The role of statutory interpretation in law-making through the courts

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Our lives are ordered by law. In fact law is all pervasive. Every activity we undertake is shaped by some law or other. For instance, as individuals heading off to school or work we may ride in a vehicle on roads governed by legislation that prescribes who can drive the vehicle, how fast the vehicle can travel, and perhaps how many people can be carried in the vehicle. If we take a bus or train, then legislation dealing with public transport applies. We enter into a contract with the provider of the service and there are laws on how we as travellers should conduct ourselves. It is possible that the law of negligence may be invoked if, either we or the provider of the service, fail to act responsibly and someone is hurt.

The Need for Interpretation

While some of the instances mentioned above are dealt with by the common law that develops according to the principles laid down by judges, much of our law is now set out in legislation. Legislators in recent years have made every effort to write in plain English, trying to convey their message to citizens, officials and judges. But what is written invariably outlives the generation it was created to serve and even the clearest piece of writing can give rise to ambiguity or differing feasible interpretations. This is not necessarily because the drafters have done a poor job, but simply because many of our words attract a number of different meanings. This opens the way for lawyers to construct ambiguity in order to advance their clients’ claims. Acting within an adversarial system, lawyers will argue that the word or phrase is or is not ambiguous depending on whether or not the result will advance their clients’ goals. It is also the case that statutes are written generally as a way of covering a broad spectrum of situations.

This approach reduces the statements to standards as opposed to absolute objectives. A statement that says that factory workers should not be required to lift more than 40kg may appear in legislation as factory workers should only be required to lift what is considered reasonable, and of course, the word reasonable needs to be interpreted.

An English judge commenting on this eventuality said that the courts are finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. In this respect McHugh J is of the opinion that parliament in some cases does this deliberately so the responsibility for choosing policies falls to the courts.

There are a number of reasons why someone might want to persuade the court to their way of understanding the words contained in statutes, particularly when a person in authority has a different view. For instance, issues that question whether a person is in breach of an act, has committed an offence, or is eligible to claim a benefit. Courts are also charged with the task of determining whether legislation created by either the Commonwealth or state parliaments is unconstitutional.

Therefore we can see that statutory interpretation plays an integral part in the ordering of our lives, often causing judges to use their discretion in dealing with issues raised before them. So how do the courts set about considering a statutory interpretation question?

Statutory Interpretation Method

The most fundamental rule of statutory interpretation requires that judges should examine the difficult words or provisions in their context—in the statute as a whole, i.e., the intrinsic material. The words of Isaacs and Rich JJ express this as:

Every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument.

In considering the intrinsic material (things within the act) the judges developed certain principles that determined the importance of preambles and headings etc. In recent years clauses in the statutory interpretation legislation deem the weight to be accorded to different parts of acts.

In keeping with the need to interpret words in their context, the judges often refer to some latin maxims like ejusdem generis (general words are limited to the same
class as specific words that precede them), *expression unius est exclusion alienius* (the express mention of something excludes other things) and *noscitur a sociis* (words take their meaning from their context—from the company they keep). Context can also include conventions of the legal system as a whole. In this regard there are a number of presumptions that reflect society’s views. However, the popularity of these presumptions has fluctuated over time. For instance, the presumption that beneficial provisions ought to be read broadly initially influenced judges to favour the claims of people to welfare payments. However, more recently there has been a recognition that welfare statutes are not designed to give benefits to all. It is important that these benefits are limited to ensure that public revenue is used appropriately to benefit as many recipients as possible.

More general approaches have been developed by the judges. The predominant approach originally was the literal approach. A view that words ought to be given their plain or ordinary meaning, within their context, as suggested above. Yet the courts have recognised that the literal approach can result in an absurdity or inconsistency, particularly when the legislation contains an error. In these situations the courts applied what became known as the golden rule, which allows them to modify the words to avoid that absurdity, repugnance or inconsistency. Another rule that was initially developed was the Mischief rule. It encouraged the court to determine meaning by considering why the legislation was enacted. What mischief was the legislation trying to prevent or cure? It is this rule that eventually became known as the purposive approach—seeking to interpret legislation according to the purpose or object that the parliament was trying to achieve.

While all of these rules were readily available to the courts, the literal approach was the one most often applied. In fact, the High Court’s rigid application of the literal rule attracted much criticism in the 1970s in the income tax cases. By applying the literal rule their decisions effectively validated the use of highly artificial schemes designed to evade tax. The criticism of these decisions resulted in both a High Court decision that favoured a purposive approach and parliament enacting amendments to the statutory interpretation legislation requiring courts to take a purposive approach to interpretation.

This is not to say that the literal approach that examines the words according to their ordinary meaning is not relevant. This is still the first course of action and it certainly is appealing. Particularly for judges who are concerned about being accused of making political judgments and offending the separation of powers doctrine that is implicitly contained in the Constitution that mandates their role as one of interpretation only, leaving the parliament to make the law. However, the statutory interpretation legislation now requires the courts to consider the purpose of the statute when carrying out their interpretive role.

One thing to note about these approaches is that they are not necessarily mutually exclusive. There can be situations where a person can argue that both the literal and purposive approaches support the argument that is being made about the meaning of words.

So there are acts11 that tell judges how they should read other acts. The *Acts Interpretation Act 1901* (Cth) s 15AA provides that a construction that would promote the purpose or object underlying the act should be applied, rather than one that does not. In order to do this s. 15AB allows judges to look to extrinsic material for enlightenment. In this regard the most common documents used are explanatory memoranda and the second reading speeches that introduce the bill to parliament. Treaties and other international agreements that are referred to in the act are increasingly used as well. However, as McHugh warned:

> *Extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by that material is one that is reasonably open.*14

### STUDENT ACTIVITIES

1. The author makes the statement that ‘the law is all pervasive’. Provide three alternate examples to those given by the author that show how the law permeates the daily life of Australian citizens.

2. Why would ‘plain English’ be replacing the formal language previously used by legislators?

3. How would arguing that a word or phrase used in legislation is ambiguous, benefit a lawyer’s case?

4. Explain the phrase ‘judges use their discretion’. When can this affect the use of precedent?

It might be useful to consider an example of how extrinsic material helps provide ways of determining the meaning of words by thinking about a scenario and the application of a hypothetical Queensland act.15

Section 5 of the *Domestic Pet Registration Act 2001* (Qld) states:

> All residents of Queensland must apply, by 1 March each year, to the Pet Registration Board to register each pet owned by them.

In his second reading speech into the *Domestic Pet Registration Bill*, the Minister for Justice stated:

> ‘The purpose of this bill is to enable those people responsible for the care and control of non-productive animals to be traced in case those animals are either left neglected, or if they cause a nuisance to others’.

Consider this situation:

Martha Jones, a resident of an outer suburb of Brisbane, seeks your advice about ‘Genny’ a dog that has been left in her care over a year ago by her brother Tom who has gone backpacking overseas. Martha says she feeds, and plays with Genny, but is now not sure if Martha is the owner, for example, if she sold Genny she would formally be wronging Tom. But isn’t there a distinction between merely short term custody/care and the long-term; particularly if the formal ‘owner’ is outside the jurisdiction? Martha in fact has had dominion over Genny for two years—it could be argued that Tom in effect has abandoned or at least gifted Genny to Martha (with some implied right of return).

This would better fit the clear purpose of the law to require *annual registration*, reinforced by the Minister’s reference to ‘those responsible for . . . care and control’.

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This is not an easy issue, since ‘owner’ suggests a formal legal relationship of ownership, and this is a fairly plain legal meaning: the Minister’s casual reference to a deeper purpose of imposing duties and potential liabilities isn’t enough to destabilise that plain meaning. However with the true legal owner AWOL for two years, the purpose of an annual registration scheme requires that ‘owner’ extend to cover people in Martha’s grey area.

**The Discretion of Judges**

As we note, there is a certain amount of judicial discretion in interpreting statutes. There is an interaction between the judge as the reader and the statute as the text, which eventually results in meaning. The idea that the judge has this discretion suggests for some that a certain amount of creativity or judicial activism is involved. Yet the current Chief Justice answers this charge by stating:

> Statutory interpretation is a function which sometimes leads to accusations that individual judges, under the guise of construing a statute, are in truth amending it. . . . In practice, judges have three major sources of protection against such an accusation. First, the principles according to which disputes about the meaning of statutes are resolved by courts are reasonably well established, and generally accepted. . . . In many respects they are reinforced by acts of parliament governing the subject of statutory interpretation. . . . Secondly, the appeal process results in a fairly large measure of conformity amongst judges in their approach to statutory interpretation. Thirdly, if parliament does not like the way a statute has been construed by the courts, it has it within its power to amend the statute.

**Conclusion**

With the growth of legislation comes an increasing role for the courts to interpret what parliament is trying to say to the public and those in authority. However, this is not a mechanical process, the judge as interpreter has a certain amount of discretion or choice in determining the meaning of words and the outcome that follows. The choice is not simply one that aligns to the judge’s own wishes. There are broader contextual considerations and a set of particular rules contained in the statutory interpretation legislation that shape the judge’s thinking. This process, along with the belief in the independence of the judiciary, legitimises what might at first appear to be an arbitrary system of determining how we as a public are ordered.

**Notes**

1. For example, the law of contract.
2. Both statutes and delegated legislation i.e., rules and regulations etc.
3. Interpretation is commonly called ‘construction’—this word comes from the verb ‘to construe’ i.e., determine meaning.
7. Ibid., 455.
8. For instance s 13(1) of the *Acts Interpretation Act 2001* (Cth) deems headings to parts and division as part of the Act and so can be referred to when considering the meaning of a word or phrase within them.
9. This is a modification of the literal approach and is very rarely used since it only has very limited application.
11. It is the role of parliament to make the law, the courts to interpret the law and the executive to administer the law. This is a doctrine originally articulated by Montesquieu. The separation of powers is advocated so that no one arm of government has absolute power. The three arms of government are to be checks and balances on the others.
12. s76 of the Constitution.
13. The Commonwealth and each state have similar statutory interpretation legislation.
14. *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113
15. The following scenario and suggested answer was written by Assoc. Prof. Graeme Orr when he was teaching into a first year course—Law and the Modern State—at Griffith University, Queensland.

**Student Activities**

5. Discuss how the literal approach can assist a judge in interpreting a statute.
6. When would a judge use either the golden rule or the mischief rule to interpret a statute?
7. Explain why it is important that there exist acts of parliament that provide criteria as to how a judge should interpret a statute?
8. In the hypothetical Queensland act, identify the legal issues that emerge in interpreting the legislation.
9. Why is a judge’s discretion important in interpreting legislation?
10. Identify three sources of protection against judicial activism that are identified by the Chief Justice in the article.
11. How would the separation of powers doctrine be offended by a judge’s interpretation of a statute? Discuss:
12. Debate the topic: The language of legislation should be rigidly constructed, so as to avoid misinterpretation of the purpose of the act.
**Can the Law Keep Up with Changes in Medical Technology and Cloning?**

*by Professor Don Chalmers*

*Dean of Law*

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**Introduction**

Nowadays, the media is full of stories about medical technology. These include discussions relating to:

- medical research, to find new medicines and therapies
- human tissue transplants
- human genetic testing and research, including privacy of medical and genetic information
- assisted reproductive technology and surrogacy
- embryo research and stem cell technology
- human cloning.

All these scientific developments involve profound social and ethical issues.

Generally, scientific achievements (*science time*) always advance more rapidly than the time for public discussion and understanding (*ethics time*). The development of laws usually lags behind the science and the debates (*law time*). But the law has a major role to play balancing the protection of individual and public interests in avoiding the perils, while not holding back, these scientific developments.

**Ethics Time—Human Genetic Testing and Research**

Scientific developments in medical research have been impressive, particularly recently in the field of human genetics. Justice Michael Kirby, of the High Court of Australia, ranked molecular biology as ‘... the most important scientific breakthrough of [the twentieth] century’ above nuclear fission, interplanetary flight and informatics.

The publication in 2000 of the first draft of the three billion base pairs of the human DNA sequence marked the start of what Francis Collins (Director, National Human Genome Research Institute, USA) described as the genome era of science.

Genetic science and research throws up difficult social issues. Genetic information on one person also provides genetic information about other family members. Genetic information may provide indications about health and disease. Should this information be kept private from insurance companies, employers, immigration authorities, elite sports institutes or legal authorities?

The privacy of genetic information is an important issue and it is essential that individuals and the community have time to debate and understand new scientific breakthroughs. Law reform commissions have an important role in ensuring the law does not limp too far behind scientific developments (*MIM v Pusey* (1970) 125 CLR 388 per Windeyer J) in genetic research. The joint report by the Australian Health Ethics Committee (AHEC) and the Australian Law Reform Commission (ALRC), *Essentially Yours: A Report into the Protection of Genetic Information in Australia* (Report 96, 2003) is a classic example of a systematic scrutiny of a science and law issue, that will have profound impacts on health research, care and delivery.

The ALRC/AHEC Report was released after extensive consultation, including submissions from health professionals, professional organisations, academics and government representatives as well as community groups. The ALRC/AHEC Report made 144 recommendations across the spectrum of activities in human genetics from health care, genetic testing, discrimination in employment and insurance, DNA fingerprinting and parentage testing to human genetic databases and tissue collections. The report recommended the establishment of a special committee to oversee the implementation of the report and to monitor developments in human genetics. The Human Genetics Advisory Committee has been established within the NHMRC with this aim.

**Law Time—Prohibition of Human Cloning**

Sometimes, decisions will be made to introduce prohibitions on some scientific activities; human cloning is a good example of prohibition in science.

In 1996, a private company in Scotland created ‘Dolly’ from a somatic (body) cell taken from an adult animal and transferred it into an enucleated sheep egg (rather than fertilisation by a sheep egg and sperm). The world’s first cloned, somatic cell nuclear transfer (SCNT) animal created a frenzy of international reaction from world leaders and organisations including the United Nations (UN), World Health Organisation (WHO) and the Vatican (Catholic Church). Could this technology be used by humans to clone themselves? Cloning, in this sense, means the creation of a genetically duplicated individual. Cloning of this type can already occur naturally when identical twins are born. The use of SCNT to create a pregnancy, sometimes called ‘reproductive cloning’ has been condemned universally.

(See, for example, UNESCO Declaration on the Human Genome and Human Rights, Council of Europe Protocol on Prohibition on Cloning of Human Beings (this protocol has been incorporated in legislation in many European countries), National Bioethics Advisory Commission USA, *Cloning Human Beings* 1997 and the United Nations declaration to ban reproductive cloning, 2005.)

recommended the prohibition of reproductive cloning. This report was referred to the Australian House of Representatives Standing Committee on Constitutional and Legal Affairs (Chair, Mr. Kevin Andrews MHR) that undertook extensive public consultations. The Andrews’ Report, Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research in 2001 recommended unanimously that reproductive human cloning be prohibited in legislation.

The Commonwealth Parliament enacted the Prohibition of Human Cloning Act 2002. In the Senate debates, the reasons for banning human cloning were given as:

- uncertainty surrounding the long-term safety of cloning
- danger of cloning being used for selective breeding/eugenics
- wasting scarce health resources on an imprecise science
- a threat to notions of identity and individual autonomy.

The Prohibition of Human Cloning Act created a list of prohibited practices that included creating an embryo other than by fertilisation of a human egg with a human sperm (s 13) or other than for a pregnancy (s 14), mixing the genetic material of more than 2 people (s 15); developing an embryo outside the body of a woman for more than 14 days (s. 16), using precursor cells from an embryo to create an embryo (s. 17), creating heritable alterations to a genome (s. 18), removing a viable embryo from a woman (s. 19), creating a chimeric embryo created by combining human embryos and animal cells (s. 20) or placing an embryo in an animal (s. 21). In addition, there are offences in relation to the import and export of ‘prohibited embryos’ (s. 22) and commercial trading in human eggs, sperm and embryos (s. 23).

These offences carry heavy fines and up to 10 years imprisonment. There are also special inspectors appointed under the Act to investigate and enforce these prohibitions.

**Law Time—Regulation of Embryo Research and Stem Cell Technology**

The various reports on human cloning, noted above, all mentioned the potential therapeutic benefits of stem cells. This was acknowledged in the Andrews’ Report Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research that recorded a six to four disagreement over embryo research but agreement on the possible benefits of embryonic stem cell technology. Here, a distinction is drawn between cloning of a human whole being (‘reproductive cloning’) and genetically duplicated cells for medical research (sometimes called ‘therapeutic cloning’).

Stem cell technology involves the extraction of cells from a developing embryo but also from some adult cells. In either case, stem cells have the capacity to self-reproduce (pluripotency). Stem cells derived from human embryos (human embryonic stem cells) have attracted most attention, both ethical and scientific.

The ethical attention concentrates on the status of the embryo. The scientific attention focuses on the potential of embryonic stem cells to produce new therapies, compatible organs for transplantation, tissue to replace damaged nerve, muscle, liver, pancreas and heart cells, treatments for Parkinson’s and Alzheimer’s diseases and safe blood products.

The US National Academies Committee on the Biological and Biomedical Application of Stem Cell Research expressed that: ‘[s] tem cell research offers unprecedented opportunities for developing new medical therapies for debilitating diseases and a new way to explore fundamental questions of biology’.

Australia has had a long record of regulation of Assisted Reproductive Technology (ART) since the world’s first legislation, the Infertility (Medical Procedures) Act 1984 in the state of Victoria. The legislation in Victoria, South Australia and Western Australia dealing with ART includes provisions regulating research on embryos, for example (Infertility Treatment Act 1995 (Vic), Reproductive Technology Act, 1988 (SA) and the Human Reproductive Technology Act 1991 (WA) ). In the non-legislative states and territories, the Ethical guidelines on the use of assisted reproductive technology in clinical practice and research, 2004 (the ART Guidelines) apply.

The Andrews Report proposed a national licensing scheme for research on human embryos and recommended an end to the mixed state and territory regulatory system.

The Research Involving Human Embryos Act 2002 (Cth) provided the longest ever debate in the history of the Commonwealth Parliament. This debate was long, passionate, difficult and highly emotional. The debates raised eight themes:

- potential therapeutic benefits—of embryonic stem cell research
- use of surplus ART embryos—for research purposes, rather than destroying or allowing them to succumb
- moral status of the embryo—some argued that the embryo has the same moral status as an adult; others that the embryo has no special moral status; and, others that the embryo has some moral status, but not outweighing the interests of potentially life saving research
- adult stem cell research as a preferable alternative—adult stem cell research should precede embryonic stem cell research
- commercialisation and exploitation—possible because of commercial interests in the research
- the slippery slope to more contentious research—embryonic stem cell research may lead to human cloning
- economic benefits and scientific implications for Australia—to pursue research promote Australia’s economy, future biotechnology industry and jobs
- national legislation imperative.

**STUDENT ACTIVITIES**

1. Discuss why ‘law time’ is important in issues of medical technology and cloning.

2. Ethical issues are major concerns in the areas of cloning and stem cells. How have Australian law makers legislated in the areas of cloning and of stem cells?

The Research involving Human Embryos Act 2002 (Cth) creates a Licensing Committee within the National Health Medical Research Council that administers a national licensing scheme for embryo research in the private and public sector. Thus far, the Licensing Committee has issued only nine licences. Although the Australian research legislation is commonly referred to as the ‘stem cell’ act,
there is no mention whatsoever of stem cells in the wording of the act. The act has the following features:

- **HREC approval**—a licence applicant must have approval for the research from the Human Research Ethics Committee
- **excess embryos for licensed research**—only ‘excess’ ART embryos (i.e. embryos not to be used in ART, donated to another couple or allowed to succumb) can be used to carry out approved research
- **consent of parties**—the ART couple must consent, in writing, that their embryos are excess to their needs and that the embryos may be used for licensed research. Information sheets and consent forms must reflect these two separate consent stages
- **licensing committee approval**—the licensing committee must be satisfied (s. 21(3)) that HREC approval and all the required consents have been obtained. The licensing committee then has to consider the following matters in deciding whether to issue the licence (s21(4)):
  1. restricting the number of excess ART embryos for the research
  2. the likelihood of significant advance in knowledge or improvement in technologies for treatment as a result of the research
  3. any relevant NHMRC guidelines, particularly the *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research, 2004*
- **monitoring and offences**—the act establishes an inspectorate and a system of monitoring not only of licensed research but also any possible breaches of the cloning legislation
- **criminal offences**—apply when excess ART embryos are used without a valid licence
- **international approaches**—the regulatory scheme in Australia is similar to schemes allowing the use of excess ART embryos in the UK, Finland, Greece, Israel, The Netherlands, Singapore, Sweden and South Korea. However, some countries have banned embryo research, such as Austria, Ireland, Canada, Philippines and Germany.

**Figure 1:** How cloning works

**Keeping the Law Up-to-date With the Science—Lockhart Report**

During 2005 and 2006 Justice Lockhart and a committee reviewed the legislation and conducted a wide public debate. The report recognized that stem cell science is at a very early stage, and that there is no established standard for scientifically certifying whether an embryonic stem cell line is ‘established’ by continuing to replicate. Also, some scientists claimed there was a need to use SCNT (the ‘Dolly’ procedure) to create autologous stem cells with the potential to produce a supply of genetically altered, and therapeutically improved, cells for an individual. Autologous cells are those cells, tissues or even proteins that are reimplanted in the same individual as they come from. The *Prohibition of Human Cloning Act 2002* (Cth) originally made it an offence to create an embryo other than by fertilization of a human egg with a human sperm (s 13). The Lockhart Report recommended supporting the use of SCNT. The *Prohibition of Human Cloning for Reproduction and Regulation of Human Embryos Research (Amendment) Act 2006* (Cth) allows the licensing committee to issue a licence for the ‘creation of human embryos other than fertilisation of a human egg by a human sperm, and use of such embryos [SCNT]’, subject to the same strict conditions as for other licences.

**Conclusions**

The ALRC/AHEC Report demonstrates the importance of law reform agencies aiding the legislature in difficult scientific areas with independent, well-researched recommendations, which are informed by international developments and supported and strengthened by extensive public consultation. Report No. 96, *Essentially Yours* did not favour a single blockbuster act but rather a wide range of amendments to existing legislation, changes of professional practices, amendments to guidelines and increased enforceability of research guidelines under the oversight of the new Human Genetics Advisory Committee. As the research develops and practices are improved and perfected in some jurisdictions, the strict prohibitions in cloning legislation may require some re-consideration.

STUDENT ACTIVITIES

3. How does the Research Involving Human Embryos Act control what happens in the areas of stem cell? In your answer, discuss the various features of the act.

Legal Update

By Beth Wilson, Health Services Commissioner, Victoria

Polish Laws Banning Discussion on Homosexuality
The Polish Government is set to pass a law banning all discussion on homosexuality in its schools and educational institutions. Teachers who do not comply will face fines and possible sacking. The Polish Education minister also wants the law to be extended to all European Union Countries. This is unlikely to occur as the President of the European Union has criticized the proposed new law which could lead to discrimination against homosexuals and could inhibit information to students about AIDS. The Polish Education Minister belongs to an ultra conservative group which views homosexuality as a ‘deviance’.

Post September 11 Law
The Commonwealth Solicitor General, David Bennett QC, has angered opponents of the Government’s control orders which are being challenged in the High Court of Australia. The challenge argues that the control orders placed on Jack Thomas (dubbed by the media as ‘Jihad Jack’) are unconstitutional. David Bennett told the Australia Legal Convention in Sydney (March 2007) that opponents of the orders were ‘Luddites’ and that their thinking is ‘very September 10’. He said, ‘There are a lot of silly people around who engage in what I call September 10 thinking.’ He argues that terrorism today is different from that in the past and consequently we need stronger laws to deal with it. The Australian Council of Civil Liberties considers Bennett’s comments to be a breach of protocol because the decision of the High Court is pending.

Human Embryos Research (Amendment) Act 2006. What is the significance of this?
5. Debate the topic: Legislators should not have the power to control the therapeutic applications of science.
6. Discuss whether the law has an ethical obligation to control scientific applications within the wider community.

Legal Costs
NSW Chief Justice Spigelman has told the Australian Legal Convention that lawyers need to reign in the costs and complexity of litigation or risk being sidelined. He said legal costs are out of proportion with the value of many disputes before the courts and, ‘What is required is ‘appropriate’ rather than ‘perfect’ justice.’ He warned lawyers that if costs are not curtailed government could step in and remove some rights to litigate, as was done with personal injury cases. He pointed to actions taken by families where wills are in dispute and where the litigation gobbles up the assets to be distributed. The Chief Justice of Australia’s High Court, Murray Gleeson also criticised the costs of litigation and said, ‘Litigation is like Parkinson’s Law: work expands to fill the available time.’ He criticized the complex summing up to juries given by some judges saying, ‘A summing up to a jury is intended to be a form of communication, not a display of knowledge and certainly not an exercise in reputational self-preservation’.

New Way of Resolving Family Disputes
Family law disputes can be particularly sensitive, and the policy makers and courts have recognised this by passing the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), which implements a new way of resolving family disputes. Central to this is a compulsory family dispute resolution which must take place before the Family Court of Australia will accept an application. This means that families in dispute must consult a family dispute resolution practitioner (these used to be called counsellors or mediators), and parties must be genuine in their efforts to resolve their dispute. Compulsory family dispute resolution is not new under the Family Law Act, but this amendment changes the timing of mediation, making it occur before any court processes have started.
**WHAT IS DEFAMATION LAW?**

The law of defamation can best be described as the means that the law has developed to balance one person’s right of free speech with protection of another person’s reputation. In relation to any statement, picture, film or any other means of communication (including a posting on the internet) that refers to a person, and is made available to even one other person, the subject of the publication may argue that his or her reputation has been harmed, and that the material is defamatory, if the statement or depiction causes ordinary people to think less of the subject. The person responsible for putting the material in the public arena is entitled, in response, to rely on any one of a variety of defences which are aimed at protecting freedom of speech.

**WHERE WOULD I FIND THE LAW?**

Until early 2006, the law of defamation differed to some extent in the different states and territories and was a combination in differing degrees of legislation and judge-made law. In early 2006, all the states and territories enacted legislation, a major purpose of which is to promote uniform laws of defamation in Australia. In each of the states, the legislation is the *Defamation Act* 2005, which, in each case, commenced on 1 January 2006. In the ACT, the legislation is contained in Chapter 9 of the *Civil Law (Wrongs) Act* 2002, and commenced on 23 February 2006, while in the Northern Territory the *Defamation Act* 2006 came into force on 26 April 2006. Section numbers in the following discussion are references to the uniform legislation.

**ELEMENTS OF LIABILITY FOR DEFAMATION**

Defamation may consist of any form of communication by which a person’s reputation may be harmed. A photograph of a then prominent rugby league player in the shower was held to be defamatory, because it gave the impression that he had posed for the photo, when in fact he had no idea either that it had been taken or that it would be published in a popular magazine. Liability is ‘strict’ in that a person may be liable despite having no reason to believe that the words used have a defamatory sting. Furthermore, liability may be imposed on anyone who plays any part in making public the defamatory material, such as the proprietor of a newspaper who publishes an apparently innocent classified advertisement which proved to be defamatory, or a talk-back radio program. The only persons excused from this strict liability are those, such as newsagents, libraries and internet service providers, who have no reason to know of the defamatory nature of the material that they make public, and no capacity to exercise editorial control over that material: section 32.

**DEFENCES TO LIABILITY**

Freedom of speech is protected by a variety of defences. It is a complete defence to prove that the material is substantially true: section 25. That is, it is not sufficient to prove that a statement is literally true, if the impression it gives is false; one cannot say ‘it is rumoured that . . . ’ and seek to escape liability by proving the existence of such a rumour. A further defence is that the statement is expressed as one of the maker’s honest opinion, on a matter of public interest: section 31. When the ABC program *Media Watch* said of a *60 Minutes* segment ‘perhaps its plagiarism, certainly it’s lazy journalism’ the court held that, although that description was untrue, it was a statement of honest, if prejudiced, opinion, and therefore did not expose the ABC to liability in defamation.

Anything said in a house of parliament by a member of that house is protected absolutely, no matter how false the statement is, or with what malicious intent it is spoken. The same protection is given to anything said or written in the course of judicial proceedings by any of the participants in those proceedings: section 27. Any reports of parliamentary or judicial proceedings and other proceedings of public concern are protected from liability, so long as the report gives a fair impression of those proceedings: section 29. The other major defence, which will apply especially to the media, is that under section 30. Reports will generally be protected if they concern matters with which the public has a right to be concerned, and provided that the media outlet acted reasonably in all the circumstances in presenting the information.

**NOTES**


