



# Criminal Statutory Interpretation

Presented by:

Julian R Murphy

Barrister – Foley's List; Gorman Chambers

PhD candidate – Melbourne Law School

[Julian.Murphy@vicbar.com.au](mailto:Julian.Murphy@vicbar.com.au)

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# Presentation structure

1. An introduction to the “modern approach” to statutory interpretation;
2. Principles and presumptions particular to criminal statutes;
3. Particular types of criminal provisions and how they should be interpreted.

# Why statutory interpretation matters

“The law of statutory interpretation has become the most important single aspect of legal practice.”

JJ Spigelman, ‘Principle of Legality as Clear Statement Principle’ (2005) 79 Australian Law Journal 769, 769.

## Text

“This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention.”

*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted).

# Context

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

*CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ)

# Purpose

"Law is a fashion industry. Over the last two or three decades the fashion in [statutory, constitutional and contractual] interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the plain or ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now ..."

Chief Justice JJ Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Speech delivered at the Risky Business Conference, Sydney, 21 March 2007) 1.

# Principles relevant to criminal statutes

1. strict interpretation of criminal statutes;
2. principle of legality;
3. *Charter*-consistent interpretation; and
4. presumptions about mens rea and strict vs absolute liability.

# Strict interpretation of criminal statutes

“where a Statute constitutes the committing of certain acts a criminal offence ... [it is not] the duty of a Court to so add to the language of a Statute as to make it include the committing of acts of the same kind which lead to the same result, but which the legislature has not constituted an offence. To do so would be to make laws, not to interpret them.”

*Scott v Cawsey* (1907) 5 CLR 132, 151 (O'Connor J).



## Principle of legality

"It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

*Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J, citations omitted).

# Charter- consistent interpretation

“So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

*Charter of Human Rights and Responsibilities Act 2006 (Vic) s 32(1)*

Relevant rights – ss 10(b), 12, 13, 21(2)

- the protection from cruel, inhuman or degrading treatment;
- the right to free movement;
- the right not to have one’s privacy or home arbitrarily interfered with;
- the right to be free from arbitrary arrest or detention.

# Mens rea & strict vs absolute liability

Refresher – all offences fall into one of three categories:

1. Mens rea offences, that is, offences requiring a subjective fault element;
2. Strict liability offences, that is, offences which do not require a subjective fault element, but which excuse responsibility in cases of honest and reasonable mistake of fact; and
3. Absolute liability offences, that is, offences where no fault element needs to be proved.

## Presumption of mens rea

"The first criterion is consideration of the words of the statute creating the offence ... The second criterion is consideration of the subject matter of the statute ... The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute ... The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability ..."

*Wilson v Gahan* [1999] VSC 72, [98] (Warren CJ) (citations omitted), cited with approval in *Stanojlovic v DPP* [2018] VSCA 152, [25].

# Presumption of strict, rather than absolute, liability

In 1987, Chief Justice Street of the New South Wales Supreme Court observed “a discernable trend in modern authorities away from construing statutes as creating absolute liability and towards recognising statutes as [strict liability]”.

*R v Wampfler* (1987) 11 NSWLR 541, 547.

## Other principles relevant to criminal statutes

1. Presumption against retrospectivity;
2. Interpretation consistent with Australia's international law obligations – note, however, that occasionally Australia's obligations under international law are cited to be "consistent with" a broad reading of a penal provision.
3. Presumption against extra-territoriality.

# Particular types of criminal provisions and how they should be interpreted

1. Offence provisions;
2. Provisions creating or excluding defences;
3. Deeming provisions.

## Further resources

- Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9<sup>th</sup> ed, 2019)
- Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2<sup>nd</sup> ed, 2020)
- Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis, 2018)
- Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5<sup>th</sup> ed, 2017)
- Julian R Murphy, 'Oceans Apart? The Rule of Lenity in Australia and the United States' (2020) 9(2) *British Journal of American Legal Studies* 233



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205 William Street  
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T (03) 9225 7777

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E [foleys@foleys.com.au](mailto:foleys@foleys.com.au)

[www.foleys.com.au](http://www.foleys.com.au)