The difficulties of teaching legislation to students[1]

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Introduction

Before becoming a Law Commissioner I spent more than 40 years teaching law at the University of Canterbury in New Zealand. I had the privilege of teaching, and learning with, many very bright young people. They mostly came to the study of law with little background knowledge of the subject and no preconceptions. They found the study of law quite hard. In particular, they found statute law hard, and they also found quite a lot of it boring. They liked the common law better, and were more at home with the judgments of the courts than they were with the work of Parliamentary Counsel. I would like in this talk to ask why that is the case, and then explain what we might do to right the balance.

Why is statute law hard?

So, then, why do students find statute law a struggle? I can dispose of two reasons fairly quickly, because they are not confined to statute law.

First, much of the subject matter of statutes is complicated. That is to be expected. Society is complex and the economy is complex, so the laws regulating them will obviously reflect that complexity. There will be categories and sub-categories; there will be rules, exceptions to the rules, and qualifications to the exceptions. But statute law does not have this to itself. Some areas of the common law are equally complex, if not more so. We can all bring to mind areas of the common law of contract which were close to nightmare territory: contractual mistake was one.

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[1] This is an edited version of a paper given at the CALC conference held in Hong Kong in April 2009.

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Secondly, statute law can be hard to find. If you set students a research exercise they will often struggle to find all the relevant provisions. Our statute law has grown up in ad hoc fashion, one piece after another. Unlike the codes of some other countries, our statute law has no logical order or system. I am reminded of the words of Jeremy Bentham[3]:

> "As if from a rubbish cart a continually increasing and ever shapeless mass of law is from time to time shot down upon the heads of the people, and out of this rubbish and at his peril is each man left to pick out what belongs to him."

Individual pieces can get lost in the mass. I once set my students an essay involving door-to-door selling and the controls upon it. They all had no trouble finding the leading piece of legislation, the *Door to Door Sales Act 1967*. But the great majority missed an important provision about door-to-door selling, which is contained in the *Securities Act 1975*. Sometimes more than two provisions bear on a subject in ways which, at first sight anyway, are not consistent. Sometimes provisions are hidden in places where you would least expect to find them. Who would ever think that a fundamental contractual rule about part payment of a debt would be secreted in the *Judicature Act 1908*? There is much more we could do to make our laws more findable. In my country, a comprehensive index would be a good start, together with a programme of consolidation or revision. The New Zealand Law Commission has recently so recommended.

But once again this problem of finding or accessibility is not peculiar to statute law. Common law cases can also be overlooked. It is all too easy to miss the fact that the case one has cited was recently reversed by the Supreme Court. We occasionally forget how much we rely on the writers of textbooks to help us find what is relevant.

So neither of these initial problems faced by the law student is confined to statute law. The problems assume different guises in common law and statute law, but essentially they are the same problems.

I want now to look at the things that make statute law hard and the things about it in particular that deter students. In what follows, I am assuming that my student is a bright young person, coming to the law for the first time, with very little prior knowledge. He or she is in fact an intelligent lay person. Here are the things that he or she finds difficult.

The first, of course, is the way that statute law is drafted. I hasten to say that I am referring here mainly to older statutes. Everyone knows that the traditional style of legislative drafting was not exactly user-friendly. While modern statutes are light-years better, there are still plenty of the old ones in force. New Zealand still has Acts more than 100 years old. Some decades seem worse than others. New Zealand endured a particularly rough patch in the 1950s. The *Trustee Act 1956* (which is one of New Zealand's most important and basic statutes) is an example. Here is section 64(1):

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[3] Jeremy Bentham, an Englishman, to the Citizens of the Several American United States, Letter 8

64 Power of Court to authorise dealings with trust property

Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

Provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

Just look at it. It is a single sentence. The long sentence is the greatest impediment to understanding: with it tend to go awkward grammatical structure, surplus words, and repetition. These features make it almost impossible for anyone to retain the sense. The example I have just shown you is also replete with some archaic language ("provided that", "the same", "thereof"). A young student is likely to look to a textbook for a paraphrase, rather than begin on the journey of reading the section him- or herself. Let me say in parenthesis that while legal documents are the most frequent offenders in the long sentence stakes, they are not the only ones. Our literature contains them as well. A Google search informs me that Jonathan Coe's novel "The Rotters' Club" contains a single sentence of 13,955 words, although I think grammarians have concluded that it is not a real sentence, just an unbroken string of words. The Guinness Book of Records states that the longest single sentence in literature is one of 1,287 words in William Faulkner's novel "Absalom, Absalom". So it is not just your Parliamentary Counsel forebears who sinned in this regard, but in the old days they did it more persistently than anyone else.

Modern statutes are a different proposition altogether. Plain language has arrived in New Zealand and as far as I can see in most other jurisdictions as well. Most modern statutes are a breath of fresh air compared with their predecessors. Their sentences are short, or, in cases where they need to be longer, they are broken up into numbered or lettered parts. The sense is conveyed as directly as possible. No more words are used than are necessary (but no fewer either).

Some statutes, although still a minority, use aids such as examples, flowcharts and overview summaries. There is a nice use of examples in the Student Loan Scheme Amendment Act 2007 (NZ), which introduces into the statute two students named Lenore and Keith.

Here is how Lenore's problem is sorted:

Example 1: Lenore

> Lenore has a loan balance on 1 April 2005 of $15,000. Lenore was issued with non-resident assessments of $1,997 for the 2005-06 tax year and $1,919 for the 2006-07 tax year, which she has failed to pay. The 2005-06 assessment ceased to be subject to standard interest (7% for the 2005-06 tax year) and instead became subject to compounding late payment penalties of 2% per month from 1 April 2006. The 2006-07 assessment ceased to become subject to standard interest (6.9% for the 2006-07 tax year) 1 year later on 1 April 2007. Her total late payment penalties on 31 March 2007 are $536 and her loan balance is $17,555.
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> On 1 April 2007 her overdue debt is zero and her loan balance is reduced by $398 (penalties of $536 less interest of $138 charged in place of penalties) to $17,157.

There are differing views about these modern aids, but to my mind this sort of thing is all to the good.

However even the shortest and plainest language in our most modern statutes can still daunt the beginner. Plain language does not necessarily mean interesting language. Take a recent New Zealand Act, the *Human Tissue Act 2008*. It is about respect for and protection of body parts. It sounds fascinating. But here is section 56(1):

56 Trading in human tissue generally prohibited

(1) No person may, except under an exemption under section 60, require or accept, or offer or provide, financial or other consideration for human tissue.

(2) A person commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding $50,000, if—

(a) the person intentionally or knowingly does an act; and

(b) that act contravenes subsection (1).

There is no waste verbiage there, and it is hard to see how it could have been put any more simply. I have no criticism of the drafting at all. But our student will not find it anything like as interesting or enjoyable as he or she was hoping. It is very different from the student's normal reading matter: novels, short stories, internet blogs and Facebook pages. First, the language, although short and simple, is much more formal than any of those other types of documents. It is in a different register; it is precise and rather stiff. No-one else writes or talks like that. One seldom finds colloquialisms in legal writing, although occasionally they do appear and seem inappropriate when they do.

Secondly, the provision contains some technical legal language: the word "consideration" is probably not one that the beginner will have heard before, at least used in this sense. "Summary conviction" will be unfamiliar.

And, thirdly, there is that all-pervasive feature of statutory drafting, the cross-reference. Section

60 is referred to. References to other provisions are just part and parcel of the modern statute. William Dale[4] called this phenomenon "centrifugence" because the reader is constantly being drawn away from the central focus to examine other parts of the document. In this provision there is a hidden cross-reference as well. So what is "human tissue"? A practised reader will detect straight away that this term is probably defined in the interpretation section, and indeed it is. The pages have to be turned back to see exactly what that definition is. It is one third of a page long. This back-and-forth process is not found in many other sorts of writing. It takes much practice to get used to it. It means that the full import of a provision can only be derived after quite a lot of work. It is a bit like doing a jigsaw puzzle.

There is another reason why statutes are not a good read. Parliamentary Counsel are constrained, in that their job is simply to set out the law and nothing else. They just set out the rules without further elaboration[5]. Parliamentary Counsel do not have the luxury of explaining the reasons for the rules they so precisely set out. Nor can they explain the same point in several different ways to make sure the message is understood: they do not say "or, to put it another way". Very occasionally they use examples, as we have seen, but it is only very occasionally. The Act is devoid of context and colour. Its very starkness makes it difficult, particularly for a newcomer, to see on reading it how the Act will fit into the social framework, and how it will affect the world that they know.

In other words, statutes are not a gripping read. For those unfamiliar with them they are dull.

The second problem students find with statutes is related to the first. You have to read a statute very carefully. Every word has a job to do. This is even truer now than it used to be in the old days when statutes sometimes contained many surplus words. So statutes require close reading. They are an intellectual challenge, and you cannot skim-read them. I recently came across this paragraph in a guide for legal researchers[6]:

> "Read the statute three times and then read it again … Assume all words and punctuation in the statute have meaning. It is tempting to skip words that you don't quite understand. Don't do it".

Another instruction manual for statute readers gives two words of advice: "Slow down"[7]. Most students, indeed most people in general, are just not used to really close and careful reading. They are used to quick reading to get the sense. In the law, too often the sense derived from a quick read is not the right one, or at least not the complete one.

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4 Dale, *Legislative Drafting, a New Approach* (Butterworths London 1977) 332.

5 Sir Christopher Jenkins *Helping the Reader of Bills and Acts* (1999) 149 New LJ 798.

6 Nolo: *Help with Legal Research* http://www.nolo.com/statute/index.cfm

7 Maranville, *How to Read a Statute: MAP it!* http://courses.washington.edu/civpro03/helpful_hints/StatuteMAP.doc

All of this is exacerbated in statutes. To understand a statutory provision you need to read the statute as a whole. It is dangerous to take a section out of context. If you do, you may fail to discern the overall purpose of the Act, which can and should influence the meaning you give to one of its sections. More importantly, you may fail to see how one provision of the Act relates to another. How often does it happen that the meaning you attach to section 21 of an Act on the first reading has to be modified, or even abandoned, when you read on and encounter section 36? I used to tell my students that that is the most important rule to reading statutes. If that was the only message they took away from my legislation class, I used to feel it was worth something. And yet it is a trap I still fall into myself when I am in a hurry. I did so recently to my embarrassment when I was critiquing a draft bill. I simply failed to see that one clause required a restricted reading in the light of another.

So our students must learn to read the whole Act. Yet there is a real problem here. Some Acts are so long that the exhortation to read them as a whole is given in hope rather than any real expectation. In New Zealand the Local Government Act 2002 is 437 pages long. Can I seriously expect that any law student will read every word of it so as to be confident of the meaning of section 21? Can I really expect any practitioner to do it, or even any judge? Here practicalities begin to overtake us. The most one can suggest is that one needs to be thoroughly familiar with the structure of the Act so that one knows where to look for other provisions that might be relevant. I do not like long Acts.

We come now to the third problem. Even when our new student has laboured over an Act of Parliament for hours and arrived at a perfectly sensible construction of the relevant provisions, he or she may find that that is not the end of it. The true meaning of the relevant provisions may be affected in a very material way by things outside the Act itself. An Interpretation Act, for example, may give a meaning to words like “person” or “public notice”, which our novice would never have dreamed of. There may turn out to be another Act on the same subject-matter, and the interpretation given the Act under study may have to be dovetailed with or reconciled with the other. Reconciliation of two apparently inconsistent provisions in different Acts causes more trouble than almost anything else. And then in New Zealand we have a Bill of Rights Act which requires that other Acts must, if possible, be read in conformity with it. So, an apparently clear answer which our student has derived from a particular provision in the Act may have to be modified because it impinges, say, on the freedom of expression guarantee in the Bill of Rights Act. Newcomers find this frustrating and difficult. Very few other sorts of writing require you to continue to cross-check with documents outside the one in question to make sure you get it right. Every statute is part of a much larger legal landscape.

Then we come to the fourth problem. It is even more fundamental than the ones I have talked about, and I fear that generations of law teachers must bear some responsibility for it. We law teachers have for far too long filled our students up with case law, and in particular the common law. In the first year of their law degree students are introduced immediately to judicial reasoning, which includes the rules of precedent, extraction of the ratio decidendi of the case, techniques of distinguishing cases, and the judicial art of reasoning to a conclusion. *Donoghue v*

Stevenson and *Rylands v Fletcher* make their appearance very early on in legal studies. As like as not a lot of time will be spent on the rules of postal acceptance in the law of contract, so that one can see how the judges develop the law on the basis of earlier precedent. Students like this better than reading statute law. The reasons are not far to seek[8].

First, the cases have interesting facts. They are about finding a dead snail in a ginger beer bottle, or about a man whose reservoir leaked onto his neighbour's land. And who can forget Mrs Carlill sniffing a Carbolic Smokeball for 14 days and then catching the flu? The cases tell interesting and sometimes very amusing stories. Acts contain only abstract propositions.

Secondly, the judges give reasons for their decisions. You can see them arguing to a conclusion and you may disagree with their arguments. You can debate about it for hours. There is something to get your teeth into. Acts do not give reasons.

Thirdly, there is often an interesting challenge in working out exactly what rule a case stands for. That is particularly so if there are multiple judgments in a superior Court and each judge uses a slightly different line of reasoning to reach the same result. There is usually no single form of words in which the rule can be expressed. Case law is based on principle and analogy rather than on any strict form of words. Acts contain predetermined rules in a set form of words.

It is for these interesting reasons that what was called the case method of teaching became popular. It still is in many quarters. It was devised in the US and came to Britain in the 1960s. Teachers give their students cases to read and then discuss them, Socratic style, in the ensuing class. If it is well done, interesting debates can ensue. An academic called Sparrow explains it thus in an article he wrote in 1967[9]: "The teacher of law should make maximum use of the teaching tool which is uniquely available to him - the case … The student is first presented with a recognisable real situation rather than an abstract principle." Sparrow then quotes a statement by Holmes describing the case method of teaching law in the United States

> "The case method puts body on the principles which otherwise would be nothing more than a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Corregio's pictures."

All of this reveals a teaching preference for the single instance rather than the abstract proposition, for the interesting fact situation rather than the generality. Yet, as I have said, statute law is all about abstract propositions. It contains rules which are pre-determined, set out in words which are indisputable. Unlike the common law the words are everything. As I have said, no

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[8] See the interesting analysis in Fitzgerald *Are Statutes Fit for Academic Treatment?* (1970) X1 JSPTL 142.

[9] Sparrow *Teaching Method: A Basis for Discussion* (1967) 1 J1 of the Association of Law Teachers 37. Yet this Socratic method of teaching cases was quite new in Britain at that time. Before then the teacher had still relied on cases, but just *described* them: see JC Smith *The Case Method of Teaching Law* (1967) 1 J1 of The Association of Law Teachers 17.

reasons are given as to how and why the rules got there. The Act is abstract and bloodless. The student does not have the challenge of formulating the rule; this has been done by Parliament.

What I am afraid tends to happen by way of compensation is that when there is litigation on a provision of a particular statute, the teacher seizes eagerly on the case, and sometimes concentrates more on that than on the words of the statute. There are obviously problems with this tendency to seek refuge in the case. One of them is that it can skew the study of the statute to place emphasis only on those provisions which have been litigated, which is dependent on accident. It also has the effect that sometimes students will cite the words of the judge explaining the Act rather than the words of the Act itself.

The concentration on cases has another difficulty, in that it assumes that our legal system revolves around the court. It is almost as if nothing is real law until it has been pronounced on by a court. There used to be a school of realist jurisprudence in the United States which came very close to endorsing that proposition. Yet, as we all know, most provisions of most statutes never get anywhere near a court. Some entire statutes never do. Yet they are the law, and have to be worked with on a daily basis by administrators and others, some of whom do not have a legal training. At the university where I worked good and able people in our registry referred to a multitude of statutory provisions all the time. Is this student entitled to enter university? To what allowance is he or she entitled? What kind of report does the university council have to file with the Ministry? How does academic freedom affect the employment rights of university staff? There are no cases on any of these things, or at least on very few of them.

The failure

So those are some of the problems which are faced by students, and their teachers, when confronting statutes. 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.

In general, university law schools have not responded well enough. There have been exceptions of course. As early as the 1920's a few American law schools had innovative courses in legislation[10], although they tended to be the products of particular professors and did not survive their passing. It was not until 2006 that Harvard Law School introduced a segment on legislation in its first year law course. Dean Elena Kagan said: "When you haven't changed your curriculum in 150 years, at some point you look around."[11]

In the UK and the Commonwealth there seem not to have been any innovative courses until very much later. In 1930, an English academic named Hughes foreshadowed the problem. Writing in the *Journal of the Society of Public Teachers of Law* he noted with alarm the growing incidence

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[10] Eskridge The Three Ages of Legislation Pedagogy (2004) Legislation and Public Policy 3.

[11] *The New York Times* October 31 2007.

of statute law[12]. He acknowledged, apparently with some reluctance, that law teachers would have to deal with it. He said:

> "Must we become mere expositors of a series of propositions with a facility for mechanical cross-references as our principal stock in trade? If this is to be the result of increased legislative interference in the growth of law a profound effect will result to the teaching of English law and the spirit of English law itself."

To give Hughes his due he examined "the feeling which I have had for some time, that if statute law increases the rational teaching of law must give way to the dull routine of expounding a code", and concluded that it might be possible to bring life to the subject by finding principles, even rational principles, underlying the dull and uninteresting propositions in the statute. Nothing much had happened by 1967 when Master Jacob, a Master of the English High Court, gave a lecture in which he noted the Law Commission's proposals to codify the law of contract[13]. He said:

> "If such a code is produced it may well revolutionise the methods of teaching contract. It will be necessary to apply new methods of teaching law without the cases. This may have a snowball effect in other branches of the law where the law may also have to be taught and learned and indeed practised without the cases."

There were eventual advances in some places. Writing in the *Statute Law Review* in 1980[14], David Miers and Alan Page outlined a far-sighted course they offered at Cardiff. But in 2007, Oliver Jones, in a very nice article[15], said that even by that time some law schools, including some of the most prestigious, "provide virtually no instruction in this area". At his own alma mater, he said, there were "roughly two lectures and two tutorials" on statutory interpretation.

What do we do?

Let me explain my ideas on the subject. I tried to put some of them into practice at my old university. There needs to be far greater instruction for students, not just in statutory interpretation, but in statute law generally. More importantly, students have, if possible, to be made *interested* in the subject.

A number of things need to be recognised when teaching students about legislation.

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12 Hughes, *The Teaching of Statute Law* (1930) JSPTL 11.

13 Jacob, *Legal Education – The Next Ten Years* (1967) 1 J1 of The Association of Law Teachers 4.

14 Miers and Page, *Teaching Legislation in Law Schools* (1980) 1 Statute Law Review 23.

15 Jones *Statutory Interpretation: The Case for a Core Subject* (2007) 5 Journal of Commonwealth Law and Legal Education 85. In *Jurisdynamics*, a blogsite, Professor Jim Chen of the University of Louisville in 2006 described the failure to teach statute law properly as "perhaps the worst pedagogical oversight in American legal education." He said that "very few law students receive any systematic education in reading statutes."

- First, statute law needs to be studied as a subject in itself, and not just picked up by osmosis in learning subjects like criminal law and land law.
- Secondly, one must correct the previous bias towards common law.
- Thirdly, teaching statute law involves a lot more than just teaching students how to interpret statutes. Inevitably interpretation will form a significant part of any course, but it should never be thought that it is the whole of it. The study of Legislation is about a lot more than just interpretation.
- Fourthly, one will inevitably refer to decided cases. One needs to do so to explain the rules of interpretation, and simply because courts at the end of the day are the authoritative interpreters of statutes. But one must get away from the idea that the cases are the whole, or even the most important part, of it. That is the old court-centric approach which engulfed us for far too long.

It also pays to think occasionally of what the students will do when they graduate. Some will go into practice and become litigators, or act for clients who are in dispute with others. To them interpretation and the adversarial process will be very important. But not all students follow that track. Some will need to explain a piece of new legislation to their clients, and summarise for them what they will have to do to comply with it. Others may be asked to critique a bill for a client who wants to make a submission to a parliamentary committee. A number will end up in the Government service, where they may be involved in policy development for a new statute. Some may become the parliamentary counsel. Some might even end up as members of Parliament who cast their vote on the parliamentary counsel's final product. By no means all law is about dispute resolution.

In what follows, I outline one way of approaching the task of teaching legislation to students. We were moving in this direction at the University of Canterbury when I taught there. But more needed to be done.

First year: introduction

One has to get in early. One has to introduce students to statute law in their first year, preferably before they have studied any other legal topics. But here you run into an immediate problem. As I intimated earlier, in their first year students know little or no law. There is no point confronting them with a complex Act about some commercial matter, because they do not know enough about the substantive law to make any sense of it, and they cannot be expected to. So you have to pick homely examples such as an Act dealing with dogs that bite people, or an Act which prohibits the casting of litter on public beaches. There are enough such simple Acts around to at least make a start. In that first year one can introduce the students briefly to how statutes are made, so they know something about policy development and the parliamentary process, and are acquainted with the fact that in our country at least the public can contribute to this by making submissions on bills. They then have to be shown how to read a statute carefully. There are different ways of helping them with this. Some teachers believe they should be told to break up a complex section

into bite size pieces, although I have never been quite so sure about that: small bites can sometimes lose the flavour of the whole. Here will come the first warning that the statute must be read carefully and closely, attention being paid to every word, and read as a whole (with the slight reservation I mentioned before). The students can be introduced to the techniques of interpretation and to the primacy of words and their purpose. One can interest them with examples. One should not stint this introduction, and one should not allow common law reasoning, important though it is, to occupy the lion's share of the first year course as commonly now happens. In my view, statute law should be allocated at least equal lecture time to common law, and preferably more.

Second year: substance

Successful students then proceed to the second year where they will study fundamental legal topics such as criminal law, land law, contract, and tort and so on. Even though statute law will not be a subject in itself in that year they will begin to acquire some familiarity with it, particularly in criminal law and land law which are substantially statutory in our country.

Third/fourth year: a course in legislation

It is in the third or fourth year of the degree that I think there should be a full course on *Legislation*. We had one at the University of Canterbury but it was optional only, and by no means all students did it. I have argued elsewhere that a legislation course of this kind, which takes statutes as a study in themselves, should be compulsory. I still hold that view. Statute law must be a separate subject of study. By the third or fourth year students have a far better grasp of substantive law, so one has, as it were, more material to work with. Such a course needs to combine practicality with academic challenge. The process of familiarising people with statutes does, I am afraid, involve a certain amount of nuts and bolts. But the process of familiarisation must also pose deeper questions. Students will rapidly lose interest if it does not. This is a large part of it: one must try to capture the interest of the students and challenge them.

Here is an outline of what I tried to do when I was teaching the course. Others will doubtless wish to do it differently[16]. The course I taught had four elements.

The making of statutes

The first part of the course was an extended study of how statutes are made, building on the knowledge gained in the first year. When do you need an Act of Parliament? Are there some

[16] Other models are found in the articles by Oliver Jones (n 13); Miers and Page (n 12); Kay Goodall, *Teaching Statutory Interpretation: citings of NESSSI in Scotland* https://dspace.stir.ac.uk; Francis Bennion www.francisbennion.com 2007/nfb/005.htm; Chai R. Feldblum *The Joy of Teaching Legislation* http://www1.law.nyu.edu/journals/legislation/issues/vol7num1/feldblum

policy goals which are best accomplished by means other than legislation? How do we know which goals those are? We then need to study where the policies for statutes originate; how policy is worked through and refined; and how the Government is persuaded to accept it. Then there are all the twists and turns it must go through in the ensuing parliamentary process. In New Zealand, that involves a great deal of public input, and with our system of mixed member proportional representation a fair amount of political manoeuvring as well. Many documents are generated in the process: Cabinet papers, explanatory notes, commentaries of select committees, and reports of parliamentary debates. When I was a student we learned nothing about this at all. It was seen as not being within the purview of a lawyer. It was the business of historians and political scientists. Knowing about this *is* a lawyer's business. It serves a number of purposes.

- First, it brings the Act to life. It becomes more than just words on a piece of paper. When I was a law student we were never told how the words got on the paper. They might as well have fallen from the sky.
- Secondly, the surrounding documents - the Hansard debates and so on - can often supply what I have said is missing in the Act itself, that is to say the reasons for it, what it is designed to achieve, and how it will fit into the social fabric. Intelligent students usually want to know the answer to the question why. Why was this Act necessary? What is it for? One can often find the answer to such questions in the associated documentation.
- Thirdly, this surrounding documentation is now widely used, in my country at least, to assist in the interpretation of Acts. There is still some controversy as to how proper this is, and from time to time one hears constitutional objections to the practice. I shall talk about them a little later. It is important for students to realise that, whatever one thinks of the practice, the reliability of such information is variable. Some of it, particularly that generated in the early stages of a process, can be downright dangerous if there have been significant changes to the bill later. It is nice to have juicy current examples of bills which have just gone through the process. Students have (hopefully) read about them in the newspaper and are interested to see the obstacles they have had to negotiate in parliament, how their shape has changed, and how the original explanatory note may have got out of date.

Another thing this study of the legislative process accomplishes is to let students see why our statute law is a collection of individual bits and pieces rather than a coherent code. Most Acts originate in a particular Government Ministry or Department. That has been happening for generations. These Ministries and Departments tend to operate as silos, and there is sometimes a failure to see across the whole spectrum of government. Given that we have 100 years' worth of Acts on our books, many of them reactions to a particular problem of the time, it is no wonder that there is the occasional inconsistency, and no wonder either that some pieces do not fit neatly into the jigsaw.

2. Drafting the legislation

Next, I think legislative drafting is a useful subject of study. There was a segment about that in the course I taught. When students come to university most of them have no idea who drafts Acts of Parliament: they have simply not thought about it. They would almost certainly never have heard of the Parliamentary Counsel Office and, even if they had heard the name, they would not know what it was. Few people do. I am thoroughly ashamed to say that until I came to teach this course I did not know either.[17]

It is an interesting, and I think important, question as to why the traditional drafting style was as it was. Why on earth would anyone ever want to draft anything as tautologous, complicated and overwritten as section 64(1) of the Trustee Act? And it is by no means the worst the example. I have heard it suggested that parliamentary counsel were once paid by the page. (If that were the case they would still be doing rather well, because despite the new economical style of drafting many modern acts are in fact longer than their forebears. This is not because they are more wordy - the very reverse - but because they deal with more things. Law is becoming more complex). The real reason, I think, for the old style is that judges used to be hostile to statutes. Like law teachers they preferred the common law. It was once said that judges seemed to think that statutes always changed things for the worst, and needed to be interpreted as narrowly as possible, and so as to depart from the common law as little as possible. So to be sure that the parliamentary counsel's message was not diluted or misunderstood it was thought prudent to leave absolutely nothing out, to leave nothing to the imagination, and to leave no possible gaps, even if this meant using ten words where one would have done. Today, when commonsense purpose-based interpretation is much more the order of the day, some of the old drafting seems almost comical in its wordiness. The early parliamentary counsel felt they had to make it judge-proof. Perhaps this fear is still not an entirely irrational one?

The modern move to plain English has been very welcome indeed. Yet, as I indicated before, there still is a line beyond which it is unwise to go. Legal English needs a certain degree of dignity. Plain though it should be, it is still legal English and not pulp fiction. But dignity can be a bit dull. (I once saw an Australian Bill dealing with credit contracts which provided for a certain consequence if a possessor of goods "got rid of" them rather than "transferred or disposed of" them. It did not sound right, and as far as I can tell it was never passed into law.) I discovered that even if students find statutory language dull, they love talking about why that is so.

In a discussion of drafting one can also delve into other deep and difficult questions. One such question is: what best belongs in an Act of Parliament and what best belongs in regulations? Where, in other words, lies the act/regulation divide? It is sometimes described as the distinction between principle and detail, but that is not nearly good enough. In 2006 I spent a whole day with the New Zealand Parliamentary Counsel Office, and we tried to have this matter out, and produce a set of guidelines. We did it, but I don't think any of us feels that the result is the final

[17] In those days it was called the Law Drafting Office.

answer. [18]

It is impossible to provide absolute rules about this. Rather there is a series of factors one must weigh in the balance. What is such high policy that it should be argued in a transparent democratic institution like Parliament rather than being done by the executive behind closed doors? Yet even some quite important provisions may need to be made so quickly that the process of parliamentary law making will be too cumbersome and too slow. How does one accommodate this? What things are so technical or so specialist that they would waste parliament's time? What human rights and freedoms are so important that they should be a matter of parliamentary enactment rather than executive regulation? Some very difficult questions can arise and sometimes there is simply no unanimity about them.

There can be another question, not entirely unrelated to this first one, as to what matters are best suited to general principle style drafting, and which matters are best spelled out in detail. In other words what legal topics are best suited to the broader coverage and flexibility, but greater uncertainty, of general principles, and which to the greater initial certainty of detailed propositions? Which is the easiest for the public to read and understand? There is a view in some quarters that general principle drafting and the plain English movement go together, but this is often not so. Detail can be expressed in plain English too.

And then there is the value or otherwise of purpose clauses. Should we have them in Acts of Parliament? Are they generally so broad-brush as to be useless or misleading? (I have heard some called "T-shirt slogans"). Are purpose clauses (and Acts' titles, come to that) ever used as a kind of shameless political advertising? Or do they, if well done, focus the mind of the reader, and even the parliamentary counsel, in a beneficial way? My own view is that if we are going to adopt a purposive approach to the construction of statutes it can be more helpful to state the purpose in the Act rather than let interpreters guess at it. Some of our senior judges have said they like the practice.

There are the sorts of topics I tried to interest students in during the drafting part of the course. They did not emerge as expert parliamentary counsel, but they did, I hope, come out with an interest in the subject.

3. Interpretation

I have been insistent so far to say that a Legislation course should not be solely about interpretation. But obviously a good part of it has to be. The purposive approach is now the order of the day, and so it should be. The old insistence on the letter sometimes used to lead to manifestly unsatisfactory results. Responsible use of the purposive approach deserves a good deal of discussion in any student course, but "purpose" cannot be allowed to descend into sloppy

[18] The guidelines appear in Legislation Advisory Committee, *Guidelines on Process and Content* (revised ed 2007) Chapter 10.

thinking: unless carefully controlled it can have that tendency.

A study of interpretation can get one into some very interesting questions about language. What is the relationship between purpose and meaning? Remembering that one's job is to interpret the words used, how is it that sometimes words can convey more or less than they expressly spell out? How far can the purposive approach allow you to effectively correct errors of expression? When does interpretation cross the line into amendment which of course is not acceptable? Linguists and lawyers should talk to each other more.

In all of this, one struggles to make students confident and competent readers of statutes, while at the same time to keep them thinking and enquiring. It is important to find or think up good examples for discussion, hypothetical or real, and there are many different ways of organising that ensuing discussion. I don't think any two teachers of interpretation teach it the same way, but it requires a lot of the teacher's time. The object at the end of it is to produce a graduate who is beginning to be an assured reader and interpreter of statutes, who can identify *why* a particular provision is causing difficulty (very important)[19] who is getting to know and handle the factors which influence the process of interpretation, and who is able to argue persuasively to a conclusion. It takes long practice to acquire real proficiency.

I spoke before of challenge. Apart from the purposive approach, three new things have hit the interpretative scene recently, and they can provoke much discussion. One of them is the growing importance and currency of human rights legislation, both domestically and internationally. We in New Zealand have a *Bill of Rights Act*. In the UK, the Human Rights Act effectively brings the European Convention of Human Rights into the domestic legal system. Human rights legislation often says that other statutes should if possible be interpreted consistently with the rights and freedoms in the Bill of Rights or Convention. We are still in New Zealand sorting out how far that entitles an interpreter to go. We are also wondering how Bill of Rights consistency is to be reconciled with our other major rule of interpretation (in section 5 of our Interpretation Act) that one should adopt a purposive interpretation. Those two approaches will usually be compatible, but may not always be. They come at the problem from different starting points. Dame Mary Arden has recently called them the "Agency Model" and the "Dynamic Model."[20] You will know that recently in the United Kingdom there have been some very far-reaching decisions of the House of Lords which give great weight to Human Rights consistency at the expense of parliamentary intent. The cases on this are not entirely consistent, but the more extreme of them go further than traditionalists would ever have thought possible. It seems to them to involve a mangling of language. The New Zealand courts have been a lot more timid, and they will only allow a rights-consistent interpretation if the words of the Act in question can

[19] For example, is it because a word is ambiguous or vague, or because of an internal inconsistency within the Act, or because the most natural meaning of the words leads to an unsatisfactory conclusion?

[20] Dame Mary Arden, *The Changing Judicial Role* (2008) 67(3) CLJ 487.

reasonably bear it. I must say I am with them on that. The fresh young minds of the students sometimes take a different view on this. They used to think I was old-fashioned and unimaginative. It is the stuff of really good debate.

The second relatively recent development, of course, is the use of parliamentary material, such as Hansard and reports of parliamentary committees, to aid the interpretation of statutes. Once that would have been thought to be highly irregular, not to say downright unconstitutional. What matters, the detractors say, is the intention of the parliament which passed the Act, which can only be found in the words of the Act. Hansard merely contains the thoughts and desires of ministers, their advisers within the executive, and individual members of Parliament. None of them is speaking for parliament. That purist view has theoretical merit, but in this country at least has been trumped by practical utility. Sometimes what one finds in Hansard and other extrinsic materials can be very useful. It can make the penny drop. Indeed the dangers of using such materials are not so much constitutional ones as practical ones. One constantly has to keep an eye on the reliability of the statements one is relying on. As I mentioned earlier that is why it is so useful to know and understand the parliamentary process. It helps one sort the grain from the chaff. One has to be very careful when explaining all this to students to emphasise that in the end it is the words of the Act which matter. Parliamentary materials are only an aid to understanding, and not an end in themselves. They cannot be allowed to distort the Act's text.

The third matter which is assuming increasing importance recently is the effect of the passage of time on statutory interpretation. I do not know why this has taken so long to emerge as an issue, because it has always been with us. Statutes, like no other documents, are built to last; they are intended to regulate behaviour for years, perhaps even decades, into the future. During that time things can change: technology, society, moral values and the surrounding law. Things happen which the parliamentary counsel and the parliament of the time could not possibly have foreseen. How could the writers of the *Copyright Act 1962* have foreseen the explosion in electronic technology which followed it? The internet and the capabilities of computers were not even dreamed of then. Yet for some thirty years that Act had to deal with and regulate these things. In applying statutes to these new developments, is one guided by the intentions of the original parliament, or by the way an ordinary reader would read the words of the Act now, or by the interpretation which gives the best practical result in the modern world? Should the interpretation of an old Act be affected by changes in moral and legal values? That is a tricky question, and I am not comfortable with it. If a 1920 Act refers to a "family", is that confined to the narrow concept of family as it was understood in 1920 (relationships by blood or marriage) or can it extend to the various forms of cohabitation which are now commonplace? In other words has the word shifted in meaning the last 80 years? Can the *meaning* of a word in an Act ever change over time? The limits of what has been called the ambulatory approach are not entirely clear. This is fascinating but somewhat dangerous territory. The students could get quite carried away by it. (I fear that a few judges have as well).

4. Other matters

Finally, this legislation course which I am describing to you tried to deal with what Oliver Jones

has rather aptly called "the other stuff"[21]. This is shorthand for a range of matters which are not really so much to do with interpretation (although they are to some extent) but which are integral to statute law and which do not have an obvious parallel in the common law. They are part of the tools of trade of anyone working with statutes. There is a little world of knowledge to be explored here, and it is an obscure world to many people. I have time only to sketch some of the items in outline.

One is the coming into force of statutes. Newcomers are usually surprised (very surprised, in fact) to hear that many Acts of Parliament do not come into force the moment they are passed by Parliament. Many have a deferred commencement date. Some will come into force only when the Governor-General by order-in-council so orders. There has been much debate in New Zealand over the desirability, and indeed the constitutional propriety, of this latter device. Is it not Parliament itself which should decide when a law comes into force? Is not Parliament divesting itself of the power to make law if it delegates coming into force to the executive? But we all know that, theory notwithstanding, such a process is sometimes necessary for good pragmatic reasons. This is another area where pragmatism wins over theory and logic.

But the order-in-council device nevertheless raises some interesting issues. Can a Government decide to let the incipient Act lie and not bring it into force at all? Apparently no, but it can be very difficult to discern the difference between deciding not to activate it at all and letting it lie dormant for a very long time indeed. We have Acts in New Zealand which have been passed, and then lain dormant for 15 years before being repealed without ever having come into force. Another question: having brought an act into force by order-in-council, can the change its mind and revoke the order? Certainly not. But what if the revoking order is made before the first one took effect? Probably, at least if it is to correct a mistake. Can an Act not yet in force have any legal effect? Well, yes and no. No-one can be penalised or have their rights taken away if the Act is not yet in force. But it is not unknown for courts to refer to such Acts, and even to allow them to influence decisions. Most Interpretation Acts have a provision to the effect that certain powers, such as powers of appointment and the like, can be exercised in advance of the legislation coming into force so that the Act can hit the ground running, as it were, when the Act is brought into force. The boundaries of that power are far from clear, and keen administrators and officials sometimes jump the gun in their anxiety to get things moving. This has been the subject of some very contentious litigation in New Zealand.

Let us now move to the other end of an Act's life. Tindal CJ once said "The effect of repealing a statute is to obliterate it completely from the records of Parliament as if it had never been passed."[22] That is utterly misleading. Students are often surprised to hear that repeal usually does not kill the Act for all purposes. The transition from repealed Act to new one is one of the

21 Above n 13.

22 *Kay v Goodwin* (1830) 6 Bing 576 at 582.

most fraught areas in the whole of our law. Most interpretation acts contain a default provision to the effect that rights acquired under the old Act continue after its repeal and can continue to be enforced then. However that is far more difficult to apply than it is to recite. Such provisions are always subject to context. They are linked with notions of retrospectivity. Their application is often very unclear. Good repealing acts usually contain transitional provisions which spell out expressly what is to happen, but I do not know of any type of statutory provision that has caused so much trouble. It is strange that it should be so. For some reason transitional provisions seem to test the foresight of parliamentary counsel more than any others. This topic is one of the most complicated in the world of statutes, and it is also one of the hardest to teach because it is hard to keep it interesting. Here is a transitional provision from the *Local Government Act 2002* (NZ):

> **292 Existing charges**
>
> (1) This section applies to any security interest that, immediately before the commencement of this section, was registered under section 122ZH of the Local Government Act 1974.
>
> (2) Every security interest to which this section applies must be treated as a prior security interest for the purposes of Part 12 of the Personal Property Securities Act 1999, and that Part applies, in relation to every such security interest, as if –
>
> (a) every reference in that Part to prior registration law were a reference to section 122ZH of the Local Government Act 1974; and
>
> (b) the transitional period were the period of 6 months commencing on the commencement of this section.

Imagine trying to make that sexy for students. I pretty much gave up trying. But it is so important.

The last topic among "the other stuff" is amendment. Once again, it has no ready parallel in common law. In New Zealand textual amendment is almost always used, but not absolutely always. The textual method is the best I think, but it is one of the biggest contributors to a messy statute book. If an Act has pieces of band aid stuck onto it year after year it can become incoherent. It is a question as to when it is better to amend and when one should repeal the Act altogether and start over again. That is sometimes not easy, in that politicians are often concerned that if one revisits the whole Act there may be pressure to revisit policy. There are theoretical questions too; can a significant amendment to an Act change the way the remaining provisions of it should be interpreted?

Conclusion

I have said quite enough. I am not sure of the answer to a lot of the questions I have posed, but one thing I am very sure of. We have to deal with statute law better than we currently do in our educational institutions. Students have to be made *thoroughly* familiar with it. They have to be comfortable with it. As far as possible they should become interested in it, because interest is the key to understanding. If they become practising lawyers, they will work with it every day of their

working lives. We are way beyond the stage when statutes were a tiresome add-on to the common law. Statute law is now the bulk of our system and far and away the most important part of it. It is the instrument by which a Government gives effect to its policies. I end by quoting Francis Bennion. He said[23]:

> "Nowadays you cannot be any sort of competent lawyer without being a statute lawyer, since legislation provides the framework for almost everything lawyers do."

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[23] Bennion, F. *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2001) 8.