words which constitute a failure to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved;²⁶ and
- Where the purpose of the provision indicates that Parliament did not intend the grammatical meaning to apply.²⁷

Nevertheless, in each respect, what must be undertaken is a process of interpretation and this imposes a significant restraint upon the ability of a court to effectuate what the court identifies to be the true legislative purpose.

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.²⁸ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.²⁹

A good example of permissible strained construction is a recent judgment of the Queensland Court of Appeal as to whether an unregistered motor cycle was subject to the indemnity provisions of the *Motor Accidents Insurance Act 1994 (Qld)*. The definition of a motor vehicle was such as to support the insurer's contention that the obligation to indemnify applied only to registered uninsured vehicles, but not to unregistered uninsured vehicles. Nothing could be more clearly inconsistent with the purpose of compulsory third party insurance. The difficulty arose because the obligation to indemnify for an uninsured motor vehicle was expressed in terms of an accident "on a road or in a public place", whereas the obligation to register a vehicle was expressed in terms only of use "on a road", without reference to a "public place". By means of a strained interpretation, the reference to motor vehicle was interpreted to include reference to a vehicle for which registration was not required until such time as the regulation required such registration.³⁰

This case probably falls into the absurdity or irrationality category. The analysis is a clear application of the relevant principles within proper bounds of the interpretative task.

The limits of strained construction are well expressed by Lord Reid who said:

“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can chose between those meanings, but beyond that you must not go.”³¹

I am aware that in the NSW Court of Appeal, Justice McHugh suggested that this passage did not “express the modern law of statutory interpretation”. However, he did not repeat this statement in the High Court judgments in which he repeated his analysis.³²

McHugh JA’s characterisation of Lord Reid’s reasoning has not been subsequently adopted. Indeed, the joint judgment of Mason and Wilson JJ in *Cooper-Brookes*, which is usually cited, including by McHugh J, as the basis of contemporary Australian doctrine in this regard, expressly adopted a “reasonably open” test when their Honours said:

“[T]here are cases in which inconvenience of result or improbability of result assists the court in concluding that

an alternative construction *which is reasonably open* is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent *discernible from other provisions in the statute.*"³³

A strained construction is sometimes permissible, but the process must be able to be characterised as genuine not spurious interpretation. The overriding test is that the meaning must be reasonably open.

Reading Down General Words

When should general words used in a statute be read down so as to have a narrower meaning than that of which they are literally capable? It is actually quite rare to find an English word that cannot be applied at different levels of generality or cannot otherwise be circumscribed in its application.

For those who seek comfort in the "plain meaning" approach, it is necessary to recognise, in the words of Lord Wilberforce, that general words do not necessarily have a "plain meaning".³⁴

Reading down general words, particularly by the application of presumptions attributed to the legislature, is a well established means of statutory interpretation.³⁵

As long ago as 1560, in *Stradling v Morgan* the Barons of the Court of the Exchequer said:

“And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.”³⁶

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

“the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of

the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”³⁷

Of course during this period the judges were still under the influence of the doctrine of the equity of the statute. Nevertheless, this technique of interpretation survived the demise of that doctrine. Even in 1890, Lord Halsbury LC described *Stradling v Morgan* as a “great case”.³⁸

There are numerous examples of reading down that could be cited. Perhaps the best known example in legal history, from the time when the law of real property was of central significance to economic and social life, occurred in the context of the Statute of Frauds. The object of requiring contracts for the disposal of land to be in writing was two-fold: first, to avoid fraud and secondly, to ensure certainty. At the expense of the second objective the courts came to give the first object

primary significance in what would today be described as a purposive interpretation.

The courts proceeded on the basis that a statute, which had as one purpose the avoidance of fraud, could not be used as “an engine of fraud” or as an “instrument of fraud”.³⁹ After the doctrine of the equity of the statute had receded from judicial memory, one can detect some embarrassment with formulations of this character.⁴⁰ An alternative formulation was suggested so that doctrines such as that of part performance, which avoided the strict application of the statute, were necessary because otherwise, in Lord Selbourne’s words:

“injustice of a kind which the statute cannot be thought to have had in contemplation would follow on.”⁴¹

As Justice Hope explained the development:

“No sooner had the Statute of Frauds been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply. In general terms, it was said that the courts would not allow the *Statute of Frauds* to be made an instrument of fraud, and that it did not prevent the proof of fraud ... The general approach ...

spread into a number of fields where a statute requires writing ... The fields ... include, as well as the doctrine of part performance, the rule that parol evidence is admissible to show that an absolute conveyance was in truth by way of security only, the principle that oral evidence can establish that a person has taken a transfer of property as trustee or agent for another, the doctrine whereby equity gave relief upon a breach by the survivor of two persons of a contract they had made to make mutual wills, and the principle whereby equity will compel beneficiaries who have agreed to accept their interests under the will upon communicated trusts to perform those trusts.”⁴²

In several ways the seemingly absolute requirement of writing was read down on the basis of an imputed intention of Parliament. The process of reading down general words has a rich legal history. It is an acceptable, indeed essential, technique of interpretation.

The operation of the principles of statutory interpretation which I have collectively discussed under the heading “Common Law Bill of Rights” in the first lecture have often been applied in this way.⁴³ So will

the rights compliant interpretation provisions discussed in the second lecture.

In the United States the classic application of this approach is an 1892 decision of the United States Supreme Court. The Church of the Holy Trinity in New York contracted with an Englishman to come to the Church as its rector and pastor. The issue was whether this violated a Federal statute which made it unlawful for a person to “assist or encourage the importation or migration of any alien ... under contract or agreement ... to perform labour or service of any kind in the United States”. In finding that the contract was not within the statute the Court said:

“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in the statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the

absurd results which follow from giving such a broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act”.⁴⁴

The Court identified the circumstances which led to the passage of the legislation as a concern with the importation of cheap unskilled labour. Hardly applicable to a man of the cloth.

The Court concluded:

“It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of a country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the Act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”⁴⁵

Justice Scalia of the United States Supreme Court, has attacked the line of authority which includes the *Church of the Holy Trinity* case on the following basis:

“Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former ... *Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life giving legislative intent. It is nothing but an invitation to judicial law making.”⁴⁶

Justice Scalia’s approach has not prevailed in the United States, although the new configuration of the majority in the Supreme Court may well indicate increased support for his critique, particularly in the area of constitutional interpretation.

Nevertheless, there are limits to what the Court can do whilst still performing the legitimate task of interpretation. Oliver Wendell Holmes Jr stated the position with his customary epigrammatic brevity. Speaking of a statute which he described as “a foolish law” – it happened to be the *Sherman Act* – he said: “If my fellow citizens want to go to Hell, I will help them. It’s my job”.⁴⁷

The technique of reading down general provisions can, of course, be used to deny human rights as well as to implement them. In the early twentieth century, the House of Lords and the Privy Council used the technique to frustrate the ambitions of the women's movement.⁴⁸

- By reading down the word “person” in the Act entitling university graduates to vote for the university's seat in Parliament as not including women;⁴⁹
- By holding that the *Sex Disqualification Removal Act* 1917 which provided that no person should be disqualified on the grounds of sex from “the exercise of any public function” did not extend to modify letters patent of a peerage that permitted male heirs, but not female heirs, to sit in Parliament;⁵⁰
- By overruling the Canadian Supreme Court to hold that the word “persons” in the section of the *British North America Act* 1876 governing the appointment of new Senators denoted only “male persons”.⁵¹

From a human rights perspective, this well-established technique of interpretation can be seen to be neutral, a quality which enhances its contemporary deployment.

Reading Words Into an Act

Some authorities and texts refer to a process of “reading words into an Act”. This terminology appears to me to offend a fundamental principle of our constitutional arrangements. In my opinion, the relevant authorities are consistent with a process of interpretation by which the court interprets the words actually used by the Parliament by giving them effect *as if* they contained additional words which must be complied with or as if some words were deleted for a specific application. This does not, in my opinion, introduce words into the Act. It involves the interpretation of the words actually used, perhaps by means of one of the specific techniques of interpretation I have set out above.⁵²

The most frequently cited passage to this effect is from Lord Diplock in *Jones v Wrotham Settled Park Estates*, where he sets out restrictive conditions before anything of this character can occur. His Lordship said:

“My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains

one of construction, even where this involves reading into the Act words which are not expressly included in it.”⁵³

It is important to reconcile the two, apparently contradictory, elements in this passage. How is it possible to “read words into” an Act, whilst engaging in a task of “construction”? From my review of the authorities, and I acknowledge this is not the only possible understanding of those authorities, the court may not supply words omitted by the legislature, *per se*. Rather, what a court may do is construe the words actually used by the legislature as *if* certain words appeared in the statute. The words are notionally “included” to reflect in express, and therefore more readily observable form, the true construction of the words actually used, by way of a strained construction.

I re-emphasise the words from Lord Diplock that I have quoted: the task of the Court “remains one of construction”. In order to be able to characterise the process as one of construction – which remains a constitutional restriction on the role of the judiciary – it is best to avoid describing the process as one of “introducing words into the Act”. It remains a process of construction only if what the Court is doing is to interpret the words actually used by the Parliament.

The issue of “text” versus “purpose” has been traced back to Aristotle.⁵⁴ The reformulation of a statutory provision with additional or fewer words should be understood as a means of expressing the Court’s conclusion with clarity, rather than as a description of the actual reasoning process which the Court has conducted.

Interpretation must always be text based. As I have said above, the task is to interpret the words of the legislature, not to divine the intent of the legislature.⁵⁵

In Australia, the basic authority on legislative inadvertence is *Cooper-Brookes v Commissioner of Taxation*,⁵⁶ which in fact affirms the centrality of the text. The joint judgment of Mason and Wilson JJ stated:

“[T]he propriety of departing from the literal interpretation ... extends to any situation in which for good reason on a literal reading does not conform to the legislative intent as ascertained *from the provisions of the statute*, including the policy which may be discerned *from those provisions*.”⁵⁷

In my opinion, *Cooper-Brookes* is not a case of reading words into an Act. What the Court concluded was that in a particular paragraph, the word “company” should not be given the extended meaning, which one section said that all such references should be given. In the full context of the whole Act, and of the legislative history, the section which made provision for the extended meaning was read down so as not to apply to the specific reference in one paragraph.⁵⁸

To similar effect is a later judgment of the House of Lords, *Inco Europe*, which, notwithstanding a statement about reading words into the Act, took words of general application, namely “any decision of the court under that Part” and concluded that that particular composite phrase had to be read down, so that the phrase “under that Part” applied only to some sections in the Part.⁵⁹

As I indicated above, Lord Diplock had identified three conditions before a court can undertake the process that he referred to as “reading words into an Act”. In *Inco Europe* these conditions were expressly relied on and the Court emphasised that such a process was limited to what could be characterised as “drafting mistakes”. Lord Nicholls of Birkenhead said, in a passage worthy of extensive quotation:

“It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ...

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have

used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ...

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching.”⁶⁰

This approach, which I understand to be the same as Australian authority that has adopted Lord Diplock’s three conditions,⁶¹ constitutes genuine, rather than spurious, interpretation. References in judgments of Justice McHugh to a court giving effect to the legislative purpose “by addition to, omission from, or clarification of, the particular provision” should be so understood.⁶²

The radical application adopted by the House of Lords for the UK rights compliant interpretation section, discussed in the second lecture, encompasses reading words into an act. In an influential judgment, Lord

Steyn expressly referred to the application of s 3 of the UK Act leading to “the implication of provisions”.⁶³

In *Ghaidan*, Lord Steyn characterised that case as having “read words into” the Act.⁶⁴

He said, authoritatively:

“Section 3 ... is ... apt to require a court to read in words which change the meaning of enacted legislation, so as to make it Convention compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect of primary and secondary legislation.”⁶⁵

The Supreme Court of Canada has also adopted, admittedly in a constitutional context, a practice of reading into legislation words in order to ensure compliance with the Canadian Charter of Rights. This has been of particular significance with respect to the equality clause which prohibits discrimination on one of a number of grounds. It appears that the Canadian Supreme Court has adopted terminology from United States jurisprudence about the equal protection clause,

which characterised legislation in terms of “under inclusiveness” or “over inclusiveness” for purposes of concluding that a statute had, respectively, failed to include persons who should have been included or included persons who should not have been included.⁶⁶

As the learned author of one of the basic texts on Canadian constitutional law has put it:

“An interesting phenomenon has been the Supreme Court of Canada’s use of the remedy of ‘extension’, under which the court extends the reach of a statute that the court finds to be ‘under inclusive’. An under inclusive statute is one that excludes some group that has a constitutional right to be included. Sometimes this is accomplished by ‘severance’, deleting from the statute the language that excludes the group. Other times this is accomplished by ‘reading in’ inserting new language into the statute to add the excluded class.”

Accordingly, in one case the Supreme Court of Canada held that a provision of the *Unemployment Insurance Act 1971* which allowed more generous childcare benefits to adoptive parents than to natural parents was ‘under inclusive’, but the court stayed its hand from striking down

the legislation so as to permit the government to determine whether to alter the law. However, the court asserted that it would have had the right to read in corrective terminology.

Lamer CJ said:

“ ... extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. ... In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down ... It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently.”⁶⁷

‘Reading in’ was regarded as an “appropriate and just” remedy to provide for an infringement of the Charter, within s 24 of the Charter. I doubt whether Australian judges will follow these precedents, whether in

the application of the principle of legality – with the enhanced salience many of the sub-principles are receiving – or in the application of rights compliant interpretation provisions.

If I can again commit the sin of self-quotation:

“[87] The process remains one of construction if the words actually used by the Parliament are given an effect as *if* they contained additional words. That is not, however, to ‘introduce’ words into the Act. It is to construe the words actually used. Interpretation must always be text based. The reformulation of a statutory provision by the addition or deletion of words should be understood as a means of expressing the court’s conclusion with clarity, rather than as a precise description of the actual process which the court has conducted.

[88] The authorities which have expressed the process of construction in terms of ‘introducing’ words to an Act or ‘adding’ words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am

unaware of any authority in which a court has ‘introduced’ words to or ‘deleted’ words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. ... There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.”⁶⁸

Notwithstanding some observations by Justice McHugh in the Court of Appeal, not repeated in his equivalent High Court judgments, the position in Australia is that identified by Stephen J:

“It is no power of the judicial function to fill gaps disclosed in legislation.”⁶⁹

These observations must be read together with the judgments in *Cooper-Brookes*, *Jones v Wrotham Settled Estates* and *Inco Europe*, to which I have referred. Indeed Justice Stephen subsequently said:

“To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.”⁷⁰

The process must remain one of interpretation so that a reading of the text with additional words must be “reasonably open” , to repeat the

overriding test from Lord Reid in *Jones v Director of Public Prosecutions* and Mason and Wilson JJ in *Cooper-Brookes* quoted above.

Conclusion

I return in conclusion to the century old article by Roscoe Pound which, again, merits extensive quotation because of its contemporary resonance. He said:

“ ... The bad features of spurious interpretation, as applied in a modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. ... In the first place, in a modern state, spurious interpretation of statutes, and especially of constitutions, tends to bring law into disrepute. Law is no longer the mysterious thing it was once. This is an age and a country of publicity. It is no longer possible to impose upon the public by covering legislation with the cloak of interpretation. ... The disguise is transparent and futile, and can only result in creating or confirming a popular belief that courts make and unmake the law at will. Second, in a common-law country where questions of politics and economics are so frequently

referred to the courts, the knowledge that courts exercise, or may exercise, a power of spurious interpretation subjects the courts to political pressure which can not but impair the general administration of justice. ... Finally, spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. And, however popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. The fiction of spurious interpretation can no long deceive any one to-day. The application of the individual standard of the judge instead of the appointed legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred.”⁷¹

This analysis represents an exposition of a point of view which remains relevant a century later. It is not, of course, the only opinion held on these matters. Clearly the interpretation of legislation cannot be held to be spurious if it occurs pursuant to an express Parliamentary mandate such as the rights compliant interpretation provisions discussed in the second lecture.

Nevertheless, even in this situation there remains a restraint on the judicial role. With respect to the exercise of federal jurisdiction that restraint could raise issues under Chapter 3 of the Constitution. In the case of all Australian courts, the issue is one of what Chief Justice Gleeson calls, judicial legitimacy. As his Honour said:

“Judicial power ... is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.

...

The quality which sustains judicial legitimacy is not bravery, or creativity, it is fidelity. That is the essence of what the law requires of any person in a fiduciary capacity, and it is the essence of what the community is entitled to expect of judges.”⁷²

¹ Reprinted in John M Creed and S B Smith, *Religious Thought in the Eighteenth Century* (1934) Cambridge University Press, Cambridge at 251.

² Quoted by John Gray, *The Nature and Sources of Law* (2nd ed, 1921) Macmillan, New York at 125.

³ See John Austin, *Lectures on Jurisprudence* (4th ed, 1879) John Murray, London, vol 2 at 1029–1030.

⁴ *Ibid* at 596–597.

- ⁵ For a general discussion of this doctrine, together with references, see W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (1999) Oxford University Press, Oxford at, 18–22; see also his Honour’s joint judgment with Justice Deane in *Nelson v Nelson* (1995) 184 CLR 538 at 552–554.
- ⁶ See P St J Langan, *Maxwell on the Interpretation of Statutes* (12th ed, 1969) Sweet & Maxwell, London, at 237; Francis Bennion, *Statutory Interpretation: A Code* (4th ed, 2002) Butterworths, London, at Section 159.
- ⁷ T F T Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1992) Cambridge University Press, Cambridge, at 95.
- ⁸ See John F Manning, “Textualism and the Equity of the Statute” (2001) 101 *Columbia Law Review* 1. For an earlier but shorter statement of this position see Roscoe Pound, “Spurious Interpretation” (1907) 1 *Columbia Law Review* 379 esp at 383–384.
- ⁹ See Manning *supra* esp at 3ff.
- ¹⁰ Gummow *supra*.
- ¹¹ Paul Finn, “Statutes and the Common Law: The Continuing Story” in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) Federation Press, Sydney, 52 at 57–58.
- ¹² Pound *supra* at 381–382.
- ¹³ William N Eskridge Jr, *Dynamic Statutory Interpretation* (1994) Harvard University Press, Cambridge Mass, at 48–49.
- ¹⁴ See Suzanne Corcoran, “Theories of Statutory Interpretation” in Corcoran and Bottomley *supra* 8 at 21–25 and Suzanne Corcoran “The Architecture of Interpretation: Dynamic Practice and Constitutional Principles” *passim* in Corcoran and Bottomley *supra* 31.
- ¹⁵ Mary Arden, “The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament”, Annual Lecture to the Constitutional and Administrative Law Bar Association, London, 26 November 2007.
- ¹⁶ *Re S (children: care plan); Re W (children: care plan)* [2002] 2 AC 291.
- ¹⁷ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (‘*Ghaidan*’) at [32] per Lord Steyn and at [67]–[68] per Lord Millett.
- ¹⁸ *Ibid* at [33] per Lord Steyn.
- ¹⁹ *Ibid* at [110] per Lord Rodger.
- ²⁰ *Ibid* at [111].
- ²¹ See Bennion *supra* at Sections 157 to 159. See also Sections 190 and 306.
- ²² *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 (‘*Sutherland Publishing*’) at 201.
- ²³ See *Kingston v Keprose Pty Ltd (No 3)* (1987) 11 NSWLR 404 (‘*Kingston v Keprose*’) esp at 421–423; *Mills v Meeking* (1990) 169 CLR 214 (‘*Mills v Meeking*’) at 242–243; *Saraswati v The Queen* (1991) 172 CLR 1 (‘*Saraswati*’) at 21–23.

- 24 See eg *Cooper-Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 ('Cooper-Brookes') at 321 quoted and applied by McHugh J in *Saraswati* at 22; *Re Lockwood* [1958] Ch 231 at 238 quoted in *Kingston v Keprose* at 422.
- 25 See *Sutherland Publishing* at 201 quoted in *Kingston v Keprose* at 422.
- 26 See *Kamins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 880-882; *Jones v Wrotham Park Settled Estates* [1980] AC 74 ('*Jones v Wrotham Park*') at 105.
- 27 *Adler v George* [1964] 2 QB 7; *Wiltshire v Barrett* [1966] 1 QB 312 at 332-333 referred to in *Kingston v Keprose* at 422.
- 28 See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].
- 29 *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613G, 645C-V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
- 30 See *Nominal Defendant v Ravenscroft* [2007] QCA 435 ('*Ravenscroft*') esp at [54]-[55].
- 31 *Jones v Director of Public Prosecutions* [1962] AC 635 at 662.
- 32 Cf *Kingston v Keprose* at 422-423; *Mills v Meeking*; *Saraswati*; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 ('*Newcastle v GIO*'). I note further that McHugh JA's criticism of what he said were observations to the same effect by Viscount Symonds in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 and have not generally found favour. See, eg, *Footscray City College v Ruzicka* (2007) 16 VR 498 ('*Ruzicka*') at [67]; *VOAW v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 79 ALD 422 ('*VOAW*') at [12]; cf *Ravenscroft* at [34]-[36].
- 33 *Cooper-Brookes* at 320 (emphasis added).
- 34 *Maunsell v Olins* [1975] AC 373 at 385-386.
- 35 I have collected the relevant Australian authorities in *R v Young* (1999) 46 NSWLR 681 ('*R v Young*') at [25]-[31]; J J Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 *Newcastle Law Review* 1 at 8; J J Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Australian Bar Review* 224 at 227-230, 232-233.
- 36 *Stradling v Morgan* (1560) 1 Plowd 199 at 204; 75 ER 305 at 312.
- 37 *Ibid* at Plowd 205; ER 315. See also *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444 ('*Bowtell*') at 457-458; *Ex parte Walsh*; *In re Yates* (1925) 37 CLR 36 ('*Ex parte Walsh*') at 91-93; *R v Wilson: Ex parte Kisch* (1934) 52 CLR 234 ('*Kisch*') at 244; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047-1049; *Church of the Holy Trinity v United States*, 143 US 457 (1892) ('*Holy Trinity Church*') at 459; *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283; *Smith v East Elloe Rural District Council* [1956] AC 736 ('*Smith v East Elloe*') at 764-765; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18 ('*Bropho*').
- 38 *Cox v Hakes* (1890) 15 App Cas 506 at 517; see also *Hawkins v Gathercole* (1885) 6 GM&G 1 at 21; 43 ER 1129 at 1135-1136.

39 See *McCormick v Grogan* (1869) LR 4 HL 82 at 97.

40 See, eg, *Maddison v Alderson* (1883) 8 App Cas 467 at 474.

41 Ibid at 475.

42 See *Last v Rosenfeld* [1972] 2 NSWLR 923 at 927–928.

43 See, eg, *Bowtell* at 456–457; *Ex parte Walsh* at 91–93; *Kisch* at 244; *Smith v East Elloe* at 764–765; *Bropho* at 17–18; *R v Young* at [23]–[32]; *Al-Kateb v Godwin* (2004) 219 CLR 562 esp at [19], [117], [122].

44 *Holy Trinity Church* at 459.

45 Ibid at 472.

46 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) Princeton University Press, Princeton, at 20–21.

47 Oliver Wendell Holmes (ed), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916–1935* (1953) Harvard University Press, Cambridge Mass at 219.

48 See generally Andrew Turek, “Ladies for Life or Who Sits Where?” (1990) 49 *Cambridge Law Journal* 334; Brenda Hale, “The House of Lords and Women’s Rights or Am I Really a Law Lord?” (2005) 25 *Legal Studies* 72.

49 *Nairn v University of St Andrews* [1909] AC 147.

50 *Viscountess Rhondda’s Claim* [1922] 2 AC 339.

51 *Edwards v Attorney General (Can)* [1930] AC 124.

52 See *R v Young* at [5]–[32]; *R v PLV* (2001) 51 NSWLR 73 at [88]–[89]; Spigelman, “The Poet’s Rich Resource” supra at 233–234.

53 *Jones v Wrotham Park* at 105. This passage has been adopted and applied in a number of authorities: see those set out in *R v Young* at [10]; see also *Mills v Meeking* at 243–244; *Newcastle v GIO* at 116.

54 Manning supra at 4.

55 See text at n 28.

56 *Cooper-Brookes*.

57 Ibid at 321 (emphasis added).

58 *R v Young* at [17]–[22].

59 See *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 esp at 592 noting the references to how a provision should be “read” in the context of “adding or omitting words” as part of an “interpretative function”.

60 Ibid at 592.

61 See *Kingston v Ke prose* at 423; *Mills v Meeking* at 244.

62 See *Mills v Meeking* at 243; *Saraswati* at 22.

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- 63 *R v A (No 2)* [2002] 1 AC 45 at [44].
- 64 *Ghaidan* at [29].
- 65 *Ibid* at [32].
- 66 See, eg, Laurence H Tribe, *American Constitutional Law* (2nd ed, 1988) Foundation Press, New York, at 16ff.
- 67 See *Schacter v The Queen* [1992] 2 SCR 679 at 698; 93 DLR (4th) 1 at 12–13.
- 68 *R v PLV* at [87]–[88].
- 69 *Marshall v Watson* (1972) 124 CLR 640 at 648; See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.
- 70 *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.
- 71 See *ibid* at 384–385.
- 72 Murray Gleeson, “Judicial Legitimacy” (2000) 20 *Australian Bar Review* 4 at 5, 11.