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Good Practice Guide (Bachelor of Laws)

STATUTORY INTERPRETATION

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Introduction

The Law Associate Deans Network commissioned this Good Practice Guide in relation to Statutory Interpretation to support the implementation of the threshold learning outcomes (TLOs) contained in the Law Learning and Teaching Academic Standards Statement developed by joint discipline scholars Professors Sally Kift and Mark Israel.¹

TLO 1: Knowledge

The Notes to the TLOs provide that the rules of statutory interpretation are included in TLO 1: Knowledge. TLO 1 provides that Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes:

- (a) the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts
- (b) the broader contexts within which legal issues arise, and
- (c) the principles and values of justice and of ethical practice in lawyers' roles.

TLO 3: Thinking skills

TLO 3: Thinking skills is also relevant to Statutory Interpretation. TLO 3 provides that Graduates of the Bachelor of Laws will be able to:

- (a) identify and articulate legal issues
- (b) apply legal reasoning and research to generate appropriate responses to legal issues
- (c) engage in critical analysis and make a reasoned choice amongst alternatives, and
- (c) think creatively in approaching legal issues and generating appropriate responses.

A comprehensive approach to the teaching of statutory interpretation encompasses both the rules of statutory interpretation (what might be called the 'narrow' approach) which are covered in TLO 1 and the ability to solve legal problems where the relevant law is found in legislation which is covered in TLO 3, which is referred to in this Guide as 'statutory analysis'.

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¹ Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010*, Australian Learning & Teaching Council (December 2010)
<http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf>.



Part 1: Literature review

Importance of legislation and statutory interpretation

In recent years, many commentators in Australia and overseas have recognised the growing importance of statutes to the practice of law. (Edmonds, 2011; Garrett, 2003; Kirby, 2009) That statutory interpretation 'now constitutes a distinct body of law' was specifically recognised by Justice Spigelman in introducing the monograph, *Statutory interpretation: principles and pragmatism for a new age*, commissioned by the Judicial Commission of New South Wales. (2007, pvi) During the previous thirty years the principles of statutory interpretation have been subject to something of an evolution. As noted by Geddes (2005, p6):

In Australia, the twenty-five year period from 1980 has been a significant one for the development of general principles of statutory interpretation. A notable feature of this period has been the parliaments' contributions to the development of interpretive processes. Legislative provisions now direct courts, tribunals and others as to how to go about interpreting statutes and delegated legislation. Another feature of the period has been that when interpreting legislation, courts and tribunals have become increasingly willing to articulate the general interpretive principles on which their reasoning is based.

Despite this, however, as Geddes (2005, p7) goes on to note, 'there is little that is new in the interpretive principles that have developed over the last quarter of a century. The changes relate mostly to the relationship of the principles to one another and matters of definition.'

Where once the interpretation of judicial pronouncements and the common law were considered of paramount importance to proper legal practice, today practitioners must also be able to properly read and interpret the myriad of statutory instruments which dominate the legal landscape. As Justice Kirby so aptly notes:

... the construction of statutes is now, probably, the single most important aspect of legal and judicial work. In Australia, courts have discovered that many lawyers intensely dislike this feature of their lives. They find the obligation to read Acts of Parliament, from beginning to end, so distasteful that they will do almost anything to postpone the labour. The High Court of Australia has been moved to protest at this unwillingness to grapple with the words of the statutory text, instead of returning to the much loved words of judges, written long ago and far away, who uttered them before the legislature's text became the law. Whilst this tribute to the judiciary is touching, it does not represent the law. The world of common law principle is in retreat. It now circles in the orbit of statute. Where statute speaks—and particularly a curious statute like a Constitution or a Human Rights Act—there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing. (Kirby, 2003, pp95-96)

Given the importance of legislation in the practice of law the teaching of statutory interpretation is a fundamental part of legal education: 'Any course that fails to introduce students to the principles and techniques of statutory interpretation fails to equip them with tools that are essential in legal practice and indeed in most other law jobs.' (Chief Justice French, 2011)

Despite the acknowledged importance of statute law to the practice of law, law schools have traditionally focused much of their instruction on teaching students how to read case law and to apply the principles of judicial reasoning. According to Stark (1994, p579): 'Statutory analysis is a vital component of the practice of law but law schools pay too little attention to it.'



It has been recognised in Australia and overseas for a number of years that case law has received an undue amount of attention in legal education. (Burrows, 2010; Goodall, 2007, p604; Grad, 1984, pp1-2) Leib (2008, p170) notes that in the USA this emphasis on case law has meant that law programs are now 'out of synch' with what lawyers actually do. While the key pieces of legislation are covered in each substantive law subject, students are taught what the legislation means in terms of what the cases have determined; they are not taught how to read the legislation to ascertain its meaning for themselves. (Jones, 2007, p87)

Statutes now occupy the vast majority of the legal universe. Teachers have to cope with them better, and they have to make their students much more familiar with them. It is remarkable how long it has taken us to come to that obvious realisation. (Burrows, 2010, p31)

Lack of instruction on the legislative process and statutory analysis has meant that law students are not given an accurate view of the legal world. They are encouraged to think that the legal profession's work is limited to the courts, the work of the legislature and regulatory bodies being largely unrecognised. (Garrett, 2003, pp11-12; Morisey, 2003, pp232-233) This belies the reality that most law graduates may not work extensively in the courts but almost certainly will be required to advise on the meaning of legislation. (Burrows, 2010, p31; Jones, 2007, p87)

Obstacles to the inclusion of statutory analysis in the law curriculum

Curriculum design issues

Over recent decades both in Australia and overseas there have been calls for changes to law school curriculum to develop more in-depth subjects to teach the skills needed by contemporary practitioners to interpret statutory provisions. Such calls have been largely ignored due to the perceived difficulties in fitting these subjects into the already fully-packed law curriculum. (Leib, 2008, p178) In Australia, the need for law schools to meet the content requirements of the Priestley 11 makes the inclusion of additional skills and capabilities, such as statutory interpretation, problematic without unduly limiting the number of elective choices available to students. Introduction of additional core subjects and a reduction in the number of electives available to students is an issue of particular concern to student groups. (Australasian Law Students' Association, 2009)

In 2010, the Law Admissions Consultative Committee (LACC) adopted a Statement on Statutory Interpretation (Appendix A) and specifically requested that Australian Law Schools map their coverage of statutory interpretation across the curriculum. The LACC Statement encompasses both the rules of statutory interpretation and the use of legislation in legal problem solving.

A matrix of the LACC principles was designed as part of this project to assist with mapping of statutory interpretation across the curriculum, and is provided in Appendix B.

Student engagement

Resistance to the inclusion of statutory interpretation subjects in the law curriculum may also be linked to the observation that students find such subjects boring and uninteresting with little relevance to their future professional lives. (Leib, 2008, pp 175, 177) Burrows (2010, pp29-30) notes that the use of archaic or formal language, extensive use of cross referencing and jargon, together with the need to carefully read large pieces of legislation contribute greatly to student difficulty in studying statutory interpretation. As Stark (1994, p583) states: 'Statutes are not designed to be entertaining, or emotionally powerful, or beautiful, or profound'. This



issue is discussed further below. (See below 'Challenges in teaching statutory analysis')

Staff development

Commentators have also observed that law faculties can experience difficulties in finding appropriate staff to teach statutory interpretation subjects. Reasons identified for this include that teachers find having to deal with a number of disparate substantive areas of law and even political theory intimidating (Garrett, 2003, p21) and the fear of career repercussions resulting from uncomplimentary teacher evaluations attributable to students' dislike of the subject content. (Leib, 2008, pp177-178) This is an area that requires further research. (See below at Part 3: 'Staff development and statutory interpretation community of practice'.)

Models for embedding statutory analysis in the law curriculum

As noted above, LACC has specifically requested that Australian Law Schools map their coverage of statutory interpretation across the curriculum. While commentators have largely agreed that law school curriculums needs to better address statutory interpretation, there is a lack of consensus about how this should be done. Should it be done as a standalone subject, or should statutory interpretation skills be embedded in other substantive law subjects? Other issues include: what is meant by 'statutory interpretation'; whether broader issues of political theory and legislative process be included; and exactly what skills and principles need to be taught.

In Australian law curriculums, statutory interpretation principles are most often covered as part of a first year, 'Introduction to Law' subject which is designed to introduce students to the structure of the Australian legal system. Statutory interpretation is then generally not dealt with again as a standalone set of skills. Aspects of statutory interpretation may then be revisited as part of the study of core subjects such as Constitutional Law and Administrative Law which are heavily based on statute.

In the UK and the USA there seems to be no common approach to teaching statutory interpretation. Jones (2007, p87) notes that the undergraduate law degree at Oxford University does not contain a statutory interpretation subject, while Goodall (2007, p604) notes that statutory interpretation is generally covered in one or two lectures. In the USA, where law is studied as a postgraduate degree, it would appear that the most common approach is for statutory interpretation to be offered as part of latter year electives or only addressed as needed in the study of substantive law subjects and not taught as a compulsory subject. (Chacón, 2011; Garrett, 2003, p11; Leib, 2008, p188)

In discussing the various approaches, commentators have indicated that introductory training on statutory interpretation is essential but, without subsequent instruction in the latter years of the degree, insufficient. Such first year training should ideally take the form of a standalone subject, which would also cover the legislative process. (Burrows, 2010; Garrett, 2003) However, students require more knowledge of the substantive law to be able to fully appreciate the intricacies of statutory interpretation; so while statutory interpretation must be introduced in first year, it must also be developed further in the last year of the degree through dedicated, compulsory subjects. (Burrows, 2010; Jones, 2007)

In terms of specific curriculum design, Burrows (2010, pp33-40) suggests that students should be introduced in their first semester of study to how Acts are made. The principles of statutory interpretation should be introduced using easily understood pieces of legislation so students focus on understanding how to correctly read an Act. In the middle years of the degree students will be exposed to how



statutes operate in various substantive law areas eg property law. In their final year, students would be required to undertake a compulsory subject dedicated solely to legislation. This subject would take advantage of the students' greater understanding of substantive law principles. This subject would include material on making of an Act and the role of government policy; the principles of drafting legislation; more detailed discussion on how to interpret legislation together with the technical rules regarding such things as commencement and transitional provisions.

Jones (2007, pp90-95) suggests a similar design for the final year compulsory subject. He advocates the extensive use of problem solving exercises, using real examples, ranging from the simple to the most complex so as to replicate the demands of legal practice. He also notes the need to emphasise the skills and attention to detail required for proper statutory interpretation.

In their suggested curriculums, both Burrows and Jones advocate giving students a number of opportunities throughout their degree to focus on statutory interpretation, without being distracted by the need to understand the content of a substantive law area. This is best done in a standalone subject. Both Chacón (2011) and Goodall (2007) have reported on the difficulties of attempting to teach statutory interpretation within an existing substantive subject. Chacón in particular is of the opinion that students' understanding of both statutory interpretation and the substantive area of law suffers from the attempt to deal with the two together. (Chacón, 2011, pp139-141) Chacón recommends the adoption of a standalone statutory interpretation/legislative process subject for first year US law students. (Chacón, 2011, pp141-142)

Challenges in teaching statutory analysis

The teaching of statutory interpretation needs to address the knowledge component required by TLO 1 (ie the application of specific rules of statutory interpretation) and also the thinking skills required by TLO 3 (ie the ability to solve legal problems where the relevant law is found in legislation ('statutory analysis')). There are three key matters for students in learning statutory analysis; first, engaging with the legislation itself (rather than relying on secondary sources), second understanding the principles of statutory interpretation and third, applying the principles of statutory interpretation in the context of legal problem solving. A holistic approach to ensuring law graduates are able to understand and apply legislation should address all three of these issues.

There are numerous resources for teaching the principles of statutory interpretation both in general introductory and specialist text books and in online guides (eg Sanson et al, 2010,; Hall & Macken 2009; Cook et al, 2009; Pyke at al, 2007; Beattie, 2010; Australian Law Postgraduate Network; Pearce & Geddes, 2011).

There is, however, limited sharing of practice in the teaching and assessment of statutory analysis, particularly in the Australian context. There are some practice examples to assist in the teaching of the principles of statutory interpretation and the interplay between legislation and precedent on web pages maintained by individual academics (see for example, the Legal Literacies webpage <<http://legalliteracies.blogspot.com/>>). There are also a few examples in journal articles (see for example Corbin, 2007), and there are some examples of statutory interpretation exercises provided in the various introductory texts (see for example Sanson et al, 2010, pp339-351; Hall & Macken 2009, pp100-110; Cook et al, 2009, pp310-311). There is, however, a need to develop a community of practice in relation to teaching statutory interpretation and a network (<<http://statutoryinterpretationpgp.ning.com/>>) has now been established to facilitate this sharing of practice (see below at Part 3: 'Staff development and statutory interpretation community of practice').



There has been more significant sharing of practice in the UK under the auspices of the UK Centre for Legal Education (UKCLE) which was established in 2000 with the aim of promoting the development of learning and teaching in law. While the UKCLE closed in July 2011, the archived website <<http://www.ukcle.ac.uk/>> includes a wealth of resources for legal education including a number of examples of approaches to the teaching and assessment of statutory interpretation. The examples include a problem-based learning approach to statutory analysis in the context of teaching corporate law, (Bailey, 2004) a portfolio including a reflection on skills development and performance, (University of Westminster, 2010) and short response questions in the context of teaching family law. (Burton et al, 2010)

There are a number of different approaches to legal problem solving involving statutory analysis suggested in the various introductory legal text books. Sanson, Worswick and Anthony (2010, p339) propose a six-step process for solving statutory interpretation problems: jurisdiction, commencement, issues, analysis, purpose test and conclusion. In contrast, Cook et al (2009, pp309-310) propose a 14-step comprehensive check list which focuses on the application of the rules of statutory interpretation rather than on a broader problem solving approach. Hall and Macken (2009, pp101 ff) demonstrate how the rules of statutory interpretation can be applied within the familiar ILAC (Issue, Law, Application, Conclusion) problem solving framework.

The key themes from these different approaches have been identified and a step-by-step guide incorporating these approaches has been developed as part of the Good Practice Guide on Statutory Interpretation (see Appendix C). The steps are:

Step 1 Issue identification

Identify the issues and the legislation relevant to the problem.

Step 2 Consider threshold matters

The threshold matters include jurisdiction and commencement.

For advanced students more complex matters such as transitional arrangements and standing may also be considered.

Step 3 Overview the Act

This is in order to gain an understanding of the legislative context and identify the relevant provisions (refer to long title, table of contents, headings etc).

Step 4 Ascertain the ordinary meaning of the provision in its context

Ascertaining the ordinary meaning requires the following:

- Read the provision carefully
- Identify the elements of the legislative provision
- Identify key words and phrases
- Check whether the key words and phrases are legislatively defined (check the particular Section, Division or Part and the Dictionary in the Act and the relevant Acts Interpretation Act).
- Apply the rules of semantic construction (*ejusdem generis* etc)
- Consider whether adjacent provisions in the legislation shed light on the meaning
- Consider certain extrinsic aids at common law to ascertain the context

In relation to context Spigelman (2005, p772) notes: 'While all statutory interpretation is text based, it has long been accepted that the words of the text must



be understood in their context. The words do not exist in limbo.’ At common law, certain extrinsic materials can be used to ascertain the context. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, Brennan CJ, Dawson, Toohey and Gummow JJ said:

... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy.

The context extends ‘beyond the Act itself to encompass the scope and purpose of the legislation. ... This reflects the contemporary approach to construction, which is well described as “literal in total context”.’ (Spigelman, 2001, p230)

Step 5 Apply the purpose rule

(refer to relevant Acts Interpretation Act²) (prefer an interpretation that best achieves the purpose of the Act)

There is no need to identify an ambiguity in the meaning of the provision before applying the purpose rule. As noted by Geddes (2005, pp10-11):

Section 15AA was different from the purposive approach, however, because it required the interpreter to take account of the purpose or object underlying the Act initially, not just at some later stage of the interpretive process at which an ambiguity or doubt as to meaning became apparent.

Ascertain the purpose from the intrinsic aids – headings, object provisions at the front of the Act, etc.

In applying the purpose rule,

(t)he task of the courts is to interpret the words used by the parliament. It is not to divine the intent of the parliament. In an era where a purposive approach to interpretation is emphasised, and indeed required by statute, the distinction between interpretation and divination is not always observed. The courts must determine what parliament meant by the words it used. The courts do not determine what parliament intended to say. (Spigelman, 2001, p225)

Section 15AB allows extrinsic materials to be used to help *confirm* the purpose at this stage.

Step 6 Consider any judicial interpretation of the provision

Has the particular provision of the legislation been interpreted judicially?

Has a word or phrase used in different legislation in the same jurisdiction been interpreted judicially?

Has a similar provision in legislation in a different jurisdiction been interpreted judicially?

Step 7 Consider extrinsic aids

If necessary refer to extrinsic aids (to confirm the ordinary meaning, resolve any ambiguity or avoid an absurd result).

For a reference to extrinsic material to have the potential to change an interpretation of legislation which would otherwise have been arrived at, it is necessary for a court to conclude that one of the conditions in s 15AB(1)(b)(i) or (ii) has been met. That means the interpreter must conclude, without taking account of any material not forming part of

² All references to the Acts Interpretation Act in this Guide are to the *Acts Interpretation Act 1901* (Cth).



the Act, that the provision in question is 'ambiguous' or 'obscure' or that, taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is 'manifestly absurd' or 'unreasonable'. (Geddes, 2005, pp14-15)

In considering extrinsic aids recall the limits to the use of such aids.

There are many issues arising in relation to the use of extrinsic aids and as Spigelman (2001, p226) notes: 'One central proposition must always be borne in mind. The content of such documents cannot be used to rewrite the enacted language.'

Step 8 Reach a conclusion

State the preferred argument for each issue.

Synthesise your answer so you reach an overall conclusion.

Applying the ILAC approach to problem solving is difficult as there is no clear distinction between the identifying the law stage and the application to the facts. The issue identification takes place in step one; identification of the law and analysis in steps two – seven and the conclusion in step eight. The relationship between the steps and the ILAC approach is illustrated in the table in Appendix C.

While the steps identified above will assist legal academics in teaching statutory analysis, there is a need to understand how students approach legal problem solving involving statutory analysis and with what aspects they struggle. This is an area that requires further research. (See below at Part 3: 'Students' approach to legal problem solving involving statutory analysis'.)

In adopting and using this guide it should be borne in mind that the process of statutory analysis is not linear, and there are some areas of the law that are unsettled. For example the appropriate use of extrinsic materials to construe the purpose of the legislation is open to some debate given the co-existence of common law principles and the provisions of the Acts Interpretation Acts. (Geddes, 2005, pp.17-24)

In addition, there are issues that may be content driven and may best be included in the context of particular subjects. For example the presumption that parliament did not intend to exclude the right to claims of self-incrimination or to permit a court to extend the scope of a penal statute may be best incorporated in a criminal law subject. There are numerous such common law presumptions (which have been unified as the principle of legality in the UK (Spigelman, 2005, p774)) and the stage at which they should be considered may differ depending on the context.



Part 2: Summary of key points

The increasing importance of legislation in legal practice and for most law related occupations means that it is imperative that law graduates are able to understand legislation and statutory analysis in legal problem solving. While the importance of including statutory analysis in the law curriculum has been acknowledged, law schools in Australia have been slow to implement statutory analysis in a systematic way throughout the curriculum and the development of skills in statutory analysis has generally not been explicit. There is a need for a developmental approach to teaching statutory analysis in the law degree which provides for increasing complexity through the degree. Teaching of statutory interpretation will encompass both the application of specific rules of statutory interpretation and the ability to solve legal problems where the relevant law is found in legislation.

While the literature is not clear as to how statutory interpretation is best embedded throughout the degree, there is a clear preference for the inclusion of at least one subject within the degree focusing on statutory interpretation without the distraction of a substantive law area. One approach for the explicit embedding of statutory analysis which has been proposed is to introduce students to the creation of legislation and the principles of statutory interpretation in the first year, develop statutory analysis skills in the middle years in the context of substantive legislation based content subjects, and the application and extension of statutory analysis skills, including drafting and policy, in the final year in a dedicated legislation subject. (Burrows, 2010)

In addition to the embedding of statutory interpretation in the curriculum, there are three particular teaching and learning issues to be addressed in ensuring that law graduates are able to understand and apply legislation: encouraging students to read the provisions of the legislation; teaching the principles of statutory interpretation and applying the principles in legal problem solving. While there are some examples of teaching and learning approaches which attempt to address these issues, the sharing or practice is limited and the research in relation to the effectiveness of different approaches is limited.



Part 3: Further work

Testing of curriculum approaches

As discussed above, while the literature is not clear as to how statutory interpretation is best embedded throughout the degree, there is a clear preference for the inclusion of at least one subject within the degree focusing on statutory interpretation not part of a substantive law subject. (Burrows, 2010)

While different models of embedding statutory interpretation in the law curriculum have been proposed there is little consensus on how it should be embedded and an evaluation of different models would contribute to the literature. Some approaches to be tested include:

- whether a standalone legislation subject is required and if so whether it is best situated in the middle or final years
- the extent to which statutory interpretation can be taught in combination with other substantive legislation based subjects.

The relationship between statutory interpretation and other legal skills: research, reading and writing

As discussed above, a number of commentators have advocated that statutory interpretation take a more prominent place in the law curriculum. Different models have been proposed to achieve this. However, in the material reviewed, there does not appear to be a consideration of how statutory interpretation skills 'fit' with other legal skills covered by the curriculum, particularly the first year curriculum. Such skills would include legal research, legal reading and legal writing.

As Geddes (2007, p7) points out: 'Electronic research tools make writing about statutory interpretation both exciting and a little daunting.' Students need to have comprehensive and efficient legal research skills for a number of reasons; primarily to ensure that the statutory material being considered is current and relevant, but also because all the relevant information needed to interpret a statute/area of law is not in one place (such as the legislation, case law and secondary source materials).

In relation to reading skills, students need to be able to process large amounts of information quickly and effectively. While there appears to be some literature on how to improve law students' case reading ability, there does not appear to be any equivalent material for reading statutes, other than the literature on the application of the specific rules. An ability to effectively interpret statutory provisions is not limited to being able to properly read the statute, and related material. Students must also be able to communicate effectively and this requires strong legal writing skills. Therefore, further work is needed to develop good practice which specifically addresses improving legislation research, reading and writing techniques.

Students' approach to legal problem solving involving statutory analysis

There has been no research in Australia in relation to how students approach legal problem solving involving statutory analysis and what aspects they struggle with. It is recommended that a series of student focus groups be carried out in which students (particularly latter year students) are given an example legal problem and various section/s of the legislation relevant to analysing that problem to review.

Staff development and statutory interpretation community of practice

There is a need for further research and consideration of what resources are



required for staff development for legal academics, and how best to implement development. Should specific staff be identified, for example in statute focused subjects such as corporate law? Or is statutory analysis a skill that should be developed in all staff?

Given the limited sharing of practice in relation to learning and teaching regarding statutory interpretation, the establishment of a community of practice, either as part of a general legal education network or as a standalone network to promote the sharing of resources and development of good practice, would assist in the development of curriculum planning resources, teaching and assessment approaches and professional development. Accordingly, a shared practice network (<http://statutoryinterpretationpgg.ning.com/>) has been established to enable legal academics and others interested in statutory interpretation to share ideas and practice on teaching statutory interpretation. Members of the network can contribute examples of their approaches to teaching statutory interpretation and the use of legislation in problem solving.



Resources

- Learning and Teaching Academic Standards Statement Bachelor of Laws (2010) (<http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf>)
- Australian Law Post-Graduate Network, Statutory Interpretation, available at <<http://www.alpn.edu.au/node/72>>
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Appendix A: Statement on statutory interpretation

ATTACHMENT

STATEMENT ON STATUTORY INTERPRETATION

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:

- (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 B: Statutory interpretation map

LEVEL*	1. Locating legislation	2. Use of intrinsic and extrinsic aids to interpretation	3. Use of interpretive techniques in solving problems	5. Special interpretive issues	5. Written analysis
1	Locate specifically named State and Commonwealth legislation from authorised sources.	Intrinsic guides to interpretation offered by the text of the relevant legislation.	Determine whether a legislative provision is open to more than one construction.	Determine whether a law has retrospective operation.	Give a reasoned opinion as to the appropriate meaning of a simple legislative provision which takes adequate account of the law of statutory interpretation.
	Update legislation by checking for repeals and amendments including Bills before parliament.	The principles and presumptions employed by the courts.	Identify and articulate alternative constructions, where a provision is reasonably open to more than one construction.	The application of a rule of interpretation in any applicable charter of human rights.	
	Identify and locate State and Commonwealth legislation relevant to specific problems/topics from authorised sources.	The common law and statutory regimes governing recourse to extrinsic materials as potential aids to interpretation.	Resolving competing alternative constructions.		
	Identify and locate legislation relevant to specific problems/topics from jurisdictions outside Australia.	The relevant Commonwealth, State or Territory Interpretation Act.	Identifying how a suggested construction may be accommodated in a manner consistent with the existing text of a legislative provision.		
		Other contextual factors authorised by the law.	Reaching a considered view on the legal meaning or likely legal meaning of a doubtful legislative provision.		

*This map is based on the LACC Statement on Statutory Interpretation and may not reflect on aspects of statutory analysis that may be included in the curriculum



LEVEL	1. Locating legislation	2. Use of intrinsic and extrinsic aids to interpretation	3. Use of interpretive techniques in solving problems	5. Special interpretive issues	5. Written analysis
2	Practise and develop the ability to locate and make use of the text of complex legislative provisions relevant to identified doctrinal subject areas.	Practise and develop the ability to use the various aids to statutory interpretation in relation to complex legislative provisions relevant to identified doctrinal subject areas.	Practise and develop the ability to use a range of interpretive techniques in relation to complex legislative provisions relevant to identified doctrinal subject areas.	Determining whether the exercise of a statutory power is invalid if a condition or procedure regulating its exercise is breached.	Give a reasoned opinion as to the appropriate meaning of complex legislative provisions relevant to identified doctrinal subject areas which takes adequate account of the law of statutory interpretation.
				Determining whether a statutory offence contains a mental ingredient to be provided by the prosecution (<i>mens rea</i>); and, if so, what that ingredient is.	
				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.	
3	Practise and develop the ability to locate and make use of the text of complex legislative provisions relevant to unfamiliar doctrinal subject areas and multifaceted problems.	Practise and develop the ability to use the various aids to statutory interpretation in relation to complex legislative provisions relevant to unfamiliar doctrinal subject areas and multifaceted problems.	Practise and develop the ability to use a range of interpretive techniques in relation to complex legislative provisions relevant to unfamiliar doctrinal subject areas and multifaceted problems.	Practise and develop the ability to use a range of special interpretive techniques in relation to complex legislative provisions relevant to unfamiliar doctrinal subject areas and multifaceted problems.	Give a reasoned opinion as to the appropriate meaning of complex legislative provisions in unfamiliar doctrinal subject areas which take adequate account of the law of statutory interpretation.



Appendix C: Eight step guide

Issues	Step 1	Issue identification Identify the issues and the legislation relevant to the problem
Analysis and application. Identify the law and apply it to the facts. For each issue present arguments as to the interpretation to support each party's case.	Step 2	Consider threshold matters Jurisdiction Commencement For advanced students more complex matters such as transitional arrangements and standing may also be considered
	Step 3	Overview the Act in order to gain an understanding of the legislative context and identify the relevant provisions (refer to long title, table of contents, headings etc)
	Step 4	Ascertain the ordinary meaning of the provision in its context Read the provision carefully Identify the elements of the legislative provision Identify key words and phrases Check whether the key words and phrases are legislatively defined (check the particular Section, Division or Part and the Dictionary in the Act and the relevant Acts Interpretation Act) Apply the rules of semantic construction (<i>eiusdem generis</i> etc) Consider whether adjacent provisions shed light on the meaning Consider certain extrinsic aids permissible at common law to ascertain the context
	Step 5	Apply the purpose rule (refer to relevant Acts Interpretation Act) (prefer an interpretation that best achieves the purpose of the Act) Ascertain the purpose from the intrinsic aids – headings, object provisions at the front of the Act, etc Extrinsic materials may be used to help <i>confirm</i> the purpose at this stage
	Step 6	Consider any judicial interpretation Has the particular provision of the legislation been interpreted judicially? Has a word or phrase used in different legislation in the same jurisdiction been interpreted judicially? Has a similar provision in legislation in a different jurisdiction been interpreted judicially?
Conclusion	Step 7	Consider extrinsic aids If necessary refer to extrinsic aids (to confirm the ordinary meaning, resolve any ambiguity or avoid an absurd result) Recall limits to the use of the aids.
	Step 8	Reach a conclusion State the preferred argument for each issue Synthesise your answer so you reach an overall conclusion

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