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Teaching Statutory Interpretation

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This conference celebrates anniversaries of the joint organising institutions. May I add a further to the list: following Professor Nussbaum's theme, I note that this is the centenary of Ernst Freund's magisterial work, *Standards of American Legislation*.¹ Freund started the book with a swingeing critique of a New York Court of Appeal judgment striking down early workers' compensation legislation on the basis that it infringed an implied freedom of contract. Freund, I should add, covered the full range of American statute law, in the context of constitutional law and by reference to private law (including both common law and equity) and public law, with lessons drawn from the legal systems of Germany and other continental European countries and Britain, and with passing reference to India, China and Japan. There is no equivalent book in this country; I suspect that now there never will be.

There are various skills which are required by lawyers. There is also much information lawyers need at their fingertips. We acquire information and hone our skills over a lifetime. We realise this very early in our careers; it is implicit in the common (but misguided) complaint “much of what I did in law school is irrelevant to my work now”, which we hear from recent graduates.

While the complaint is misguided, it invites the question, if we were to identify one essential skill needed by a qualified lawyer, what would it be? The answer I would

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¹ University of Chicago Press, 1917.

give now (though it would not have occurred to me at any point during my own student days) is the ability to read a statute.

There are a number of criticisms one hears of that answer. First, it is commonly said that there are many kinds of statutes and each needs to be read in (and therefore taught in) its own legal context, be it tax law, torts or immigration. I accept the premise, but not the conclusion.

Inherent in the logic behind that criticism is another common criticism, namely that there are no generic principles worthy of separate study. That is because there are many texts (including contracts and wills) and secondary texts (like judgments) which are to be read and understood; if there are general principles, they are not usefully studied only by reference to statutory interpretation.

Finally, there is the criticism that, like reading judgments, there is an elementary introduction required (often achieved by reference to the acknowledged canons of construction), but that the necessary skills must be developed in the course of studying specific topics, or in practical courses following one's university education.

These responses all contain a kernel of truth, but I think they miss a fundamental point. Statutory interpretation is concerned with and reflects the relationship between the key institutions in our system of government. No doubt the more statute law there is, the greater the need to understand the respective roles of the legislature, the executive and the courts, but the underlying questions are not new.

There is another response, one particular to law school deans. It is pragmatic; namely that the subject is seen to be dry and no one wants to teach a new course that they were never trained in.

Again there is some truth in this, but it is really a short term problem which identifies a challenge. When a number of us started a "law, lawyers and society" course at UNSW in the 1970s, none of us had been taught such a course and there was no text. Even that is not true of statutory interpretation, about which there are some texts, and there is a growing, if still small, group of academics committed to teaching, researching and writing about the subject. They include Dr Jeffrey Barnes from La Trobe, who was the lead author of the report prepared in June 2015 for the

Council of Australian Law Deans, at the request of the Council of Chief Justices. It also includes Associate Professor Dan Meagher also from La Trobe, who writes regularly on this topic.

Let me seek to illustrate what is, apparently, an unconventional view of statutory interpretation, with two topical examples. The first concerns the former Senator, Mr Rod Culleton. Mr Culleton, as you will recall, ran for the Senate at a time when he was the subject of a conviction for petty theft. After he nominated and was elected the conviction was annulled. A person with such a conviction fell foul of s 44 of the Constitution and was ineligible to become a senator. Broadly speaking, this was a constitutional case; did s 44 apply with respect to a conviction which had later been annulled? There was no doubt that the answer turned upon the construction of s 44; but there was a minor theme which was equally intriguing and was at the heart of Mr Culleton's submissions. It all depended, he argued, on whether the annulment of the conviction was retrospective in operation. That turned on various provisions of the *Crimes (Appeal and Review) Act 2001* (NSW). There was no doubt that the Act gave retrospective effect, at least in some circumstances and for some purposes, to the annulment. On what was purely a question of statutory construction, the High Court unanimously held that the retrospective effect did not alter Mr Culleton's status at the time he stood for and was elected to Parliament.

Let me offer a second example. The Parliament confers power on a departmental officer to grant or refuse a benefit, depending upon whether a claimant satisfies certain criteria, such as being in fear of persecution in their country of nationality. Is that fear a "fact" within the exclusive remit of the officer, applying the law correctly, or may a reviewing court make its own findings as to that fact? In order to construe the relevant statutory provision (s 36 of the *Migration Act 1958* (Cth)), one must know how to approach the question. If the fact is for the officer, not the court, to determine, can the officer's finding be challenged on the basis that it is unreasonable? In other words, is there an implied requirement of a "reasonable" exercise of the power? And if so, what precisely is the extent of the implication?

These important issues arise in the context of public law; indeed, the principles of statutory interpretation are themselves part of the public law, although they operate in relation to questions of both public and private law. They are confronted in every

aspect of procedure, civil and criminal, including the rules of evidence. They dominate taxation law, company law and planning law. They are of great importance in administrative law, in relation to consumer protection and in claims in tort. The list is almost endless.

Any law graduate who has not received a solid grounding in how to read statutes, as a coherent and stand-alone element of the public law curriculum, is in danger of being an incompetent advisor, researcher, drafter and advocate.

In making these observations, I am conscious that progress is being made. The topic of teaching statutory interpretation was the subject of the comprehensive report in June 2015 to which I referred earlier. However, the report's recommendations appeared to reflect differing views held in various Australian law schools, rather than to provide a clear direction for the future.

I am also conscious of (and share) widely held concerns that the overall trend of law school education is towards increasing the proportion of the compulsory curriculum. The consequential limits on the scope for taking a range of optional courses is not to be lightly disregarded. However, I think that some flexibility can be allowed within the core curriculum by grouping subjects, rather than mandating individual courses. Similarly, there is room for flexibility in the scope and duration of core elements.

Finally, I accept the burden of making the case for a compulsory course (whether new or recognised). We all have our prejudices and predilections, which must be acknowledged. What troubles me is that academic inertia tends to delay a reform in legal education which many of us view as necessary to produce graduates who can properly profess competence in the law.

Surely it is time to internalise and consummate Ernst Freund's vision from 100 years ago.