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SITUATING STATUTORY INTERPRETATION IN ITS PUBLIC LAW CONTEXT

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I INTRODUCTION

As Chief Justice Spigelman said in 2001:

> The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. Statutory interpretation is not merely a collection of maxims. It is a distinct body of law.[1]

It is axiomatic that in 'an age of statutes',[2] law students must understand what statutes mean, and how that meaning is determined. This requires law teachers to go beyond a brief explanation of some core principles and rules, as has traditionally been done,[3] to see the interpretation of statutes as 'a distinct body of law.'

Law teachers have debated whether teaching statutory interpretation as a distinct body of law requires that it be taught as a stand-alone subject, or whether it is best to 'embed' statutory interpretation within other subjects.[4] There are benefits and problems with both approaches. The embedded approach has the advantage of demonstrating to students that statutory interpretation is central to all legal topics, but runs the real risk of (and has tended to result in) a lack of serious attention to the principles of statutory interpretation as a discrete body of principles.[5] Teaching statutory interpretation as a stand-alone unit ensures that the

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1 The Hon JJ Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation' (Address to the Government Lawyers' Convention, Sydney, 7 August 2011) 1.

2 Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13(2) *Oxford University Commonwealth Law Journals* 271, 271.

3 Jeffrey Barnes, 'Teaching Statutory Interpretation: Issues from the Literature' (Literature Review prepared for Teaching Legislation Symposium, Centre for Legislation, August 2017) 3–4.

4 Jacinta Dharmananda and Patricia Lane, 'Teaching Statutory Interpretation in Australia: What's Next?' (2018) 39(1) *Statute Law Review* 27, 34–35.

5 See David Miers and Alan Paige, 'Teaching Legislation in Law Schools' (1980) 1(1) *Statute Law Review* 23; Jennifer M Chacon 'Statutory Analysis: Using Criminal Law to Highlight Issues in Statutory Interpretation' (2011) 1(1) *UC Irvine Law Review* 130.

principles are given adequate attention, but may not reflect the contexts in which interpretation happens and as a result, may be viewed by students as 'difficult' and 'boring'.[6] In addition, there is the question of where in a degree to place a stand-alone unit. Too early in the law degree and students will not have an adequate appreciation of the key theoretical and doctrinal issues that shape the principles of statutory interpretation and make them interesting. Too late, and students will not have time to develop their skills in interpreting statutes in their other subjects, such as criminal law and administrative law.[7]

In this paper we argue that statutory interpretation can be seen as a distinct and core component of public law. We argue that it is different to, but interconnected with, the other public law subjects of constitutional and administrative law. In jurisdictions with statutory or constitutional bills of rights, the principles of statutory interpretation are also intertwined with that body of law. As such, we suggest that one method of teaching statutory interpretation is to teach it alongside foundational public law concepts and principles in a first-year unit. We note that this is quite distinct from an 'embedded' approach. Rather, our suggested approach teaches the principles of statutory interpretation as a body of law in its own right, but places that body of law in the context of other fundamental public law principles. In our experience, teaching statutory interpretation in this way overcomes several of the common challenges that academics have reported in teaching statutory interpretation.

In the first section of this paper, we explain why statutory interpretation should be viewed as a discrete, but integrated, part of the broader public law curriculum. In the second section we outline the advantages of teaching statutory interpretation in an introductory law course combined with an introduction to the foundational public law principles and institutions. In the third section of the paper, we describe in a little more detail, the approach that we have taken in designing (and re-designing) and teaching a unit titled 'Public Law and Statutory Interpretation' at Monash University, and in the new textbook developed to support that unit.[8]

II STATUTORY INTERPRETATION AS A FOUNDATION OF THE PUBLIC LAW CURRICULUM

There is no doubt that an understanding of the principles and process of interpreting legislation is an essential skill for all lawyers — regardless of the area in which they specialise. As Justice Spigelman said: 'No area of the law has escaped statutory modification'.[9] But this does not mean that principles that courts apply in interpreting the

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6 Dharmananda and Lane (n 4) 42.

7 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) xxxv.

8 Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017).

9 Spigelman (n 1) 1.

Corporations Act 2001 (Cth) form part of the subject of company law. Nor does the way in which courts go about interpreting provisions of the *Civil Liability Act 2002* (NSW) form part of the law of torts. Of course, the substantive law contained in those statutes, as properly interpreted, forms part of those respective areas of law. And, as such, students and practitioners of company law and torts law must know what those statutes mean, and how to ascertain their meaning. But the *principles* and *process* of interpreting a statute are themselves a part of *public law* — by which we mean 'the body of legal principles that apply to public power'.[10]

Statutory interpretation forms part of public law because, at its heart, it about the way the judicial branch exercises one of its core functions. As Lord Justice Sales has said: 'Statutory interpretation is embedded in constitutional law'.[11] The principles that courts apply in interpreting statutes, and the process through which they apply those principles, reflect the constitutional relationship between the courts and the other branches of government. This is true both of principles developed by courts themselves, and those expressed in interpretation acts.[12] We must look to the nature of public institutions, their powers, and the relationships between them, to understand and explain many of the key principles of statutory interpretation. We must also look to the principles and process of statutory interpretation to illuminate and explain the practical operation of these public law powers and relationships. Statutory interpretation is an integral component of public law — it is underpinned by constitutional principles and is essential knowledge for administrative law. However, statutory interpretation is also quite distinct from these other public law subjects: it comprises a defined body of principles and rules that courts apply in interpreting legislation.

In order to understand the principles of statutory interpretation, students must have some basic understanding of the nature of public institutions, their powers, and the relationships between them as established by the *Australian Constitution*. The very fact that it is the courts' role to interpret statutes — or at least, to make a legally binding decision as to their meaning — is due to the nature of the *Constitution*, and structural implications regarding the relationship between the legislative and executive branch. The constitutional limits of judicial power explain why it is that courts cannot write or rewrite statutes. These ideas have received far greater emphasis in recent years. That is, the High Court now insists that the principles of statutory interpretation are grounded in the *Constitution.* In *Zheng v Cai*, it was said that:

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10 Crawford et al (n 8) 1.

11 Rt Hon Lord Justice Sales, 'Modern Statutory Interpretation' (2017) 38(2) *Statute Law Review* 125, 125.

12 Those interpretation acts being: *Acts Interpretation Act 1901* (Cth); *Interpretation Act 1987* (NSW); *Acts Interpretation Act 1954* (Qld); *Acts Interpretation Act 1915* (SA); *Acts Interpretation Act 1931* (Tas); *Interpretation of Legislation Act 1984* (Vic); *Interpretation Act 1984* (WA); *Legislation Act 2001* (ACT); *Interpretation Act* (NT).

> judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.… the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[13]

In *Plaintiff S10/2011 v Minister for Immigration and Citizenship*, it was then said that:

> The principles and presumptions of statutory construction which are applied by Australian courts … are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the *Constitution*. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above.[14]

These are somewhat controversial propositions, and their full meaning is unclear. They must be read in light of other statements from the High Court, which insist that parliamentary intention is a 'fiction', or at least, not a useful guide to statutory meaning.[15] This is a radical shift in approach — as Ekins and Goldsworthy explain:

> For at least six centuries, common law courts have maintained that the primary object of statutory interpretation 'is to determine what intention is conveyed either expressly or by implication by the language used', or in other words, 'to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed'. This has often been described as 'the only rule', 'the paramount rule', 'the cardinal rule' or 'the fundamental rule of interpretation, to which all others are subordinate'. In the leading case of *Cooper Brookes*, Mason and Wilson JJ said: '[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention ... The rules [of interpretation] ... are no more than rules of common sense, designed to achieve this object'. Likewise, Gleeson CJ has said that 'the object of a court is to ascertain and give effect to, the will of Parliament'. It follows that '[j]udicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise ... in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge'. The proposition that the will or intention of Parliament

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13 *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ), quoting *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–412.

14 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146] (Gummow J), 141 [341] (Hayne J). See also Hayne (n 2).

15 Eg *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–412 (French J); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 87 ALJR 131, 138 [25]; *Zheng v Cai* (2009) 239 CLR 436, 455–6 [28]; *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146]; (Gummow J); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43]–[44] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]. There are views to the contrary: see most recently *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212, 229 [74]–[77] (Gageler J).

> is the object of interpretation has been affirmed in leading cases and textbooks on statutory interpretation in England, Australia, Canada and the United States for ages (literally).[16]

The concept of parliamentary intention also explained and justified the application of the more specific rules of statutory interpretation: these were portrayed as heuristics for ascertaining Parliament's intention. Now, the matter is less clear. The claim that the principles of statutory interpretation are grounded in the *Constitution* is a difficult and largely untested claim. Can it really be said that all of the principles of statutory interpretation are grounded in the *Constitution*? What is clear is that this view has formed a new orthodoxy and seems unlikely to be overturned in the near future. Educators who wish to impart their students with an understanding of the *current* principles and practice of statutory interpretation must confront these complexities. And the new orthodoxy can only be analysed by applying public law principles. To assess the new approach, we need to understand division of power between courts and parliament. Does, it for example, permit the courts to overreach the limits of judicial power and usurp or otherwise frustrate the exercise of legislative power? Is it consistent with public law values like the rule of law, separation of powers, and democracy?[17]

Thus, we suggest that in order to understand the principles of statutory interpretation, students require some basic understanding of these constitutional principles. This does not mean that statutory interpretation must be taught *after* constitutional law, only that an appreciation of the key public law institutions and their powers helps to situate statutory interpretation. Indeed, in our view it is important that students have a basic understanding of constitutional principles before learning about statutory interpretation; but that a good knowledge of statutory interpretation is actually crucial to students of constitutional and administrative law.

While statutory interpretation requires an understanding of public law principles — especially constitutional principles and values — it also informs other public law subjects. For example, the constitutional validity of a statute cannot be ascertained without first ascertaining what the statute means; the legal validity of an exercise of statutory executive power cannot be ascertained without first ascertaining the scope of the power conferred. Of course, not all executive power derives from statute, but in our legal system is seems an acceptable generalisation to say that most do. Recent developments in Australian administrative law jurisprudence emphasise the centrality of statutory interpretation. Most questions that a reviewing court has to answer in order to decide the validity of executive action will depend upon the

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[16] Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 39–40 (citations omitted).

[17] Note that Jeff Goldsworthy has argued that the new approach is not consistent with these values: see Jeffrey Goldsworthy, 'Is Legislative Supremacy Threatened?' (2016) 60(11) *Quadrant* 56.

proper construction of the statute.[18] Indeed, the High Court continues to insist that all the limits of statutory executive power are to be found in the statute by which it is conferred, albeit interpreted in light of principles, many of which were developed by the courts. In other words, the limits of executive power are not free-standing common law norms.[19]

For all these reasons, statutory interpretation should be understood as a crucial component of the public law curriculum, which is both inherently intertwined with, but also distinct from, constitutional and administrative law.

III THE ADVANTAGES OF TEACHING STATUTORY INTERPRETATION IN ITS PUBLIC LAW CONTEXT

In this section we outline three key advantages that we have found in teaching statutory interpretation in its public law context. First, it is necessary to briefly explain our teaching approach. Note that we will explain this in more detail in section III of the paper.

In brief, we have taken the approach of teaching a course called 'Public Law and Statutory Interpretation' in first year. The course is broadly divided into two halves. The first examines the basic concepts, institutions and principles that underpin our system of public law. This includes examination of what it meant by the rule of law, and the principles of democracy, constitutionalism and federalism. It also includes a fairly brief overview of the nature of legislative, executive and judicial power in the Australian constitutional context, with a focus on the interrelationship between the three branches of government. The second half of the course focuses on introducing the fundamental principles of statutory interpretation in a practical context.

The statutory interpretation component of the course begins with an overview of the principles of statutory interpretation, but is largely taught via the use of 'case studies' — in which students are given legislation, explanatory material, and the facts of a problem question ahead of class, and asked to discuss and debate their interpretations of the relevant provisions in class. Some case studies are drawn from real cases, but students are not made aware of, or given, the judgments until after they have considered and discussed the problem for themselves. This encourages students to see *statutes* as the primary source of law in

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[18] See, eg, Will Bateman and Leighton McDonald, 'The Normative Structure of Administrative Law' (2017) 45(2) *Federal Law Review* 153, who argue that 'over the course of the last 40 (or so) years there has been a profound reorientation of how [the rules and principles of administrative law] are conceptualised in Australian law. The shift has been away from an approach which gives prominence to the identification and articulation of 'grounds of review' towards an approach which gives increasing emphasis to statutory interpretation and particulars.': 153.

[19] See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350–1 [26]–[29] (French CJ), 360–1 [57] (Hayne, Kiefel and Bell JJ), 370–1 [90]–[92] (Gageler J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ); *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, 913 [100] (Edelman J).

our legal system. In our view, this is important in modern legal curricula, as the traditional precedent-based approach to studying law creates a tendency in students to see court judgments as the main, authoritative source of law.[20] Other case studies are purely fictional. Class discussions about key interpretive principles, and the method of interpreting legislation, are interwoven with these case studies.

This approach means that students gain a broad understanding of the key public law principles that underpin the principles of statutory interpretation, so that they can critically engage with the way courts interpret statutes. However, teaching statutory interpretation as a subject before constitutional and administrative law means that students have ample opportunity to practice, develop and apply their skills in later year public law subjects.

This approach has three distinct advantages, which overcome some of the major difficulties that teachers of statutory interpretation have identified.

A *Contextualising the Canons of Construction*

The first benefit of teaching statutory interpretation together with the foundational principles and concepts of public law is to provide a broader theoretical and institutional context for the principles of statutory interpretation.

Many experienced teachers have noted that it can be difficult to interest students in legislation and its interpretation — the subject is frequently perceived as 'difficult', 'boring' and challenging to teach.[21] This is particularly the case when statutory interpretation is taught as a disconnected series of rules and cannons — including many with complicated Latin names — as it often seems to be. Dharmananda and Lane agree that 'if statutory interpretation is taught as just a stream of rules and principles it would be a dry and vapid subject'.[22]

Dharmananda and Lane offer two strong rebuttals. The first is the interesting and important questions raised in many cases on interpretation. The second is to point out that law teachers should be 'cautious about being too guided by what students find "fun"'.[23] We agree with both of these points.

We have also found that teaching statutory interpretation in its public law context tends to make the subject more interesting to students, as well as teachers. By introducing the broader public law institutional and theoretical framework in which legislation is made, applied and interpreted, students see the principles of statutory interpretation as complete and coherent body of law, rather than an ad-hoc list of difficult and contradictory rules. This allows students not just to learn the principles, canons and rules of constitution, but to understand them, and to appreciate why and how they have developed.

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20 See Part III below.
21 Dharmananda and Lane (n 4) 42.
22 Ibid.
23 Ibid 43.

With an understanding of the foundational principles of public law, students critically engage with the canons and principles and process of construction.

B *Integrating Theory and Doctrine*

One of the perennial debates in teaching statutory interpretation, and law teaching more generally, relates to its overarching aims: is the role of a law school to produce 'Pericles or plumbers'?[24] The arguments that underpin the recent push for an increased focus on statutory interpretation have tended to focus on the need for students to develop practical skills. For example, Justice Maxwell, President of the Court of Appeal of the Supreme Court of Victoria said:

> Law schools are, after all, about training lawyers and, if lawyers need to be good at statutory interpretation, as I think they do, law schools need to make sure that students learn those skills.[25]

Similarly, Chief Justice French has said:

> Competence in using the techniques of statutory interpretation is essential to legal practice today. To provide a basic grounding for the development of that competence is a responsibility of legal educators.[26]

Our own view is that the theorist and practitioner should not be viewed as dichotomous. Theory and practice inform one another, and a grounding in theory will allow students to view the rules of statutory interpretation in their broader public law context, which will enable them, as practitioners, to make coherent arguments about the application and development of those rules in specific cases. An understanding of theory and a capacity for critical thought will make those students who go on to practice law more adaptable and capable lawyers. And a knowledge of doctrine can only strengthen the work of those who are more theoretically focussed. Most law students will have careers that benefit from an understanding of both theory and doctrine.

Our approach to teaching statutory interpretation therefore integrates theory and practice. We have found that grounding doctrinal principles and rules in theory encourages students to think critically about doctrine and contextualise those rules. For example, we introduce competing ideas about the rule of law in the first class, and then return to them throughout the course. This encourages students to critically examine competing views about the role of judges in interpreting statutes. Similarly, a basic discussion of parliamentary sovereignty at the start of the course is built on when students study the literal and purposive approaches to statutory interpretation, the presumption that

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[24] William Twining, 'Pericles and the Plumber' (1967) 83(3) *Law Quarterly Review* 396.

[25] Christopher Maxwell, 'Reflections from the President' (2012) 2 *Dictum—Victoria Law School Journal* 1, 4.

[26] Chief Justice Robert French, 'Bending Words: The Fine Art of Interpretation', (Lecture, University of Western Australia Faculty of Law, Guest Lecture Series, 20 March 2014), 17 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf>.

legislatures do not intend to limit fundamental rights, and the approach courts take to drafting errors.[27]

Once students have a basic understanding of the nature and scope of legislative and judicial power and the interaction between them discussions about whether courts should take a literal or purposive approach to statutory interpretation occur naturally. In fact, we have found that discussions about these issues are frequently student-led; raised by the brightest students prior to the principles of statutory interpretation even being introduced by the teacher. For instance, after introducing students to the powers of and interaction between the three branches of government, we consolidate their knowledge of those topics by examining cases dealing with executive detention — including *Al-Kateb v Godwin*.[28] Central to McHugh J's judgment in that case, was his statement that: 'a law authorising detention will not be characterised as imposing punishment if its object is purely protective'.[29] This leads naturally to a discussion about how courts go about the task of determining the objects of a statute and whether parliaments can be said to have intentions. This also highlights how closely the principles of public law and statutory interpretation, and theory and practice, are interwoven.

We suggest that combining statutory interpretation with a basic introduction to public law theory and public law principles contextualises the principles and method of statutory interpretation. This encourages nuanced and interesting discussions about statutory interpretation and ensures that the course appeals to students with a range of strengths and interests.

C *Incorporating Other, Related Content*

Several commentators have argued that, because there is 'more to legislation than just statutory interpretation',[30] and that topics such as the legislative process, administrative decision-making and executive power, government and regulatory frameworks, theories of interpretation, and legal history should all be included in a course on statutory interpretation.[31] Of course, too much content risks 'overcrowding' and diluting the focus on statutory interpretation; but, as Garrett has pointed out: 'It's difficult to interpret the product of a process without understanding that process itself'.[32]

Teaching statutory interpretation together with the foundational principles of public law achieves this. Before studying the details of the

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27 Specific examples of the activities undertaken are described in Section III of this paper.

28 (2004) 219 CLR 562.

29 Ibid 584 [44].

30 Dakota S Rudesill, Christopher J Walker and Daniel P Tokaji 'A Program in Legislation' (2015) 65(1) *Journal of Legal Education* 70, 71.

31 See, Dharmananda and Lane (n 4,) 36; Ethan J Leib, 'Adding Legislation Courses to the First Year Curriculum' (2008) 58(2) *Journal of Legal Education* 166, 182–9.

32 Elizabeth Garrett, 'Teaching Law and Politics' (2003) 7(1) *New York University Journal of Legislation and Public Policy* 11, 15.

interpretive methodology, students are introduced to the legislative process in the broader context of legislative power, democracy and participation, and parliamentary sovereignty. While necessarily fairly brief (we spend approximately one week on this topic), we have found this is sufficient for most students to appreciate the general nature of legislative processes. Though we note that law schools with a larger cohort of international students may need to spend more time on these issues, to ensure students are familiar with the Australian political and legislative process.

As the literature suggests, we have found that this approach:

> provides a foundation for understanding the relationship between text and policy, that purpose is sometimes elusive and that the legislature 'rarely pursues a single purpose at all costs.'[33]

Similarly, providing students with an overview of executive power and the administrative state (a topic with which most students tend to be less familiar compared with legislative process) provides an understanding that the administration also plays a large role in making and applying legislation. While, in Australia, the interpretations given to legislation by the executive are not final and conclusive, the reality is that most legislation is not subject to litigation. Thus, the executive tends to be responsible, in most circumstances, for interpreting the legislation it applies.

It is critical, then, that students who go into government work understand how to interpret the scope of their own statutory powers, and how to determine the meaning of the legislation that they administer. It is equally critical that they understand this task in the broader constitutional context in which executive powers operate. The recent High Court decision on the same-sex marriage postal survey — *Wilkie v The Commonwealth*[34] — provides a good illustration. The Court's interpretation of s 10 of the *Appropriation Act (No 1) 2017-2018* (Cth), both for the purposes of determining its constitutional validity, and the scope of the Minister's powers under it, relied heavily on the history and constitutional context of appropriations legislation and executive spending.[35]

IV OUR APPROACH TO TEACHING PUBLIC LAW AND STATUTORY INTERPRETATION

Public Law and Statutory Interpretation was introduced into the Monash curriculum in 2015. Most students complete this course in the second semester of their first year of study. The unit also forms part of the JD curriculum, where students take the course some time in their

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33 Dharmananda and Lane (n 4) 37, quoting *Carr v The State of Western Australia* (2007) 232 CLR 138, 143 [5] (Gleeson CJ).

34 (2017) 91 ALJR 1035.

35 Ibid. See especially [69]–[93], [98]–[128].

first year. In both courses the subject is a pre-requisite for Constitutional Law and Administrative Law.

The course comprises of two parts. The first focuses upon the principles of public law; the second focuses upon the principles and practice of statutory interpretation. The following is a list of the topics taught:

1. Foundational Concepts, Relationships and Structures
2. Parliament and Legislative Power
3. The Executive and Executive Power
4. Courts and Judicial Power
5. Public Law in Practice: Executive Detention of Asylum Seekers
6. Public Law in Practice: Human Rights in Public Law
7. Legislation and the Public Law Context
8. Parliamentary Intention
9. The Process of Statutory Interpretation
10. Statutory Interpretation: Text
11. Statutory Interpretation: Context and Purpose
12. Statutory Interpretation: Presumptions
13. Interpretive Clauses in Charters of Rights

This design serves the functions explained in the first sections of this paper. It provides students with an understanding of the foundational principles of public law so that the principles of statutory interpretation may then be understood, and analysed, in that light.

Throughout the course, there is an emphasis on active learning. Discussion questions, group activities and case studies feature throughout the first part of the course. Examples of activities include:

- Circulating news reports which raise issues discussed in the course—such as judicial independence or federalism—and asking students in groups to explain and contextualise the issue to the rest of the class.
- Posing hypothetical questions which require students to apply key principles and consider how they might operate together, such as 'The Victorian Government seeks your advice on how it can withdraw from the Commonwealth'.
- Debating whether a charter of rights should be included in a constitution, after having read leading commentary on both sides of this issue.
- Having groups of students draft and justify a judicial appointment process.

In week 5, we focus on the ever-contentious issue of the legal protection of human rights as an opportunity to consolidate students' understanding of the relationship between the three branches of government and assess public law principles in light of the more foundational concepts we explore in topic 1. For example, in this week students are invited to debate a proposal to amend the *Constitution* to

include a bill of rights and design a list of rights that might be included (along with, if appropriate, a 'limitations' clause). Students are also introduced to the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) and federal *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and required to identify and discuss the strengths and weaknesses of these instruments.

This emphasis on active learning continues in the second part of the course. Material setting out the fundamental principles of statutory interpretation, and key case law, is conveyed through online materials and videos. Classes are reserved for high-level discussion of these principles, activities, and (as explained in the preceding section) case studies that demonstrate their application. For example, students complete a case study on *Evans v New South Wales*[36] (the World Youth Day case) to see the close way in which Australian courts work with statutory text, and the way in which ordinary natural meaning is ascertained. The case of *Victims Compensation Fund v Brown*[37] is studied as an example of the complexities that might arise in ascertaining the 'purpose' of a statute, and thereafter, how statutory purpose might inform statutory meaning.

At the end of the course, students attend three statutory interpretation workshops. For these classes, lecture streams are divided into two to reduce class sizes and enable more interaction between teachers and students. Students complete a pre-class, in-class, and post-class exercise. The pre-class exercise will typically comprise of reading a piece of legislation, and extrinsic material. In class, students work in groups to answer questions about the interpretation of that legislation, in light of given facts. After class, students read a case in which a court confronted these questions and reflect upon whether the approach they took in class was similar to or different from that taken by the courts (or, if the case is fictional, a discussion paper prepared by their lecturers). Structuring the material in this way reinforces to students that the process of statutory interpretation 'does not begin with case analysis, but with the text of the statute'.[38]

These workshops were introduced in 2017 after it became clear that students were failing to engage in the interpretive task and resorting to case-based reasoning or 'application' in their exams. This is a challenge that, it seems, many teachers of statutory interpretation have faced.[39] Others have suggested that it is due to the traditional focus in legal teaching on judicial reasoning and case law.[40] Our experience supports this. By forcing students to work with the legislative material *before* looking at how it was applied in a particular case, we encourage students to better engage with the interpretive process. These workshops mimic what students are required to do in their final exam. The legislation and hypotheticals we use typically involve the conferral of power on an executive officer, and students may also be asked a

36 (2008) 168 FCR 576.
37 (2003) 201 ALR 260.
38 Dharmananda and Lane (n 4) 39.
39 See ibid.
40 Ibid.

question about whether a particular provision of the statute is compatible with public law principles, further emphasising the relationship between public law and statutory interpretation.

The use of real cases in which justices of the High Court have disagreed with one another, or with the justices of a Court of Appeal, in these workshops has the advantage of showing that demonstrating that there is not a single 'right' approach to interpreting a statute. Students see that 'the interpretation of legislation is not susceptible to being a mechanical or scientific task',[41] and that the most senior judges may take different views as to which principles deserve greater weight in any particular case. We have used a range of cases in workshops, and these can be varied depending on the interests of students and teachers. We have chosen cases which raise particularly interesting issues, such as *AB v WA*,[42] *Lacey v Attorney-General (Qld)*[43] and *Uber BV v Federal Commissioner of Taxation.*[44] (And, for this same reason, have stopped teaching *Certain Lloyd's Underwriters*![45]).

Along with two of our Monash colleagues — Melissa Castan and Maria O'Sullivan — we have recently published a textbook designed to support this course. The textbook, *Public Law and Statutory Interpretation: Principles and Practice*, published by The Federation Press, comprises expository and analytical text combined with carefully edited extracts of key cases and straightforward commentary on foundational and advanced issues. It also includes:

- several in-depth case studies which provide an opportunity to engage with pressing public law issues in a practical context; and
- discussion questions, reflective exercises and other activities, to demonstrate the contemporary significance of the issues explored in the text.

V CONCLUSION

Teaching statutory interpretation in its public law context offers several benefits over the 'embedded' and stand-alone approaches, in our view. This is not to say that it is problem-free. In teaching this course we have experienced many of the same issues identified by others in the literature. For example, it remains difficult to get students to focus upon the legislation, and treat it as a source of law, before moving to consider how that law applies to a particular set of facts. It is sometimes difficult to convince students that there is no single 'right' answer or approach to interpreting a statutory provision—while at the same time, there are some interpretations that a statutory provision simply cannot bear, or that a court operating in our constitutional

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41 Hon Justice John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2016) 40(2) *Melbourne University Law Review* 626, 629.

42 (2011) 244 CLR 390.

43 (2011) 242 CLR 573.

44 (2017) 247 FCR 462.

45 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 87 ALJR 131.

system could not legitimately give it. There is general resistance to the 'active learning' approach, which tends to require more from students in terms of time and effort. However, this may differ at institutions where active learning is expected from day one of law school. As noted above, some of these issues have been managed by changes to the course and approach. Others, such as some students finding the course too challenging in terms of workload or resisting the active learning approach have not been addressed. This is because we have found that the course has significantly improved the quality of students' statutory interpretation skills in later units — particularly Administrative Law.

We have not undertaken a formal empirical study comparing the statutory interpretation skills of students who have studied the unit and those who have not. However, our observations, as teachers of later year public law units in administrative and constitutional law, both prior to and after the public law and statutory interpretation unit was introduced, indicates students' skills in statutory interpretation have improved. Many of our colleagues who teach later year public law subjects have made the same observation. By way of example, we have found that we have been able to increase the length and complexity of statutes used in administrative law assessments, and that most students who have studied public law and statutory interpretation in first year are well equipped to answer problem questions based on those complex statutes.