

**THE COUNCIL OF AUSTRALIAN LAW DEANS GOOD
PRACTICE GUIDE TO TEACHING STATUTORY
INTERPRETATION**

Prepared for CALD by

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EXECUTIVE SUMMARY

This guide recognises that statutory interpretation is a discrete area of law of critical importance to the practice of law. It makes suggestions for teaching statutory interpretation in Australian law schools.

It suggests that attention needs to be given to laying a solid foundation early in the law degree, and ensuring that that foundation does not diminish but develops through iterative learning.

The foundation comprises learning the general principles, the general method, and the central interpretative criteria of the law governing statutory interpretation.

To ensure a student has acquired a solid foundation it suggests that law schools institute a hurdle requirement in the subject in which that solid foundation is laid down. The hurdle is a test of a student's competence to interpret legislation at that level. Only if a student passes that hurdle should a student be considered to be eligible to pass that subject.

It is suggested that opportunities for iterative learning occur in later subjects in which statutory interpretation is a major issue. These opportunities will occur if a coordinated effort is made within each law school to ensure that statutory interpretation is taught and assessed in those subjects.

The guide includes an extensive number of examples of teaching and assessment practice that are likely to foster appropriate learning and development of a student's knowledge and ability in the area of statutory interpretation.

1. OVERVIEW

1.1 The project

In August 2014 the Council of Australian Law Deans (CALD) invited a drafting committee comprising Jeffrey Barnes (La Trobe University), Jacinta Dharmananda (University of Western Australia), Jeffrey Goldsworthy (Monash University) and Alex Steel (University of New South Wales) to prepare a good practice guide to teaching statutory interpretation. Jeffrey Barnes was invited to be the lead author. The writing has however been a team effort.

The guide draws on a literature review initially developed by Jeffrey Barnes, which is available from the author.

A draft of the guide developed by the project team was discussed at the CALD meeting held at the University of Wollongong on 14 November 2014.

In the light of that discussion a further draft was discussed with members of an Advisory Group at a workshop held in Melbourne on 25 February 2015. A list of members of the Advisory Group appears at Appendix A. Other distinguished persons kindly contributed comments on the draft.¹ Following this feedback, further revisions were made to the draft.

On behalf of CALD, the committee expresses its appreciation to all persons who kindly provided information and advice in the preparation of this guide.

1.2 Sections of this guide

The remainder of the guide comprises the following sections.

Section 2 provides some context for the guide's discussion of the teaching of statutory interpretation.

Section 3 discusses the scope of the topic, statutory interpretation, from a number of perspectives.

Section 4 sets out some suggested principles to guide the teaching of statutory interpretation. It contains suggested learning outcomes for students of statutory interpretation and, in the

¹ Council of Chief Justices; Justice Mark Leeming, Court of Appeal, Supreme Court of New South Wales; the Hon Murray Gleeson AC QC.

form of general guidelines, suggestions for teaching and assessing statutory interpretation across the law degree.

Sections 5 and 6 give examples of teaching and assessment practice. Section 5 is concerned with teaching practice across the degree program. Section 6 is concerned with assessment of statutory interpretation.

Three appendices accompany the draft. Appendix A sets out the list of members of the Advisory Group. Appendix B sets out the statement on statutory interpretation issued by the Law Admissions Consultative Committee in February 2010. Appendix C sets out a select bibliography of works relating to teaching statutory interpretation, and statutory interpretation generally.

2. CONTEXT

The academic subject of statutory interpretation is affected by a number of factors, within the university sector and outside it.

Australian law schools teach law and produce graduate lawyers within a web of supportive quality assurance regulation. Through their universities, they are regulated by the Australian Quality Framework which requires generic learning outcomes for Bachelors and Masters (Extended) level programs. Through the Australian Law School Standards Committee they are able to be certified against the CALD Standards for Australian Law Schools. These standards incorporate a range of teaching and learning related matters, including the Bachelor of Laws and Juris Doctor Threshold Learning Outcomes (TLOs).

Fundamentally, Australian law schools are also regulated, through jurisdictional admitting authorities, by the prescribed areas of knowledge ('Priestley 11') set out in Sch 1 of the Law Admissions Consultative Committee Uniform Admission Rules 2014.² These list areas of legal knowledge in respect of which all graduates must have acquired and demonstrated appropriate understanding and competence if they wish to be admitted to the legal profession. Although the Priestley 11 does not specifically mention statutory interpretation as a discrete area of legal knowledge, statute law is fundamental to each of the prescribed areas.

² <http://www1.lawcouncil.asn.au/LACC/images/pdfs/Uniform_Admission_Rules_2014_-_June2014.pdf>

The huge and growing importance of statute law has been observed by many commentators, especially over the last 20 years. There are now very few areas of law that are not significantly regulated by statutory provisions. As Justice Leeming has noted:

What is commonly thought of as ‘common law’, namely, the various bodies of judge-made law, including equity and admiralty, taught in law schools and written about in law books is and always has for the most part been sourced in statute and is unintelligible without reference to statute. Most of the time, as Windeyer J said, ‘it is misleading to speak glibly of the common law in order to compare and contrast it with a statute’. It is misleading because it distracts attention from what Gummow J called the ‘supreme importance of statute law’ in most areas of conduct (for example, taxation, company law, aviation law, occupational health and safety, industrial law, bills of exchange, family law, crime, consumer protection, migration, partnership, bankruptcy, real and personal property, assignment, defamation, not to mention civil and criminal procedure). As Finn J has said, ‘we live in an age of statutes and ... it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.’ ... It is trite to say that most of what lawyers advise, counsel argue, and courts decide, is the construction and application of statutes.³

As a result it is impossible to teach law without constant reference to statutes, or to analyse judicial decisions without the meaning of provisions being central to the analysis. Students reading cases or textbooks are likely to see references to statutory provisions on nearly every page. This means that the law studied and assessed in most courses is based on legal regimes supported by statute.

The rise of statute law has affected the significance of statutory interpretation. It is a discrete body of law in at least two ways. First, the rules, principles, presumptions and canons of statutory interpretation form part of the law.⁴ Second, where relevant, the interpretative

³ Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36(3) *UNSW Law Journal* 1002, 1004-5.

⁴ See extra-curial statements to this effect in Hon Murray Gleeson AC, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *Public Law Review* 26, 27, 28; Hon J J Spigelman AC, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 769; Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans, Princeton University Press, 2005) 47. For other commentary, see F A R Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 513. That author cites, among other sources, *Harbert’s Case* (1584) 3 Co Rep 13b, and William Blackstone, *Commentaries on the Laws of England* (OUP, 1st ed, 1765) i 68.

criteria are binding⁵ and a judge or other interpreter has a duty to apply the criteria to the best of his or her ability.⁶

The challenge for Law Schools is not to introduce the teaching of statutory interpretation into the curriculum – it is currently taught. It is instead to ensure the foundation is sufficiently solid, to enable ongoing development of the knowledge and skills associated with statutory interpretation throughout the degree, and to ensure the student’s understanding of that solid foundation does not diminish but is developed appropriately.

Developing knowledge and competence with statutes and their interpretation should not be seen as an either/or choice in competition with other areas of study. It can instead be seen, like case law analytical skills, as immanent in the whole curriculum. Thus knowledge and skills of statutory interpretation should be developed throughout the curriculum to support attention to statutory law as well as the development of an ability to deal with new or previously unfamiliar statute law.

University study exists within a wider learning context. While students at university learn the fundamentals of law and legal practice, learning the law extends beyond law school — to Practical Legal Training, to Mandatory Continuing Legal Education, and as part of legal practice itself. To be a lawyer is to enter a lifelong learning process. More than many other areas of study, law changes constantly, and sometimes dramatically. Statutory interpretation is not immune from such pressures. However, law schools have a vital and fundamental role: graduates must be equipped with the skills needed to enter the legal profession and related fields of practice, and they must be able to deal competently with such change. A primary role of Law School then should be to ensure that graduates have a solid understanding of foundational legal knowledge and skills. A close affinity with statute-based law and its interpretation is one such foundational area of knowledge and skill.

3. WHAT IS STATUTORY INTERPRETATION?

From a doctrinal perspective, ‘statutory interpretation’ refers to the body of law governing the determination of the legal meaning and effect of legislation. For the purposes of this guide, the major components are described in section 4.2 below. A number of scholarly works

⁵ Barak, above n 4, 47.

⁶ Bennion, above n 4, 13, 435.

elaborate that body of law.⁷ The application of statutory interpretation doctrine is illustrated authoritatively in the reasons for decision of superior courts. However, it would be misleading to see the use and relevance of statutory interpretation as merely ‘courtroom knowledge’. Statutory interpretation is routinely required outside the courtroom and is an essential component of legal practice and the implementation of the law more generally. Indeed, it is usually the first response to a legal issue on which there is no direct case law authority. The courts remain crucial, of course.⁸

Despite the ready answer that, from a doctrinal perspective, may be given to the question ‘what is statutory interpretation?’, answering the question from the perspectives of the learner, the law teacher, and the scholarly researcher, is not as straightforward as first appears.

From a law teacher’s perspective the challenge is in teaching the law to the newcomer. The law teacher quickly realises that contextual material is crucial to explain the law. Indeed it could be argued that implicit in the knowledge and skills of what is usually thought to be ‘statutory interpretation’ are broader understandings. A law teacher will be sensitive to the need to make the students aware of a number of these contexts and indeed will incorporate many of them into any teaching of ‘statutory interpretation’.⁹

Perhaps the most basic is comparison of the interpretation of the written word in statutes with the interpretation of the oral word in ordinary speech.

A basic legal context is afforded by the general law, and the comparison with the development of the common law. As noted by the High Court,

⁷ Oliver Jones (ed), *Bennion on Statutory Interpretation* (LexisNexis Butterworths, 6th ed, 2013); Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014); Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles: The Laws of Australia* (Thomson Reuters, 2014). The last-mentioned work replicates material on statutory interpretation in Perry Herzfeld, Thomas Prince and Stephen Tully, *Interpretation and Use of Legal Sources* (Thomson Reuters, 2013) and in *Laws of Australia*, Title 25.1 (Lawbook). Smaller works include F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP, 2009); Michelle Sanson, *Statutory Interpretation* (OUP, 2012); Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 9th ed, 2015) chs 10-14; Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 2nd ed, 2007).

⁸ As Justice Brennan noted, ‘[The lawyer should always have] his eye cocked over his shoulder, so to speak, to see how the Court would respond to what he is doing’: The Hon Mr Justice Brennan, ‘Ministers of the Third Branch of Government’, An address delivered to the Young Lawyers’ Section of the Law Society of New South Wales, Sydney, 29 May 1981.

⁹ As there are numerous explanatory contexts, the following is not to be taken to be an exhaustive statement.

... the judicial task in statutory construction differs from that in distilling the common law from past decisions.¹⁰

More specifically, there is a raft of related topics that fall under the broad subject of ‘statute law’ with which statutory interpretation is inextricably linked. Any course on statutory interpretation would benefit from their prior study or their inclusion. These should include, for starters, the elements of Acts and other pieces of legislation, such as definition provisions and the like.¹¹

Also necessary is an outline at least of the processes that bring about statute law — in particular the parliamentary processes: how legislation is developed and enacted.¹² Included in these processes is the preparation of legislation, or legislative drafting. Drafting and interpretation affect each other and a knowledge of the problems that confront drafters and the techniques they employ can better inform the interpreter. If students experience legislative drafting they are more likely to appreciate each word and each technique that the drafter has employed. Finally, at a more advanced level in the legislative process are the processes involved in the implementation of the law.¹³

More widely still, but still close to the heart of statutory interpretation, there are the events and processes that in time cause doubt to arise in legislation. It is simplistic to see the cause of doubt about the meaning of legislation merely in an ambiguity in the meaning of the words concerned. There are many deeper causes and a wider literature on it.¹⁴ As well as problems in language, this literature takes in conditions arising prior to the creation of the rule,

¹⁰ *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, 661 [40].

¹¹ See Cook et al, above n 7, ch 9.

¹² For an introduction to the formal processes, see Kath Hall and Claire Macken, *Legislation and Statutory Interpretation* (LexisNexis Butterworths, 3rd ed, 2012). For a policy maker’s perspective on the development of legislation, see Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen and Unwin, 5th ed, 2013). An official account of the legislative process is Department of Prime Minister and Cabinet (Cth), *Legislation Handbook* (1999) at <<https://www.dpmc.gov.au/pmc/publication/legislation-handbook>>, and state equivalents. See also *House of Representatives Practice* (6th ed, 2012) at <http://www.aph.gov.au/about_parliament/house_of_representatives/powers_practice_and_procedure/practice6> and *Odgers’ Australian Senate Practice* (13th ed) at <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>

¹³ For a recent examination, see Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010). For several perspectives, see Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012). For a classic, global perspective of the legislative process, see Ross Cranston, *Law, Government and Public Policy* (Oxford UP, 1987) ch 1.

¹⁴ For a synthesis, see Jeffrey Barnes, ‘Sources of Doubt and the Quest for Legal Certainty’ (2008) 2 *Legisprudence: International Journal for the Study of Legislation* 119.

difficulties and errors arising at the rule-making stage, conditions occurring after the creation of the rule, and special features of the particular case.¹⁵

As an aside, understanding the legislative process is of great significance to many lawyers in private practice, to those involved in developing public policy, and to those in business environments who wish to influence the development of legislation.

In short, the learning of “statutory interpretation” requires students not only to develop a mastery of the body of law, but also awareness of a range of explanatory contexts.

Finally, statutory interpretation is a scholarly field of research, analysis and commentary. A teacher’s scholarly interests will involve them in examining some of the burgeoning scholarship in this field,¹⁶ and that scholarship will in turn inform their approaches to teaching. In particular, students should be aware that, as a field of law and scholarship, statutory interpretation is dynamic rather than static. Examples of recent scholarly debate include:

- The sense in which legislative intention is ‘objective’ rather than ‘subjective’, and whether it should be regarded as a useful fiction or a real phenomenon.¹⁷
- The extent to which courts should give priority to textual meanings as opposed to purposive considerations. A perceived tension between the ‘letter’ and the ‘spirit’ of written laws has been a staple of western jurisprudence for centuries and a lively debate between ‘textualists’ and ‘purposivists’ continues to flourish in scholarly journals.¹⁸

Discussion is not confined to scholarly journals. Issues in the case themselves include:

¹⁵ William Twining and David Miers, *How to Do Things with Rules* (Cambridge UP, 5th ed, 2010) ch 6.

¹⁶ For a selection, see Appendix C.

¹⁷ See, eg, these recent explorations: Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36(1) *Sydney Law Review* 39; Joseph Campbell and Richard Campbell, ‘Why Statutory Interpretation is Done as it is Done’ (2014) 39 *Australian Bar Review* 1; Chief Justice Robert French, ‘2011 Goldring Memorial Lecture: The Judicial Function in an Age of Statutes’, Wollongong, 18 November 2011; Stanley Fish, ‘Intention is All There is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law’ (2008) 29(3) *Cardozo Law Review* 1109; Daniel Greenberg, ‘The Nature of Legislative Intention and its Implications for Legislative Drafting’ (2007) 3 *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 6.

¹⁸ See, eg Stanley Fish, ‘There is No Textualist Position’ (2005) 42 *San Diego Law Review* 629; Stanley Fish, ‘Fish v Fiss’ (1984) 36 *Stanford Law Review* 1325; Owen Fiss, ‘Objectivity and Interpretation’ (1982) 34 *Stanford Law Review* 739.

- When it is appropriate to find implications.¹⁹
- The relevance of extrinsic aids to interpretation, especially second reading speeches and parliamentary debates.²⁰
- The admissibility of international materials such as the International Covenant on Civil and Political Rights.²¹

4. SUGGESTED PRINCIPLES TO GUIDE TEACHING OF STATUTORY INTERPRETATION

4.1 Learning outcomes

In its 2010 statement on statutory interpretation the Law Admissions Consultative Committee (LACC) set out a number of appropriate learning outcomes for law students²² (see Appendix B). The preparation of this guide has been informed by that statement. Building on the principles set out in the LACC statement, set out below is an expanded set of learning outcomes for statutory interpretation and related principles of statute law.

1. Understanding the legislative process and identifying applicable legislation

A law graduate should be able to:

- (a) show understanding of the nature and elements of the legislative process, and the structure and components of statutes and delegated legislation;
- (b) use appropriate legal research techniques to locate, for the purposes of solving a legal problem, the text of a legislative provision in force at a particular time in a particular jurisdiction.

¹⁹ *Taylor v Owners – Strata Plan No 11564* (2014) 306 ALR 547; *Director of Public Prosecutions v Leys* (2012) 296 ALR 96.

²⁰ See, eg, Hon Keith Mason, ‘The Intent of Legislators: How Judges Discern It And What They Do If They Find It’ (2006) 27 *Australian Bar Review* 253; Hon Justice Susan Kenny, ‘Constitutional Role of the Judge: Statutory Interpretation’ (2014) 1 *Judicial College of Victoria Online Journal* 4.

²¹ Compare the views of Gleeson CJ and Kirby J in *Coleman v Power* (2004) 220 CLR 1, 27-30 [17]-[24] (Gleeson CJ); 91-6 [240]-[249] (Kirby J).

²² This statement appears at <<http://www1.lawcouncil.asn.au/LACC/images/pdfs/StatementonStatutoryInterpretation.pdf>>

2. General principles of interpretation

A law graduate should be able to show understanding of:

- (a) the distinction between interpretation and amendment, and the constitutional principles that underlie that distinction, especially the separation of powers and legislative supremacy in law-making;
- (b) the central organising concepts of legal meaning and legislative intention;
- (c) the modern approach to statutory interpretation involving consideration of text, context and purpose, following which the interpreter identifies, weighs and assesses the interpretative criteria and principles that are relevant to defining and resolving the problem at hand; and
- (d) the key historical developments relating to statutory interpretation, both before and after the institution of the ‘modern approach’ to statutory interpretation in the 1970s and 1980s.

3. Aids to interpretation

A law graduate should understand, and be able to make appropriate use of, the various aids to statutory interpretation authorised by law, including:

- (a) the intrinsic guides to interpretation offered by the provision concerned and by the remainder of the Act, including particular components of the relevant legislation;
- (b) the relevant Commonwealth, State, or Territory Interpretation Act;
- (c) the interpretative requirements of other relevant Acts of general application, such as a charter of rights;
- (d) pre-existing, related, or similar statutes and common law doctrines;
- (e) the interpretative principles and presumptions developed by the courts, including the principle of legality, the presumption against retrospectivity, and implied repeal;
- (f) extrinsic (especially parliamentary and international) materials;
- (g) precedents in comparable cases;
- (h) other contextual factors authorised by the law, including the consequences of alternative constructions (such as absurdity or injustice).

4. Deploying interpretative techniques

A law graduate should be able to deploy appropriate methods in the course of solving an interpretative problem, including:

- (a) beginning with consideration of the text of the Act concerned;
- (b) drawing on a reading of the whole Act, and its context and purpose, to determine if there is in fact an interpretative issue or problem, and, if so, what is the provision whose meaning is in doubt;
- (c) determining whether the statutory provision in question is open to more than one interpretation;
- (d) identifying and articulating alternative constructions (the rival contentions as to the legal meaning of a provision);
- (e) determining when a non-grammatical interpretation is permitted, and in particular, when drafting errors may be corrected, implications permitted, and words ‘strained’ or ‘read down’; and
- (f) making a considered choice between alternative constructions of a legislative provision.

5. Special interpretative issues

A law graduate should understand, and be able to handle adequately, problems raising special interpretative issues, for example:

- (a) determining whether a statutory power is discretionary or obligatory, either generally or in the circumstances of the case;
- (b) determining the consequences of non-compliance with a statutory provision;²³
- (c) determining the applicability of the presumption that fault elements are implied into statutory offences, and, if so implied, what those elements are;

²³ For example: whether, if a procedure or other requirement regulating the exercise of a statutory power is breached, the exercise of the power is invalid; whether a contract that is inconsistent with a statute is void or unenforceable; and whether the defence of illegality is available in tort when a claimant was involved in a criminal enterprise prohibited by statute.

- (d) determining whether some other substantive surrounding or ancillary law, such as the principles of natural justice, is implied in a legislative provision;
- (e) determining the scope of a statutory power to make delegated legislation, in order to determine the validity of delegated legislation purportedly made under that power;
- (f) determining the legal meaning of a provision in the case of conflicting statutory provisions; and
- (g) determining the correct application to the facts of a broad legislative term, such as a ‘reasonable’ requirement.

6. Written advice

A law graduate should be able to give a reasoned opinion as to the appropriate meaning of a legislative provision, and as to the correct application of the provision to a given set of facts.

4.2 Teaching across the degree program

Law school curricula are arranged in different ways, and taught to differing student cohorts. Preserving a diversity in teaching statutory interpretation is thus important, and the learning outcomes above may be achieved in different ways. At the same time, some basic ideas seem particularly important and should exist in any approach to teaching statutory interpretation. These ideas may be arranged, for convenience, under ‘teaching’ (see below) and ‘assessment’ (section 4.3).

This guide suggests that the teaching of statutory interpretation should be approached in two main ways: first, by laying a solid foundation near the beginning of legal study, and secondly, by providing subsequent opportunities for iterative learning. Each is now elaborated.

A solid foundation

Competency cannot be built on a cursory overview of the law. As mentioned above,²⁴ statutory interpretation is more than a skill; it is a discrete body of law.

A solid foundation needs to be laid down. Such a foundation includes the general principles of statutory interpretation and statute law, the general method of statutory interpretation, and the central interpretative criteria of the law of statutory interpretation.

²⁴ See section 2 Context.

General principles or concepts of statutory interpretation

The general principles include:

- Where more than one construction of a law is available, there is no simple formula for resolving the dispute. The process of interpretation is not the application of any rule but involves a multifactorial assessment.
- Interpreters cannot select, from the relevant interpretative criteria, which criterion or criteria to apply; rather, a judgment is made on the basis of all of the relevant criteria.
- The object of statutory interpretation is to arrive at the presumed intention of the legislature. Put another way, it is the duty of the court to give the words in doubt the meaning which the legislature is taken to have intended them to have (the legal meaning).
- The context of the provision concerned (as well as the provision itself) is always to be considered. If ascertainable, the legislative purpose must be taken into account. As a result the relevant criteria will vary according to the problem at hand.
- While parliamentary materials may support an available construction, the court is not a mere 'reflecting mirror' of a construction given to the provision in question by a member of the Parliament or the government.
- Interpretation must be text based.

And standing behind these general principles are constitutional principles that, among other things, inform the distinction between interpretation and amendment. These principles include the separation of powers and legislative supremacy in law-making.

A general method

Neither common law nor statute law provides, nor could reasonably be expected to provide, a precise method of statutory interpretation in terms of a universally applicable 'rule', 'approach' or formula. Consequently there is no single approach in terms of an interpretative factor or even set of factors that can uniformly be applied to each and every case that may arise with respect to a diversity of statutes. As Justice Crennan notes, the legal interpreter works *up* from problems rather than imposes a one-size-fits-all solution:

It is the problems which are thrown up by the cases, and the particular statutes under

consideration in individual cases, which determine which approach is useful, rather than it being the other way round.²⁵

However, a *general* method can be derived from the approach of Australian courts. That general approach is a critical framework within which individual interpretative criteria are deployed. Knowledge of the general method enables an interpreter to understand the overall process by which statutory meaning is constructed.

Without being definitive, key aspects of the general method include:

- locating the provision in question;
- reading it in context;
- identifying the relevant and multiple interpretative criteria for the problem at hand;
- critically analysing how and to what extent those factors assist in determining the legal meaning of the provision;
- formulating opposing and available constructions of the provision in the light of the indications of meaning gathered so far; and,
- after comparing the support each rival construction accrues from the interpretative factors, making a judgment as to which of the constructions, on balance, carries more weight and is to be regarded as expressing the legal meaning.

It is true that such a general method, incorporating a multifactorial approach, is rarely, if ever, explicitly pronounced in full in the case law. However, this is not unusual in the law. To take just two examples, the law of judicial review of administrative action and the law of negligence are rarely, if ever, fully enunciated in a single case. Judging involves only the reasoning and decision-making that is relevant to the facts of a particular case. Inevitably, a general underlying theory or structure will be assumed. So the lack of convenient encapsulation does not mean that the law of judicial review of administrative action, the law of negligence, or the general method of statutory interpretation, do not exist.

However the general method underlies the case law. A key aspect of teaching statutory interpretation is to assist students in identifying how particular cases relate to a general

²⁵ Justice Crennan, 'Blackstone's "Signs" and Statutory Interpretation', CLE Lecture, The Victorian Bar, 28 November 2007 at <<http://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-crennan-ac>> 11-12.

method, and particularly when the general method is not explicitly labelled. Helpful guidance as to the general method applying in Australia and other common law legal systems can be found in articles and texts,²⁶ as well as of course in the case law itself. A particularly useful guide for identifying relevant interpretative criteria is expounded in an article by Justice Susan Glazebrook.²⁷

As regards the key component in the general method that a multifactorial approach be taken, rather than a single cure-all, approach or formula, the following statements by the High Court are indicative:

There is, of course, **no simple formula** for determining what is a ‘contrary intention’ for this purpose ...²⁸

The legitimate endeavour of the courts is to determine what inference really arises, on a **balance of considerations**, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.²⁹

the question as to the operation of the statutes remains a matter to be gleaned by reference to legislative intention. That intention is to be extracted ‘from **all available indications**’.³⁰

²⁶ Bennion, above n 4, Appendix A, gives a detailed version of the general method. For a short statement of that version see ‘the basic rule of interpretation’ at section 193 (p 544): ‘The basic rule of statutory interpretation is that the legislator’s intention is taken to be that in any case of doubtful meaning the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.’

²⁷ Justice Susan Glazebrook, ‘Filling the Gaps’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 153, 169-76. For an illustration of this method, see Jeffrey Barnes, ‘How Statutory Interpretation Sustains Administrative Law’ (2015) 22(3) *Australian Journal of Administrative Law* 163.

²⁸ *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) 79 ALR 509, 512 per Mahoney JA, cited in *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40, 64 [93] (emphasis added).

²⁹ *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 per Kitto J, approved in: *Singh v Commonwealth* (2004) 222 CLR 32, 335-6 [19] per Gleeson CJ; *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393, 407 [51]. (Emphasis added)

³⁰ *Commissioner of Police v Eaton* (2013) 252 CLR 1, 19 [46] per Crennan, Kiefel and Bell JJ, citing *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 553-4; emphasis added.

Central interpretative criteria

The courts deploy an extensive range of interpretive criteria. Those important for a foundational understanding of interpretation (as noted in the suggested Learning Outcomes) include:

- (a) the intrinsic guides to interpretation offered by the provision concerned and by the remainder of the Act, including particular components of the relevant legislation;
- (b) the relevant Commonwealth, State, or Territory Interpretation Act;
- (c) the interpretative requirements of other relevant Acts of general application, such as a charter of rights;
- (d) pre-existing, related or similar statutes, and common law doctrines;
- (e) the interpretative principles and presumptions developed by the courts, including the principle of legality, the presumption against retrospectivity, and implied repeal;
- (f) extrinsic (especially parliamentary and international) materials;
- (g) precedents in comparable cases; and
- (h) other contextual factors authorised by the law, including the consequences of alternative constructions (such as absurdity or injustice).

Teaching formats

The gaining of a solid foundation is compatible with a range of program structures. A solid foundation might be gained in: part of a first year subject (providing sufficient time is allocated), across two subjects, or in a specific subject devoted entirely to statutory interpretation. Of course, the more time that is devoted to developing a foundation, the more likely it is that the foundation will be effectively laid down and learnt.

Iterative development

If a solid foundation is provided for students in their introductory subjects there is ample opportunity for developing the knowledge and skills of statutory interpretation throughout the curriculum and in most assessment. However, absent a solid foundation, attempts at development in later substantive subjects are likely to flounder.

The literature on statutory interpretation, and teaching experience, indicate that students need more than a once-off introduction, however long it is. Of equal importance to the laying down of a solid foundation is the opportunity for students to practise and develop the skills and knowledge of statutory interpretation in substantive subjects so that, when they graduate, they may be competent practitioners in those subjects. Competency cannot be maintained simply through osmosis. Students need to learn and re-learn statutory interpretation as they progress through their degree. Otherwise the ‘solid foundation’ will diminish.

A second rationale for iterative development is to broaden the scope of exposure to statutory interpretation. A single once-off subject on statutory interpretation, or substantial exposure to that law in one or more subjects offered early in the curriculum, will not be able to address all the law of interpretation. Part of that law comprises special interpretative issues. A number are listed in the suggested Learning Outcomes (section 4.1). Others are listed below in the Examples of Teaching Practice (section 5).

A third rationale for iterative development is to enhance student learning of substantive subjects. Utilising techniques of statutory interpretation in exploring areas of the subject not well trodden by case law can show how legal issues in the subject are not fully resolved, but remain at large.

Iterative development will not occur in a systematic and consistent way without considerable coordination by law schools and leadership by their Education Committees, Heads of School or Deans. While each Law School will have its own approach, it is likely to involve mapping of statutory interpretation across the curriculum, including: identification of which subjects will teach and assess statutory interpretation; and how it will be taught and assessed. In particular, decisions will need to be made about the subjects that will teach special interpretative issues that have not been covered in the subject or subjects laying down a solid foundation (see section 4.1). It is recognised that appropriate iterative development cannot occur without ensuring the teachers are appropriately skilled. Again, this is an issue for Law Schools to consider as part of their professional development initiatives, or staff research goals. The Australian Law Teachers Association or CALD might be able to provide sector-wide assistance or resources. There might also be synergies with the profession’s own efforts to update practitioners on statutory interpretation developments.

Capstone subject

By the final year of the degree, students are more mature in their legal studies and have a deeper understanding of a range of subjects and of the legal system. A ‘capstone’ subject provides an ideal platform for students to supplement, reinforce and consolidate their learning to date — the solid foundation early in the degree and the range of iterative development across the degree. It allows them to demonstrate the level of competence in statutory interpretation that is expected of a law school graduate. Teaching interpretation at the capstone stage provides students with an opportunity to bring together, as experienced law students, method, knowledge and skills. Given the central role of statutory interpretation in legal practice (discussed at the start of this Guide), providing this holistic and systematic instruction can assist in ensuring that students have the satisfactory level of knowledge and skills needed for practice.

Teaching at the capstone level can be by way of a dedicated capstone subject (which might also include teaching of interpretation of other legal instruments) or be integrated with another capstone subject. Such teaching should include one overarching assessment or a number of assessments that together demonstrate competence.

4.3 Assessment

Not only is assessment of statutory interpretation critical at the ‘solid foundation’ stage of the law curriculum, it will drive learning in later substantive subjects. If final exams or mid-session assessment involve students receiving marks based on their employment of knowledge and skills in statutory interpretation, students will have an incentive to improve their knowledge and skills in that area. Setting such tasks in assessment will also significantly encourage teachers to ensure students are prepared for such forms of assessment, thus re-emphasising the importance of the knowledge and skills in statutory interpretation throughout the curriculum wherever statute law is important.

Some guidelines on assessing statutory interpretation are suggested below.

(1) Where appropriate, assessment tasks are authentic

‘Authentic assessment’ has been defined as

engaging and worthy problems or questions of importance, in which students must use knowledge to fashion performances effectively and creatively. The tasks are either replicas of

or analogous to the kinds of problems faced by adult citizens and consumers or professionals in the field.³¹

In relation to statutory interpretation, it means requiring students to interpret either actual legislation or realistic made-up legislation. Realism is enhanced if students are required to read all the relevant legislation and extrinsic material.

(2) There is no one particular format for assessing statutory interpretation

Authentic and advanced assessment of statutory interpretation can occur in a range of formats. In addition, there are many other forms of assessment that can usefully complement and support the major statutory interpretation assessment tasks, particularly for formative (feedback) purposes. A range of these major and supporting assessments is suggested below in section 6 Examples of Assessment Practice. In all cases, it is important that the marking criteria require reasonably sophisticated demonstration of statutory interpretation principles and skills.

(3) Students should be required to think for themselves

Assessment should avoid giving students questions which are already answered in the case law. By requiring students to think for themselves the assessment not only tests knowledge of interpretative criteria, but also the students' ability to appropriately use them in interpretation. This builds competence with interpreting previously unseen legislation when in practice.

(4) Students are to locate the legislation themselves

This way, students practise and, if necessary, develop their research skills. It also prepares them for practice.

(5) Students are to locate and consider extrinsic materials

Even though extrinsic materials may not be relevant in a particular case, let alone determinative, access to such materials is a well-settled part of interpretative practice.

These days, counsel are expected to have checked extrinsic materials to see whether they contain anything of relevance.³²

³¹ Jon Mueller, 'The Authentic Assessment Toolbox: Enhancing Student Learning Through Online Faculty Development' (2005) 1(1) *Journal of Online Learning and Teaching* at <<http://jolt.merlot.org>>. Mueller gives several reasons why authenticity is important in higher education. Authentic assessment helps students learn how to perform the meaningful tasks they will encounter upon graduation. It addresses student concerns as to when they are going to use the knowledge and skills that form part of the curriculum. Doing an authentic task enables students to see the direct application of their learning. And the judgements students make in performing authentic assessment enable students to add to their learning.

Extrinsic materials inform the reader of the background to the legislation, including what are regarded as the mischief and the general underlying purposes. Locating these materials also develops students' research skills.

(6) Account is taken of the level at which the student is currently studying

As far as possible the subject matter of the legislation should be accessible to the students concerned, taking into account that students are expected to study, and be informed by, extrinsic materials.

If a student is in first year, little knowledge of background law (common law and legislation) can be assumed. But students can be prescribed particular cases to assist them to acquire a certain proficiency.

It can be assumed that students in second and later years will have a background in certain legal areas of knowledge. In this case, problems can assume that knowledge. If these students have not come across an area of common law or statute law that is relevant to a statutory interpretation problem, the teacher can prescribe appropriate background reading.

(7) Statutory interpretation exercises require consideration of surrounding case law

As case law is commonly an interpretative aid, statutory interpretation opinions should give students experience in using cases in this regard. The case law might be a case interpreting a different but comparable provision in the Act in question, a case interpreting a comparable provision in the predecessor Act, or a case interpreting a comparable provision in another Act. Or the case might be a decision on the background common law.

(8) The knowledge and skills to be assessed should vary according to whether the subject is at the solid foundation stage, the doctrinally-applied stage, or the capstone stage of the curriculum

At 4.1 of the guide desirable learning outcomes for students of statutory interpretation are set out.

Since elements 1-4 of that definition broadly relate to the building of a solid foundation, it is suggested that assessments measure whether those outcomes have been met.

³² Hon Murray Gleeson AC, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20(1) *Public Law Review* 26, 32.

Since element 5 relates to special interpretative issues, it is suggested that, if not covered in a subject or subjects laying the solid foundation, assessments in later substantive subjects measure whether those outcomes have been met.

(9) If statutory interpretation is part of a 'solid foundation' subject offered early on in the law degree, a hurdle requirement is appropriate to ensure that students who continue beyond that subject are only those who have demonstrated basic competency in the capacity to handle and interpret statute law

Normally, a student passes a subject if the student achieves an overall pass mark or higher. This may occur even though a student has performed an important assessment task unsatisfactorily. A hurdle requirement imposes an additional requirement for what constitutes a pass in the relevant subject. If the student does not reach a certain level in a piece of assessment examining a particular area of knowledge and skill (such as statutory interpretation), though the student has achieved a provisional pass overall, the student is required to pass additional assessment in the particular area in order to be accorded an overall pass in the subject.³³

If law schools do not set such a hurdle requirement in relation to statutory interpretation some students are likely to encounter difficulties in later subjects in which statutory interpretation is taught and assessed. Teachers in those later subjects will also wish to assume that basic competency has been achieved. Setting an interpretative task as a hurdle requirement ensures that students do not progress in the law degree until they have acquired a basic competency in statutory interpretation. It also ensures they are equipped to tackle more specialised issues of interpretation that arise in particular substantive subjects such as Criminal Law, Constitutional Law and Administrative Law.

³³ For example, a subject might contain a number of assessment tasks for which a student may be awarded a mark out of 100, and one of those tasks might assess foundational competence in statutory interpretation. If so, a hurdle might be 50% of the marks awarded in the assessment task that assesses statutory interpretation. If a student provisionally achieves 50 or more marks out of 100 total marks in the subject, but fails the hurdle (that is, the student is awarded a mark that is less than 50% for the hurdle assessment task) the student will need to undertake additional assessment in that particular area. Only if the student passes the hurdle in that additional assessment (that is, is awarded a mark that is 50% or higher for that additional assessment) will the student be awarded a pass in the subject.

5. EXAMPLES OF TEACHING PRACTICE

5.1 At the foundational stage

The foundations of statutory interpretation can be taught discretely, whether in a specific or stand-alone subject, or in a broader subject or combination of subjects.

Traditionally, students have been introduced to parliament, statutes and statutory interpretation in their very first unit, which also provides a general introduction to law, including the basic structure and institutions of the legal system and the doctrine of precedent. In this first introduction, students typically learn the nature of law-making and the relationship between Parliament and the courts, the structure of Acts and regulations, and the general principles and presumptions used in interpreting statutes. Students are usually taught how to find statutes, the classification of statutes (private/public), the interaction between common law and statute, the interpretative criteria that were traditionally used in statutory interpretation (literal rule, golden rule etc.), grammatical conventions such as *expressio unius*, and other central interpretative criteria. They are shown how the modern approach to statutory interpretation modifies traditional approaches, and are introduced to the Interpretation Acts of the States and Commonwealth. This movement from simple to complex within a historical context helps students understand the evolving nature of statutory interpretation.

To be effective however, this approach to laying down a solid foundation in statutory interpretation must include two things. One is the general method of statutory interpretation (see section 4.2 of this guide), which ensures their learning will be organised into a coherent and effective framework. The other is the provision of formative opportunities to practise that method.

It is important to recognise that students learn skills by using them rather than by hearing about them. At this stage, therefore, class exercises should involve some ‘hands on’ student consideration of practical problems of statutory interpretation. At this early stage in the law degree, emphasising the relevance of interpretation of statutes to the students’ learning and broader professional practice is also important.

Alternatively, in some law schools statutory interpretation is covered over two sequential, single-semester units. For example, a second-semester unit is devoted to introducing students to the basic principles of public law, showing how they shape the principles of statutory

interpretation. In this way, principles introduced in the first semester introductory unit are studied in more depth and detail in light of their foundations in constitutional principles (the separation of powers and legislative supremacy in law-making). In this way students learn how legitimate statutory interpretation requires an appreciation of the appropriate jurisdictional boundaries between the three arms of government under the constitution. Such a unit may explore in more depth difficulties in distinguishing between the interpretation and amendment of statutes³⁴ by studying examples of legitimate non-literal interpretation. The latter includes the correction of drafting errors, consideration of the principle of legality, and techniques of implying or ‘reading in’ of words. This requires exploring in more depth the nature and role of legislative intention and statutory purpose (including their ‘objective’ nature) and the use of extrinsic materials.

A further alternative is to combine a first semester introductory unit with a compulsory unit devoted entirely to statutory interpretation, which may be taught either in the second semester of first year or in the second year of study. There are already several law schools that provide a unit dedicated entirely to statutory interpretation and related issues early in the degree. This unit covers, in a comprehensive fashion, the fundamental principles, the general method of statutory interpretation, and the interpretative criteria. This approach aims to ensure that students have a systematic foundation for the remainder of their degree. It permits students ample opportunities for practice and it gives students the opportunity to develop a level of sophistication in their interpretative skills.

Although the importance of a solid foundation which informs students for later years should be recognised, it can be misleading to suggest a precise amount of time that should be spent on statutory interpretation in this early phase. This arises from the variability in the way classes are taught and semesters are timetabled across Australian law schools. Whatever the arrangement, however, it is good practice for law schools to ensure their students have achieved basic competence at this early stage. This assurance will occur either through the student being required to pass a dedicated statutory interpretation subject or through a hurdle requirement imposed in a broader subject in which the foundations of statutory interpretation are taught (see 4.3 Assessment, above).

³⁴ For example, as discussed by the High Court in *Momcilovic v the Queen* (2011) 245 CLR 1.

5.2 At the doctrinally-applied stage

Of equal importance to establishing a solid foundation is what is taught throughout the degree by way of refreshing and deepening knowledge that is imparted in the first year of study. There are too many possibilities for the embedding of statutory interpretation for any attempt at comprehensive description. Some units are more suited to the deeper study of particular aspects of statutory interpretation than others, but in all subjects it is important to emphasise the principles and techniques of interpreting legislative provisions when they arise. For statutory interpretation to be successfully embedded throughout the curriculum, refreshment, reinforcement and deepening of student understanding of key principles should be a feature of the curriculum as a whole. This may entail some repetition in the coverage of central principles and key issues.

In what follows there are set out a number of examples of particular emphases that could be taken in individual subjects and of the way critical readings of statutes can be central to those subjects. These examples are not exhaustive but illustrate what is possible. They are drawn from material provided by a number of different law schools across Australia. In addition to the subjects below, the study of many electives would benefit from analysing statutory interpretation issues.

Criminal Law

- introduction to whole Acts and, in some jurisdictions, Codes
- examination of the interpretative principles governing the implication of fault elements, including in relation to strict liability offences
- use of common law presumptions, such as the presumptions relating to retrospectivity and the principle of legality, and judicial approaches to genres of statutes (such as penal statutes)
- analysis of the relationship between common law and statute, such as through sentencing laws and the concept of consent.

Torts

- interaction between statutory compensation schemes and the common law of negligence

- detailed interpretative analysis of a whole civil liability Act, including the use of extrinsic material (such as a second reading speech) and judicial interpretations of that Act using the doctrine of precedent
- case study of the development of a piece of legislation, requiring students to identify: the policy behind the law; the political, drafting and legal issues behind the law; and the parliamentary compromises required to pass the legislation³⁵
- determination of whether a cause of action for breach of statutory duty arises.

Contract

- examination of similarities and differences between the interpretation of contracts and statutes (involving consideration of objectivity, use of extrinsic materials, implied terms etc.)
- interpretation of consumer protection and contracts review Acts.

Land Law

- examination of statutory schemes for land ownership and strata titles
- interpretation of provisions for which no case law exists
- development of reading and interpretation skills involved in handling a legislative scheme, especially a very large statute, such as the skills of navigation through Parts, Divisions, definitional sections, interpretation legislation, etc.

Civil procedure

- identification of relevant provisions of procedural statutory schemes and interpretation of those provisions to determine what they require or allow
- use of case law in the interpretation of these legislative provisions.

Constitutional Law

- application of the presumption in favour of constitutional validity
- use of interpretative principles to understand the limits of severance and reading down of otherwise invalid legislation

³⁵ Such a case study could be done in many core subjects.

- examination of similarities and differences between constitutional and statutory interpretation.

Administrative Law

- interpretation of a provision of a parent Act enabling the making of delegated legislation and of the delegated legislation made pursuant to that provision
- determining whether parliament has conferred a power in a statute by implication, and the imposition of limits on express and implied powers
- identification of the statutory purpose from an analysis of the Act and a consideration of the principle of legality
- ascertainment of whether breach of a statutory requirement invalidates an impugned act with which the requirement is associated (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).

Corporations Law

- the equitable and legislative history of directors' duties, the interpretation of directors' duties, and the ongoing interplay between the common law and statutory wording
- the scope and effect of individual regulatory provisions
- the development of reading and interpretation skills involved in handling a very large statute (the *Corporations Act 2001* (Cth)), such as the skills of navigation through Parts, Divisions, definitional sections, interpretation legislation etc.

Evidence

- use of the Uniform Evidence Act as an example of navigation of a large Act
- fact scenarios that require students to come to reasoned conclusions in situations where general and specific provisions of an Evidence Act move in different directions
- discussion of what is the best interpretation where courts in different jurisdictions have taken inconsistent approaches to the same uniform statutory provisions
- examination of the issues of codification of common law doctrines not previously the subject of extensive judicial pronouncement.

Legal Reasoning/Legal Theory/Legal Philosophy

- the study of statutory interpretation from a jurisprudential point of view
- the inclusion of material that covers political and legislative processes and the authority of legislative decision-making
- debates concerning the existence, nature and significance of legislative intention.

Taxation

- examination of the inter-relationship between statutes, and between tax statutes and background common law principles
- application of syntactical canons, such as *ejusdem generis*
- illustrations of the tension between ‘textualism’ and ‘purposivism’ in interpreting tax avoidance provisions.

5.3 At the ‘capstone’ stage

As mentioned above, some law schools offer a final year ‘capstone’ unit in which a special emphasis on statutory interpretation in teaching and assessment is used to consolidate, refresh and supplement knowledge and skills that have been learnt in previous units. This can be done in a number of ways. Two examples are given below.

First, a capstone subject might focus on the legislative process and statutory interpretation at an advanced level. For example, such a subject can initially provide a refresher on key statutory interpretation principles and then focus on further developing knowledge and understanding of the legislative process as well as statutory interpretation law. Material on the legislative process then provides students with a more sophisticated understanding of the way that legislation is made, particularly its political context and the process of drafting legislation. Parliamentary Counsel may be involved in the teaching of legislative drafting and the legislative process. The subject may also cover the underlying principles and theories which influence and explain Australian statutory interpretation. Such capstone subjects can allow students to develop more sophisticated interpretation skills and deepen their understanding of more complex issues, such as determining the scope of a provision enabling the making of delegated legislation, resolving conflicting statutes (such as through implied repeal), rectifications of drafting errors and implying words in statutes. Comparisons with the interpretation of contracts and constitutions can be included to provide a wider context

relevant to legal practice. As students have by this stage nearly completed their law course, this subject can draw on a wide range of laws such as from criminal law, taxation, administrative law, intellectual property and consumer law.

Second, a doctrinal subject involving a substantial amount of research and independent learning might be the vehicle. By way of example, Administrative Law is used in some law schools as a ‘capstone’ unit. The issues raised usually turn on the exercise or purported exercise of express or implied statutory powers that are subject to both express and implied limitations. Determining those limits requires statutory interpretation aimed at revealing ‘objective’ legislative intention. Grounds of judicial review can be taught within the framework of statutory interpretation, and interpretation issues provide scope for consideration of a wide range of interpretative criteria including consideration of extrinsic material. Importantly, assessment may require a student to apply general principles to a previously unfamiliar statute that the student has to locate, analyse, and interpret for themselves.

6. EXAMPLES OF ASSESSMENT PRACTICE

There are a large range of assessment tasks that can assess understanding and proficiency with statutory interpretation principles and methods. What follows are a number of suggestions, many of which draw on existing practices in Law Schools. It may be appropriate earlier in the degree to provide means by which students can continue to increase their skills (‘scaffolding’), such as guides to analysing a case on statutory interpretation, guides to studying legislation from an interpretative perspective, model answers, etc. Discussion of statutory interpretation tasks in class also provides for instant formative feedback and enhances the ability of students to correct errors in approach.

6.1 At the foundational stage

Questions designed to get students to ‘navigate’ their way around an entire Act

Students are given an entire Act and relevant extrinsic materials. Students are required to answer a series of simple and short questions. The questions do not assume any knowledge of statutory interpretation at this stage and do not require it, at least at a sophisticated level. The questions require students to locate the relevant provision or provisions, and apply the

provision(s) to the facts in a straightforward manner. The questions are a stepping-stone to problems of statutory interpretation involving opposing constructions.

Short research exercise

In a legal reasoning unit students are required to find and then accurately cite particular features of Acts, regulations and parliamentary debates.

Legislative drafting exercise

A tutorial or assignment question requires students to read a short policy proposal and to draft a Bill to reflect that proposal. The task also requires them to identify the concepts that were challenging to draft (and why), and the areas where further instruction is required.

A variation may be to require students to draft an amendment Bill implementing the result of a case they have studied in which the court found a non-grammatical meaning to express the legal meaning of the provision in doubt. The advantage of this exercise is that students are familiar with the relevant policy. The challenge is to find the form of words to implement the policy. In this exercise students may be given a drafting template so that they observe the appropriate formalities and drafting conventions for amending Bills.

Case analysis and commentary supporting authentic assessment

In a short answer assignment students are asked to analyse and comment on a case raising important social issues. The assignment may require students to: state the legal issue; identify the interpretative criteria applied by the court, including extrinsic sources; state the conclusion the court reached; and comment on whether he or she agrees with the decision and give reasons why in their opinion the Act the subject of interpretation does or does not require any amendment.

Case analysis for discussion in tutorials

Students are given a case each week to study before the case is discussed in the tutorial. The cases are changed each year. The case relates to the previous week's lecture topic, that is, one or more of the interpretative criteria applied in the case relate to the previous week's lecture topic. To increase students' reading skills, the cases are not extracted and a substantial amount of class time is devoted to discussing each case. In the class, guided by their teacher, the students analyse and evaluate the judicial reasoning. In a written assignment to be handed up at the beginning of the class, students must identify: the statutory provision whose meaning was in doubt, the opposing constructions of the provision, and the interpretative

criteria the subject of the previous week's lecture that were applied in the case. Students are supported in this task through a number of aids including a guide to analysing a case on statutory interpretation.

Problem questions discussed in tutorials calling for students to apply their learning on statutory interpretation

Students are required to solve a problem calling for statutory interpretation. Students are expected to apply their learning to date on statutory interpretation. The problems are designed to raise the applicability of interpretative criteria the subject of the previous week's lecture. The exercise is supported by a model answer distributed to all students. The problems are discussed in class.

Online quiz to test students on their knowledge of the elements of legislation and the legislative process

Students are required to answer a number of multiple-choice questions, randomly allocated to them from a bank of questions. The questions are based on assigned reading. When the quiz closes, students are given their mark and are informed of the right answers. An option is to give students feedback on each option: why the right answer is correct and why other options are not correct.

Online quiz to test students on their knowledge of the Acts Interpretation Acts

Students are required to answer a number of multiple-choice questions, randomly allocated to them from a bank of questions. The questions are based on the *Acts Interpretation Act 1901* (Cth) and a state equivalent Act (with a set number of questions based on each Act). When the quiz closes, students are given their mark and are informed of the right answers. An option is to give students feedback on each option: why the right answer is correct and why other options are not correct.

Analysis of parts of legislation

Students are required to write a 'legislative memorandum'. This involves identifying, for a piece of legislation, the problem it is trying to solve, the purpose sought to be achieved, and the framework the Act adopts. Discussion of the framework includes how the legislation is trying to achieve its aims, what rights, prohibitions and other changes it creates, who is responsible for making it work, and generally how it will work.

Conceptual analysis and critical appraisal of statutes and the law of interpretation

In an examination a component of the examination paper requires students to answer a series of short answer questions on concepts of statute law and statutory interpretation. The questions raise issues on the role and function of statutes and require students to critically appraise particular interpretative techniques.

Legal opinion exercises

Students may be assigned a statute they have not studied in class. Students are required independently to locate the statute and any relevant extrinsic materials. Students are required to undertake detailed analysis of provisions within the statute against a fact scenario, and demonstrate appropriate knowledge and skills in interpreting provisions whose meaning is in doubt. The feedback rubric has explicit statutory interpretation criteria. The questions are deliberately designed to focus on provisions for which there is no direct judicial authority.

A variation is as follows. Students may be required to locate an Act that is not taught in class together with relevant extrinsic materials, and answer problem questions. The Act is assigned to students at the start of the subject. Students are given questions to answer on it in a two-part assignment. The paper includes questions involving the meanings of words as well as questions requiring the application of the presumption against retrospectivity and the presumption that offences require proof of mens rea. Students are required to make appropriate reference to extrinsic material. Some questions do not identify the provision at issue. Some questions require students to draw on specified cases interpreting comparable legislation. Some questions require students to make appropriate reference to background common law. The students are not taught these cases and are required to locate and study them independently. The problem questions are deliberately designed to focus on provisions for which there is no direct judicial authority. Some parts of the exercise may be based on made-up but realistic legislation, eg an amending Act which raises a question of retrospectivity. Assessment criteria given to students at the start of the exercise specifically relate to statutory interpretation. The exercise is supported by, among other things, a generic guide to studying legislation from an interpretative perspective. A generic guide such as this can also set out questions arranged under the weekly lecture topics.

6.2 At the doctrinally-applied stage

Range of skills relating to legislation tested in a criminal law subject

Students are set exam questions on a fictional offence they have not seen before. The offence is deliberately drafted poorly. Students may be asked to: define the elements of the offence, outline areas of ambiguity and overlap with other offences, and provide arguments as to whether the offence should be enacted or amended. The assessment may require students to make a critical reading of the provision and demonstrate their understanding of the elements and scope of other offences. Asking students to provide advice on improvement to the legislation also focusses students on best practice in legislative drafting.

Interpretation in criminal law and procedure

A take-home examination is designed to assess students' ability to interpret multiple aspects of an offence provision that they have not previously encountered.

Independent research and analysis of an Act in foundations of public law

In a second-year foundations of public law subject students are required to answer a hypothetical problem which involves locating particular Acts and answering questions on the legislation.

Statutory analysis in a federal constitutional law subject

Students are set a mid-semester take-home examination that is based on an unseen current Parliamentary Bill (or a fictional one if a suitable authentic one is unavailable). Students are asked to analyse its provisions and determine the basis on which it is, or is not, constitutionally valid. This requires close reading of the provisions of the Bill and a discussion of the interpretation of the Bill to determine whether the legislation can be construed so as to avoid it being held to be unconstitutional.

Interpretation in land law

In a mid-semester assignment students are required to interpret a statute concerning strata titles that is not taught. Students are expected to: navigate their way successfully to the relevant provisions; apply to that Act, where relevant, concepts studied in class pertaining to the relevant *Real Property Act*; and provide clear advice on the issue to a client.

In another land law subject a take-home examination involves statutory interpretation. Students are required to apply a statute not taught specifically in class — an Act governing

retail shop leases. They are required to apply that Act to a sample lease to assess its compliance with the nature of the agreement intended and the statute itself.

Independent research, analysis and interpretation in an administrative law subject

In an administrative law subject taken in the final or penultimate year students are required to locate an Act and extrinsic materials that are not taught and answer problem questions on the legislation. The whole primary decision-making Act is examinable. The questions usually raise among other things, the meanings of words relevant to a narrow ultra vires issue; whether there is a legislative intention to oust the prima facie applicability of the principles of natural justice; merits review of the exercise of a statutory power, which has to be construed before being applied to the facts; and ombudsman investigation of the administration of a statutory provision, which has to be construed before answering the question. Some questions do not identify the provision at issue. The exercise is supported by, among other things, a generic guide to studying legislation from an administrative law perspective. This guide sets out questions arranged under the weekly topics.

Other administrative law subjects have variations. Some notify students of the legislation a week in advance, some several weeks before the due date. Some base the problem on legislation that is adapted from actual legislation.

6.3 At the 'capstone' stage

The Administrative Law examples given above have a dual function of also providing opportunities to learn at a capstone level. Other capstone assessments can be given.

Advanced legal opinion

In a research-based subject students are given a capstone fact scenario for which a legal opinion is required. The exercise requires identification of the most relevant legal materials to resolve the issue. The assignment requires identification of local and international law. This primarily involves a statutory framework. However it may also require the interpretation of a private agreement such as a contract. Without any teacher assistance, students are required to identify the most relevant statutes and the most relevant provisions within those statutes that could resolve the legal issues in the fact scenario, any judicial interpretation of those provisions or comparable provisions in other statutes, any background common law, and any secondary materials that might assist in giving legal advice. After this research the student is

expected to synthesise, analyse, interpret and apply the relevant law as appropriate to the factual issue in question.

Essay question on aspects of statutory interpretation principles and theory

An elective subject on legislation contains an essay question designed to test students' understanding of more complex aspects of principles and theory relating to statutory interpretation. For example, it might require students to analyse and compare two or more journal articles on statutory interpretation and require students to write a submission to a law journal responding to that commentary. The submission requires the student to present evidence for the claims made in the piece by way of one or more case studies of statutory interpretation.

APPENDIX A

MEMBERS OF ADVISORY GROUP

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The Honourable Justice Arthur Emmett, Chairman, Legal Profession Admission Board of New South Wales

The Honourable Justice James Edelman, Federal Court of Australia

Mr Greg Calcutt AM SC, Western Australia Bar/Legislation Consultant

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Mr Garry McGrath SC, NSW Bar

Mr Andrew O'Brien, Queensland Bar

Mr Daniel Stewart, ANU College of Law, The Australian National University.

APPENDIX B

LAW ADMISSIONS CONSULTATIVE COMMITTEE³⁶

STATEMENT ON STATUTORY INTERPRETATION³⁷

(February 2010)

1. Locating and using legislation

A law graduate should be able to locate, and make appropriate use of, the text of a legislative provision relevant to a legal problem.

2. Aids to interpretation

A law graduate should be familiar with, and be able to make appropriate use of, the various aids to statutory interpretation authorized by law, including:

- (a) the intrinsic guides to interpretation offered by the text of the relevant legislation;
- (b) the principles and presumptions employed by the courts;
- (c) the common law and statutory regimes governing recourse to extrinsic materials as potential aids to interpretation;
- (d) the relevant Commonwealth, State or Territory Interpretation Act;
- (e) other contextual factors authorized by the law.

3. Deploying interpretative techniques

A law graduate should be able to deploy, where appropriate, a range of techniques in the course of solving an interpretative problem. In addition to deploying substantive interpretative factors, the techniques include:

³⁶ LACC's Charter is approved by the Council of Chief Justices which also appoints its Chairman. LACC is not, however, a committee of the Council, nor does it act on the Council's behalf.

³⁷ This statement appears at <http://www1.lawcouncil.asn.au/LACC/images/pdfs/StatementonStatutoryInterpretation.pdf>

- (a) determining whether a legislative provision is open to more than one construction;
- (b) identifying and articulating alternative constructions, where a provision is reasonably open to more than one construction;
- (c) resolving competing alternative constructions;
- (d) identifying how a suggested construction may be accommodated in a manner consistent with the existing text of a legislative provision (for example, whether it is to be by judicial gloss or by an implication);
- (e) reaching a considered view on the legal meaning, or likely legal meaning, of a doubtful legislative provision.

4. Special interpretative issues

A law graduate should be familiar with, and be able to handle adequately, problems raising special interpretative issues, including:

- (a) determining whether the exercise of a statutory power is invalid if a condition or procedure regulating its exercise, is breached;
- (b) determining whether a law has a retrospective operation;
- (c) determining whether a statutory offence contains a mental ingredient to be proved by the prosecution (*mens rea*); and, if so, what that ingredient is;
- (d) determining the scope of a statutory power to make delegated legislation in the light of delegated legislation which has purportedly been made under that power;
- (e) the application of a rule of interpretation in any applicable charter of human rights.

5. Written advice

A law graduate should be able to give a reasoned opinion as to the appropriate meaning of a legislative provision which takes adequate account of the law of statutory interpretation.

APPENDIX C

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