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**MACQUARIE UNIVERSITY**  
**MACQUARIE LAW SCHOOL**  
**PHD THESIS**

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**A HISTORY OF AUSTRALIAN LEGAL EDUCATION**

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*This thesis is presented for the degree of Doctor of Philosophy of Law to Macquarie Law School, Faculty of Arts, Macquarie University, Sydney, Australia*

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## **STATEMENT OF CANDIDATE**

I certify that the work of the thesis entitled ‘A History of Australian Legal Education’ has not previously been submitted for a higher degree to any other university or institution.

I also certify that the thesis is an original piece of research, and it has been written by me.

Any help and assistance that I have received in my research work, and the preparation of the thesis itself has been appropriately acknowledged.

I also certify that all information sources and literature used are indicated in the thesis.

In addition, I confirm that parts of the thesis were subject to approval of the University’s Ethics Committee in accordance with final approval reference number: 5201300091(R).

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David Leslie Allen Barker

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## **ABSTRACT**

### **A History of Australian Legal Education**

This thesis examines the history and development of legal education in Australia by tracing the establishment of university law schools and other forms of legal education in the states and territories from the time of European settlement in 1788 until the present day. While early Australian legal education was founded on historic practices adopted in England and Wales over many centuries, the circumstances of the Australian colonies, and later States, have led to a unique historical trajectory. The thesis considers the critical role played by legal education in shaping the culture of law and thus determining how well the legal system operates in practice. The thesis also takes account of the influence of state and territory regulatory authorities and legal practice admission boards, together with consultative councils and committees. In addition it examines a major challenge for legal educators, namely, the tension that arises between ‘training’ and ‘educating’, which has given rise to a plethora of inquiries and reports in Australia. In the final analysis, the thesis argues that legal education can satisfactorily meet the twin objectives of training individuals as legal practitioners and providing a liberal education that facilitates the acquisition of knowledge and transferable skills.



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## Chapter 1

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#### 1. Preamble

Australian law schools are very different today from a century ago or even longer. The modern law school represents a vibrant part of both the university and the legal community. Despite the ever-present warnings given to law students that there are too many of them, and that they will face bleak employment opportunities on graduation (a prophecy which has proved unfounded until now), law schools are still able to recruit some of the brightest year 12 students and graduates from other disciplines who see a future in the legal profession or beyond.

At federation in 1901 there were only four law schools. By 1989 there were 11. Since then there has been—as described later in this thesis—an ‘avalanche of law schools’, with a dramatic increase to a total of 38 today; a number likely to expand further with the establishment of an increasing number of private university law schools.

This thesis traces the foundations of legal education and the transformation of law schools from their early role as small entities within universities that trained legal practitioners to institutions with more complex present-day functions. These include an emphasis on students developing legal skills rather than merely accumulating knowledge, and growing participation in high-level postgraduate research.

The thesis also examines the development of law into a major university discipline. In addition, it examines the role that law teachers have played in this transformation. Originally, they were mostly legal practitioners teaching on a part-time basis, a fact which is underlined by the estimate that there were probably only 15 full-time law academics in the immediate post World War II period. In comparison, there are now likely in excess of 1000 full-time equivalent law teachers, the majority of whom would possess a postgraduate qualification in law, with an increasing number having a doctorate.

Legal education is a topic that has long preoccupied the legal profession, the judiciary and the general legal community. Indeed:

The examination of legal education in a society provides a window on its legal system. Here one sees the expression of basic attitudes about the law: what the law is, what lawyers do, how the system operates or how it should operate. Through legal education the legal culture is transferred from generation to generation. Legal education allows us to glimpse the future of society.<sup>1</sup>

This quote from John Merryman is an appropriate starting point for this thesis, the purpose of which is to examine Australian legal education by tracing its evolution and assessing its effect and influence on the development of the legal profession generally from the time of European settlement in 1788 until the present.

The historical background and cultural and social contexts of legal education in Australia have been previously documented by academic writers and reviewers.<sup>2</sup> However, there is still a strong case for a meaningful examination of Australian legal

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<sup>1</sup> John Merryman, 'Legal Education There and Here: A Comparison' (1975) 27 *Stanford Law Review* 859, 859.

<sup>2</sup> Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 37 *Melbourne Law Review* 965, 965.



education. This examination should not only take account of the historical development of legal education, but should reflect, as described by the Australian Law Reform Commission (ALRC), that ‘education, training, and accountability play a crucial role in shaping the “legal culture”—and thus in determining how well the system operates in practice.’<sup>3</sup>

The choice of methodology to be adopted for this project is examined comprehensively in Chapter 3. Traditional doctrinal research methodology is applied only in part; such methods are not fully adopted. Rather, the emphasis is on the extraction of relevant information relating to the formal and informal histories of law schools and legal education institutions. The adoption of an historical research approach has therefore been more suitable. In addition, the cross-disciplinary nature of this project has made it desirable to include an element of archival/historical research techniques.<sup>4</sup>

As will become evident, there was also a need to use empirical methods to support this research by undertaking a series of qualitative interviews of a cross-section of individuals involved with legal education. These interviews ascertained their insights, initially during their time at law school, and subsequently in their various roles within the legal community.<sup>5</sup>

Another aspect of this thesis is the issue regarding the influence of lawyers on society. There has always been a national concern about the appropriate goal of legal education as it might be affected by national economic policies and priorities. In the view of some commentators this has frequently created a problem for law teachers who are caught between the dilemma of attempting to justify legal education solely in terms of a liberal education philosophy and meeting the demands of the legal profession for an emphasis on ‘training’ and ‘educating’.<sup>6</sup> Together with the varying roles of legal education in an ever-changing higher education system, this has given rise to a plethora of reports at

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<sup>3</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 113–14 [2.3].

<sup>4</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010) 129.

<sup>5</sup> Appendix 1.

<sup>6</sup> Charles Sampford and Sophie Blencowe, ‘Context and Challenges of Australian Legal Education’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 1, 11.

both national and state level which need to be considered in any historical examination of Australian legal education.

One of the major outcomes of these reports has been the recognition that legal education has been synonymous with change, so it is axiomatic that an historical review of legal education should also include an account of what has been described as the ‘Shifting Paradigm of Legal Education.’<sup>7</sup> This is an acknowledgement of the importance of examining the development of legal education and the ongoing influence of scholarship and thought on the Australian legal profession and the wider community.

## 2. Recurrent Themes

The material examined for this thesis—including primary and secondary sources, and the data collected through the qualitative interviews—reveals a number of central and recurring themes in Australian legal education. These leitmotifs have influenced the development of legal education, from the establishment of the original New South Wales (NSW) Barristers Admission Board in 1848 until the present. The main themes are described below.

### 2.1 The Purpose of Legal Education

The first and central theme is the ambiguity in the core purpose of legal education. As stated in the outset of this chapter, the principal purpose of legal education has been the subject of wide-ranging debate, especially since the end of World War II.

The main divide lies between those who regard legal education in instrumental terms, namely, training individuals as future legal practitioners, and those who regard it as an academic discipline with its own intrinsic value. Among adherents of the former view, there has been a gradual evolution from a strict focus on the acquisition of legal knowledge to greater emphasis on learning skills relevant to legal practice.<sup>8</sup> Among adherents of the latter, the principal concerns have revolved around legal theory and

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<sup>7</sup> Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Co, 1994) 26.

<sup>8</sup> Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)' (Australian Government Publishing Service, 1987) 57 [1.142].

legal methodology when compared with other disciplines in the social sciences. Identifying this transformation in legal education is an ongoing theme of this thesis, especially in the light of major increases in the number of law schools, legal academics and law students in recent years.

## 2.2 Expanding Teaching Methods

A second theme of the thesis concerns the methods by which students acquire knowledge about the law and gain practical skills that prepare them for practising law. The notion of teaching law as a craft within the confines of a university setting is another theme introduced early in the thesis.

Although the historical foundations for such legal training were laid down early by the London Inns of Court and Chancery in the 15<sup>th</sup> century,<sup>9</sup> law was not taught in English universities until Dr William Blackstone commenced his lectures on English law at Oxford in 1753.<sup>10</sup> In contrast to England, the concept of legal training in Australia became the responsibility of Australian universities from the foundation of the first Australian law school at the University of Sydney in 1856<sup>11</sup> and the first law school to commence teaching at the University of Melbourne in 1857.<sup>12</sup>

Although at the Inns of Court lectures had been interposed with moots, whereby students would argue fictitious cases in front of their peers within the Inns,<sup>13</sup> at both English and Australian universities the sole method of teaching was in the form of lectures to students.<sup>14</sup> This has been described as ‘the imparting of information in the form of legal principles, rules and propositions ... to be committed to memory for examination purposes.’<sup>15</sup>

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<sup>9</sup> John Baker, *An Introduction to English Legal History* (Butterworths Lexis Nexis, 4th ed, 2002) 161.

<sup>10</sup> Ian Doolittle, 'William Blackstone and William Prynne' in Wilfred Prest (ed), *Blackstone and His Commentaries* (Hart, 2009) 47, 58.

<sup>11</sup> John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (University of Sydney, 1991) 19.

<sup>12</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 5.

<sup>13</sup> William Holdsworth, *Sources and Literature of English Law* (Oxford University Press, 1925) 130.

<sup>14</sup> Waugh, above n 12, 78.

<sup>15</sup> James, above n 2, 965, 967.

Even though William Langdell had introduced the case method of legal education in the United States when he was Dean of Law at Harvard in 1870,<sup>16</sup> this form of teaching was hardly considered and never adopted by Australian law schools, although the differences between Australian and American patterns of teaching were discussed in the Pearce Report.<sup>17</sup>

Although the individual histories of law schools are occasionally punctuated with experiments by law teachers attempting to adopt alternative teaching methods, such as the simulation sessions conducted by William Hearn at the University of Melbourne Law School<sup>18</sup> and the provision of teaching notes at the University of Sydney,<sup>19</sup> most law school teachers continued to adopt the formal mode of teaching by lectures, involving dictating notes. It was not until the establishment of what became known as the ‘Second-Wave’ law schools after World War II that innovative forms of teaching began to be introduced in some of the newly established law schools. Despite these alternative forms of teaching, and changes in the philosophical approach to law teaching, there were still occasions that gave rise to disputes or extreme disagreement as to how teaching was to be conducted.

Since 1989 ‘Third-Wave’ law schools, among others, have adopted various forms of creative teaching methods. These have often emphasised the acquisition of skills and knowledge to assist students in adapting to the demands of a modern legal profession. This theme recurs throughout the thesis as the question of whether the emphasis should be on skills or knowledge is constantly debated by both representatives of the legal profession and the law schools.

### **2.3 Standardising the Law Curriculum**

A third theme concerns the early development and design of law programs within the university sector in Australia. This created an ongoing dilemma which has faced legal academics and those involved with legal education from the commencement of the

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<sup>16</sup> David Barker, 'The American Case Method and its Influence on Modern Legal Education' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Victoria University, Melbourne, 2006) 4.

<sup>17</sup> Pearce, Campbell and Harding, above n 8, 12 [1.31–1.32].

<sup>18</sup> Waugh, above n 12.

<sup>19</sup> Mackinolty and Mackinolty, above n 11, 113–14.

tertiary teaching of law until the present. The approach to the law curriculum was originally laissez-faire; while individual law schools required their law students to undertake a stipulated group of law subjects, there was no mandated group of subjects which law schools in every Australian jurisdiction were required to teach as part of a particular law degree. This was borne out in the interview with Chester Porter QC, who still remembers his studies at the University of Sydney Law School during World War II.

There were no such things as compulsory subjects ... in the law course that I did commencing in year 1943, the same subjects for everyone. There were a few subjects like lunacy which you just got lectures on. Lunacy and legal ethics, I think. You got lectures, but no exams. Apart from that, you were examined in every subject.<sup>20</sup>

This was the practice in every program taught by Australian law schools, subject to the fact that every Bachelor of Laws (LLB) course would have received the approval of the appropriate state or territory admission board. The Boards expected certain core subjects to be included in a curriculum prior to its accreditation,<sup>21</sup> but there was no uniformity across states and territories.

This thesis examines the various processes which were followed in the immediate post-war years to establish a common group of legal subjects acceptable to all law schools as providing the basis for qualification for admission as a legal practitioner. Most of these deliberations can be traced back to 1976 when a National Conference on Legal Education was proposed, giving rise to the expectation that it would designate a core group of compulsory subjects as the basis of a common law degree acceptable to all Australian law schools. It was also anticipated that this would form a basis for those seeking admission as legal practitioners.<sup>22</sup>

These deliberations resulted in a final choice of eleven subjects required to be incorporated into any law degree accredited as satisfying the academic requirements for admission as a legal practitioner. Because the committee which made these

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<sup>20</sup> Interview with Chester Porter QC (Sydney, 30 January 2014).

<sup>21</sup> Pearce, Campbell and Harding, above n 8, 29–30 [1.72].

<sup>22</sup> Law Admissions Consultative Committee, *Uniform Admissions Rules 2008* <[http://www1.lawcouncil.asn.au/LACC/images/pdfs/212390818\\_1\\_LACCUmiformAdmissionRules2008.pdf](http://www1.lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUmiformAdmissionRules2008.pdf)>.

recommendations was chaired by the Hon Justice Priestley of the Supreme Court of NSW, the qualifying group of subjects became known as the 'Priestley Eleven.'<sup>23</sup>

## 2.4 From Teaching Law to Legal Research

A fourth theme relates to the transition of law schools from having a teaching only function to one which incorporates a teaching–research nexus. The concept of research did not feature in the early years of Australian legal education. This was due to the initial emphasis on legal education being for the sole purpose of preparing students for entry into the legal profession.

Although a search of the various law school histories reveals the occasional award of a research degree, this was an unusual occurrence and an exception from the normal teaching routine of the law school.<sup>24</sup> The first emphasis on the importance of research was in 1946, at the inaugural meeting of the Australian Universities Law Schools Association, the forerunner of the Australasian Law Teachers Association, when a resolution was passed seeking support for the development of research within Australian law schools.<sup>25</sup> This approach was taken further when the same body welcomed the formation of the Australian National University (ANU) whose original purpose was to undertake research.<sup>26</sup>

Subsequently, Australian law schools began to expand on their original purpose of training students to become legal practitioners to include research. Initially this was for their students to acquire a Master of Laws (LLM). Later they developed postgraduate programs leading to the award of a doctorate, normally the award of a Doctor of Philosophy (PhD) but very rarely a Doctor of Laws (LLD), although the latter is still widely used by universities to recognise leading members of the community by its award in an honorary capacity.

The Pearce Committee's Report of 1988 marked the first major acknowledgement that law schools should regard research as a major component of their role within the

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<sup>23</sup> Ibid.

<sup>24</sup> Waugh, above n 12, 250–51.

<sup>25</sup> George Paton, 'Australian Universities Law Schools Association' (1946) 20 *Australian Law Journal* 99, 99.

<sup>26</sup> Ibid.

university educational environment. The Pearce Report created the impetus for the development of legal research in its modern form in Australia.<sup>27</sup>

Although the Pearce Report and its aftermath meant that research began to feature in the structure and ongoing activities of law schools, in reality little immediate progress, if any, was made with regard to both development of legal research and its recognition by government. Only after the meeting of the Council of Australian Law Deans (CALD) on 29 September 2005 in Fremantle, Western Australia, was there a turning point in the attitude of law schools towards research. In particular, CALD decided that law schools had to have a coordinated strategy to refocus legal research to meet the changing needs of society and the requirements of government.<sup>28</sup>

From this time onwards law schools began to develop research management plans, establish research committees and appoint a senior member of the faculty as Associate Dean (Research), or equivalent. Where there were already law school journals or law reviews, the management of these was restructured to provide for a refereeing procedure to satisfy the peer-review requirement that attracted competitive research funding. Although it was highly controversial, for a time the law schools also became involved in a ranking process for all law journals, whether published by a law school or some other law institution or centre.<sup>29</sup>

## 2.5 Personnel: From Legal Practitioners to Professional Teachers

A fifth theme is an examination of the transition in the characteristics of those involved in teaching law. From the establishment of the first law schools in the 1850s at the Universities of Sydney and Melbourne there has been a gradual change from law teaching being dominated by legal practitioners to the current situation whereby the law school staff comprises mostly full-time law academics.<sup>30</sup>

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<sup>27</sup> Pearce, Campbell and Harding, above n 8, 306 [9.1].

<sup>28</sup> Council of Australian Law Deans, *Statement on the Nature of Legal Research* <<http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>>.

<sup>29</sup> Michelle Sanson, 'Foreword' (2011) 21 *Legal Education Review* iii, iii.

<sup>30</sup> Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

In the original sandstone law schools located in the capital cities of each colony or state often the only full-time teaching appointment would be that of a single professor who was also expected to serve as the dean of the law faculty. Consequently, such academics would have unlimited tenure, so they retained their positions for a lengthy term. Outstanding examples of individuals who each served for more than 30 years in that capacity are John Peden (Sydney) 1910–1942,<sup>31</sup> William Moore (Melbourne) 1893–1927<sup>32</sup> and Dugald McDougall (Tasmania) 1900–1932.<sup>33</sup>

Another interesting aspect of these early appointments was the emphasis the universities placed on successful candidates holding overseas qualifications, normally doctorates, particularly from the Universities of Oxford or Cambridge.<sup>34</sup> Appointees would therefore often have to travel from the United Kingdom to take up their appointments, and they would discover on arrival that Australian university life was not as congenial as it was in the United Kingdom.<sup>35</sup> In contrast to Australian-born appointees, these overseas office holders would often, after only a short term of academic tenure in Australia, terminate their teaching contracts and return to the United Kingdom.<sup>36</sup> Because of such experiences there was a gradual change of attitude on the part of appointing bodies so that most professorial appointments began to be occupied by candidates who had obtained their qualifications in Australian universities.

It was only with the advent of the new law schools, beginning with the creation of the ANU Law School in 1960, that there was a change of emphasis on the nature and quality of those being appointed to law teaching positions in Australian law schools.<sup>37</sup>

## 2.6 Teaching Resources

The sixth theme is concerned with one of the great myths about legal education, namely, that very few or indeed no resources are needed to enable a competent law teacher to

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<sup>31</sup> Mackinolty and Mackinolty, above n 11, 58.

<sup>32</sup> Waugh, above n 12, 58–9.

<sup>33</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993) 12–13.

<sup>34</sup> Waugh, above n 12, 48.

<sup>35</sup> Ibid, 59–60.

<sup>36</sup> Ibid.

<sup>37</sup> Coper, above n 30, 391.



educate law students. This attitude has obstructed any improvement in the quality of legal education in Australia until the late 20<sup>th</sup> century.

Individual law school histories reveal that there were very few resources available to the early law schools in Australia. Until quite recently the main resource for a law school was seen as the law library.<sup>38</sup> Where these were provided by universities they often operated under the aegis of the university librarian. Where there was a dedicated law school library this was usually housed in poor accommodation and often there was difficulty of access for the law students. It was only on the establishment of the newer law schools that, in certain circumstances, a proactive law dean could obtain those serviceable library facilities which should be expected of a modern law school.<sup>39</sup>

Legal education was one of the early academic disciplines to embrace computer technology. Principally this was due to the ease with which law students and law academics were able to incorporate digital learning into the legal education process. It was also aided by the fact that online learning became an integral part of practical legal training (PLT) programs. This was especially true of those conducted by the College of Law, an early innovator of such programs. These came to be conducted across Australia in accordance with the College's role as the principal provider of PLT.<sup>40</sup>

In addition, the early use of computers was essential to both law students and legal practitioners in accessing legal databases, whether digitised law reports or legislation. Information in this genre was not only of value because of its provision in an easily portable form, but also because it was relatively simple for the providers of the information to ensure that it could be quickly updated.<sup>41</sup>

A major innovation and a contributor to this change of emphasis was the establishment of the Australasian Legal Information Institute (AustLII), jointly operated by the Faculties of Law at the University of Technology Sydney and the University of New South Wales. AustLII was originally established to provide free access to Australasian

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<sup>38</sup> Pearce, Campbell and Harding, above n 8, 736 [19.1].

<sup>39</sup> Ibid, 751 [19.40].

<sup>40</sup> Interview with Neville Carter (Sydney, 17 October 2013).

<sup>41</sup> Andrew Mowbray, 'Justice and Technology' in Russell Fox (ed), *Justice in the Twenty-First Century* (Cavendish Publishing, 2000) 207, 209.

legal material to anyone who had access to the internet.<sup>42</sup> It now operates over 2418 publicly accessible databases of legal material on the World Wide Web. It is recognised as the world's largest free provider of legal information on the internet, with over 700 000 hits daily (i.e. more than 250 million hits annually).<sup>43</sup>

The experience of Australian law schools and their access to independent computerised legal information systems is in complete contrast to the difficulties they encountered when endeavouring to establish physical law libraries. This success in the electronic sphere is partly because law academics were involved in the early development of electronic information retrieval systems. In addition, Australian law teachers have had a principal role in this major technical evolution, particularly with regard to the expansion of free public legal information systems, both nationally and internationally.<sup>44</sup>

## 2.7 Practical Legal Training

The seventh theme, PLT, was developed to replace articulated clerkships, which had been the accepted process for qualifying as a solicitor in each Australian state and territory until the early 1970s. However, at this time it was recognised in some jurisdictions that this form of training had become outmoded and also that there might be insufficient numbers of solicitors in the future to provide articles for the ever-increasing number of law graduates who might wish to become legal practitioners. Therefore, an alternative procedure was established under the designation of PLT, which simulated the form of training undertaken by articulated clerks.

Whilst the Australian National University Law School introduced a legal workshop course in 1971 as an alternative to articles, in 1972 the Leo Cussen Institute for Law in Melbourne, Victoria, became the first centre established for PLT, followed in 1977 by the College of Law in Sydney, NSW. Together, these institutions provide the majority of PLT in Australia. However, more recently a number of university law schools, such as those at the University of Newcastle, Queensland University of Technology and the

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<sup>42</sup> Graham Greenleaf and Andrew Mowbray, 'Founders Vision' in *Celebrating 15 Years of Free Access to Law* (Australasian Legal Information Institute, 2010) 1.

<sup>43</sup> Australasian Legal Information Institute, *About AustLII* <<http://www.austlii.edu.au/austlii/>>.

<sup>44</sup> Ibid.

University of Technology Sydney, have moved into the direct provision of PLT as an integral part or an ‘add-on’ to their basic law degree program.

The ALRC recognised that with the proliferation of PLT programs there was a ‘need to clarify the goals, improve the content and develop a set of national minimum standards and competencies.’<sup>45</sup>

## 2.8 Law Schools and Continuing Legal Education

The eighth theme is the growing participation of law schools and others in Continuing Legal Education (CLE), which has been defined by Christopher Roper, a leading commentator on legal education, as

any activity or process where a lawyer learns something which enhances his/her capacity to carry out his/her work, whether or not it takes place in a formal or non-formal setting or way, and whether it occurs consciously or unconsciously.<sup>46</sup>

Although CLE had been recognised as early as 1966 in the Martin Report as the third stage of Australian legal education—the others being the academic and PLT stages—until recently it was regarded as the least essential of the three. One reason for this was that there was no statutory regulation making it compulsory until 1987, when NSW was the first state to make it mandatory for all solicitors. Subsequently some form of CLE has become obligatory for both solicitors and barristers in all Australian states and territories.

CLE has featured as a topic in two major reports. In the first, the Pearce Report, there was a chapter mainly devoted to the provision of CLE by the university law schools. This referred to the types of program which were currently on offer.<sup>47</sup> The second report, by the ALRC, described ‘professional development as an essential aspect of professionalism’. This report made a broad-ranging inquiry into the history of the

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<sup>45</sup> Australian Law Reform Commission, above n 3, 150 [2.114].

<sup>46</sup> Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999) 5.

<sup>47</sup> Pearce, Campbell and Harding, above n 8, 282 [8.1].

various state professional bodies that had investigated the arguments for and against mandatory CLE.<sup>48</sup>

## **2.9 Institutionalisation**

The ninth and final theme is institutionalisation. This acknowledges an often overlooked fact that one of the major influences on the development of legal education has been exercised by various external academic and professional bodies. These have evolved as various interest groups representing law academics, law teachers specialising in PLT, law deans, law librarians and law students, and an association such as the Australian Academy of Law whose membership is drawn from across the legal spectrum to include the judiciary, the academy and the practising profession. There are also the state and territory bar associations and law societies which represent legal practitioners, and their peak bodies the Law Council of Australia and the Australian Bar Association.

These organisations and their activities are examined in greater detail in Chapter 8. This examination reveals that they have had a mixed influence on legal education, with a positive effect on improving the quality of teaching and learning, but a negative effect on lobbying government for any improvement in the development of resources to support these activities.

## **3. Structure of the Thesis**

The thesis consists of 11 chapters. Apart from this introductory chapter the content of the remainder of the thesis is briefly outlined below.

Chapter 2 reviews the key literature surrounding the history of legal education in Australia. This includes an interpretation of the research which has been undertaken on the actual process of legal education historically or its ongoing effect.

Chapter 3 outlines the mixed methodologies used in the thesis and, in particular, discusses the process of collecting qualitative data through the interview of subjects.

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<sup>48</sup> Australian Law Reform Commission, above n 3, 154 [2.29].

Chapter 4 examines the early development of legal education in England and Wales and how this influence was transferred to the colony of NSW and subsequently the remainder of Australia. Incorporated into this account is a description of the establishment of the first five law schools. These were at the Universities of Sydney (1855), Melbourne (1857), Adelaide (1883), Tasmania (1893) and Western Australia (1927).

Chapter 5 covers a period which is described as the ‘Waiting Years—1930 to 1960’, when few significant changes were made to the system of Australian legal education. Nevertheless, this span of years saw the creation of the Law Council of Australia in 1933 with its inaugural meeting resolving on a form of basic educational requirements for all legal practitioners, and the foundation of the University of Queensland Law School in 1936. It also saw all law schools making serious attempts to ensure their survival through the Great Depression and World War II, and the further expansion of legal education during the post-war reconstruction culminating in the establishment of the ANU Law School in 1960.

Chapter 6 is concerned with the initial period of expansion of Australian legal education during the years 1960 to 1988. This period covers the establishment of a group of law schools which became known as the ‘Second-Wave’ law schools. It was this group of law schools that signalled the modernisation of Australian legal education, with their focus on imaginative forms of teaching and a greater concentration on graduate studies and legal research.

Chapter 7 focuses on a development which is described as an ‘avalanche of law schools’. This is the period commencing in 1989, during which there was an unprecedented expansion of what became known as the ‘Third-Wave’ law schools. A contributing factor in this expansion was the implementation of the Dawkins reforms, introduced in 1988, which abolished the binary divide between universities and colleges of advanced education, under the policy directive of the then Labor Minister for Education, John Dawkins.

Chapter 8 examines the effect of external factors on the development of Australian legal education and reviews how these power relations influenced the conduct of law schools.

It inquires into the manner in which the federal, state and territory committees and boards were involved in these outcomes, and the role that academic law associations had in this process.

Chapter 9 is entitled 'Legal Education Reforms: Concerns, Innovations and Transformation'. The first part covers three aspects of Australian legal education—standards for Australian law schools, learning and teaching in the discipline of law, and threshold outcomes of the LLB. The second part examines the development and outcomes of PLT, CLE, clinical legal education, the NSW Legal Profession Admission Boards, the University of Sydney's Extension Course, access to legal education including for indigenous law students, and the provision of free legal information via the internet.

Chapter 10 is entitled 'Four Pillars of Australian Legal Education' and reviews and critiques four reports that have been critical to the development of legal education in Australia, namely, the Martin Report (1964), the Bowen Report (1979), the Pearce Report (1987), and the ALRC's *Managing Justice* Report (2000). An assessment of the effect of these reports on Australian legal education reveals that they mark an increasing involvement of government in legal education, primarily at federal level. The Bowen Report is an exception to this although it is an illustration of state (NSW) intervention.

Chapter 11 concludes the thesis with a review of the significance of the research and the resolution of the question whether a judgement may be formed regarding the appropriate goals of legal education. Apart from a review of how the designated themes have contributed to this process, it has to be recognised that law schools have progressed from their original purpose of solely training students to become legal practitioners. This conclusion still recognises the need of the community for well-qualified lawyers but also accepts that a career in legal practice is now just one of many outcomes of modern legal education. Such an education requires that law students become well-educated graduates with a grounding in transferable skills, not only to assist them in legal practice, but also to enable them to undertake law-related or similar challenging employment opportunities.

## Chapter 2

### Literature Review

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#### 1. Introduction

Legal education has had a profound effect on the development of the legal profession in Australia and on those individuals who have participated in the process. These may be law students, law academics, members of the legal profession and the judiciary, as well as other participants in the legal process such as court employees, witnesses and litigants, including defendants in criminal prosecutions. This chapter reviews the research that documents the historical evolution of legal education and its ongoing effect, including as a teaching process. It also examines external factors such as reforms, reviews and critical assessments of legal education such as those contained in the popular press or journal articles.

#### 2. The Common Law Background

The history of law in England and Wales is crucial in understanding the subsequent development of legal education in Australia. A wealth of legal historians have made a major contribution to an understanding about how legal education originated and

developed in the Middle Ages, particularly the foundation and expansion of the Inns of Court in London which were long regarded as the ‘third university’ in England. The record of English legal education in the Middle Ages, its subsequent disappearance and its revival in the 19<sup>th</sup> century owes much to the legal historians of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. One of the most eminent of these was William Holdsworth, sometime Vinerian Professor of English Law at the University of Oxford (Oxford). Holdsworth emphasised the invaluable role that the Readers of the Inns of Court played in legal education, particularly because of their status:

The Readers were appointed from amongst the senior members of the Inns of Court; and, in the days before printing, the Readers were evidently a welcome addition to the existing manuscript literature of the law.<sup>1</sup>

The relevance of the Inns of Court to the early development of legal education in England is reinforced by the writings of Fortescue, the Chief Justice of the Kings Bench from 1442 to 1460. His book, *De Laudibus Legum Angliae*, written in the form of a dialogue between Prince Edward (son of Henry VI) and himself, contained the ‘earliest account of the Inns of Court, legal education, and the ranks of the legal profession.’<sup>2</sup> This view was supported by a further quote from Holdsworth about:

the authority of those old Readings, which were an authoritative source, and an important part of the literature of the law in the Middle Ages and down to the close of the sixteenth century; so the revival of an adequate education system has been accompanied by a great revival in the quality, and therefore in the influence, of our legal literature.<sup>3</sup>

Another influential figure in English legal education, whose writings contributed to the wealth of material on the topic, was Sir William Blackstone (1723–1780), who was judge of the Kings Bench and Common Pleas and the first Vinerian Professor of English Law at Oxford. His reputation had been stated

as due mainly to his Commentaries, which sum up the law as developed by the modern common lawyers of the period which begins with Coke and Hale, and which ends with the period which opens at the close of the eighteenth century. It is also due in part to the fact

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<sup>1</sup> William Holdsworth, *Sources and Literature of English Law* (Oxford University Press, 1925) 130.

<sup>2</sup> Ibid 135–6.

<sup>3</sup> Ibid 161.



that by his example and by his writings he foreshadowed both the revival of the teaching of English law in the last century, and the form which that teaching has taken.<sup>4</sup>

His influence has to be seen in the historical context of legal education. Between the collapse of legal education at the Inns of Court at the end of the 17<sup>th</sup> century, and 1753, when Blackstone presented his first series of lectures at Oxford, there had been no teaching of English law. During these inaugural lectures as Vinerian Professor Blackstone emphasised that there was '[c]learly the need for the re-establishment of a system of legal education' and he also foreshadowed 'the form which it ought to take.'<sup>5</sup>

Any review of the major influences on modern legal education should consider the parts played by Sir Frederic Maitland and Sir Frederick Pollock in the latter part of the 19<sup>th</sup> century and beginning of the 20<sup>th</sup> century. Although these prominent authors are often considered as exercising a joint influence—one commentator has described them as the 'Gilbert and Sullivan of English legal education'<sup>6</sup>—Maitland would be regarded as the pre-eminent of the partnership. He was described by Robert Schuyler as '[t]he greatest historian of the English law,'<sup>7</sup> whilst Pollock called him '[a] man with a genius for history, who turned its light upon law because law, being his profession, came naturally into the field.'

It is surprising that his career as a professional historian lasted little more than 20 years, during which time he served as the Downing Professor of the Laws of England at the University of Cambridge. He was also appointed the Foundation Literary Director of the Selden Society in 1887. He is estimated to have completed more than 100 written items, including books, volumes of legal records, other source materials edited with introductions including historical treatises, and contributions to various journals including many book reviews.

In his inaugural lecture in 1888 as Downing Professor of Laws, Maitland made several pertinent comments regarding legal education:

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<sup>4</sup> Ibid 155.

<sup>5</sup> Ibid 160.

<sup>6</sup> Cecil Fifoot, *Pollock and Maitland: 31st David Murray Lectures* (University of Glasgow, 1971) 2.

<sup>7</sup> Robert Schuyler, *Frederic William Maitland* (University of California Press, 1960) 1.

As it was, the education of the English lawyer—I speak of the later middle ages and of the Tudor time—was not academic; it was scholastic.<sup>8</sup>

No English institutions are more distinctively English than the Inns of Court; of none is the origin more obscure.<sup>9</sup>

Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in the course of time evolved a scheme of legal education; an academic scheme of the medieval sort, oral and disputations. For good and ill this was a big achievement: a big achievement in the history of undiscovered continents. We may well doubt whether aught else could have saved English law in the age of the Renaissance.<sup>10</sup>

In 1883 Sir Frederick Pollock was appointed to the Corpus Chair of Jurisprudence at Oxford, which he held for 20 years. Prior to his appointment Pollock had already established a scholarly reputation, particularly with his *Principles of Contract at Law and in Equity* published in 1876. Steve Hedley stated that:

Pollock helped to establish law as an academic discipline and to arrange matters so that the common law was studied as the core of that discipline with statute only as a relatively unimportant appendage ...<sup>11</sup>

But his writings did an enormous amount to shape the system of legal education which emerged in this period. On the university side Pollock was building up the image of law as a leading member of the humanities.<sup>12</sup>

A wealth of legal writing starting in the Middle Ages documents the history of legal education in England and Wales. One has to take account of the research undertaken by Radcliffe and Cross<sup>13</sup> and Baker.<sup>14</sup> The latter has had a major influence on the approach

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<sup>8</sup> Herbert Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, 1911) 487.

<sup>9</sup> Frederic Maitland, *English Law and the Renaissance: The Rede Lecture for 1901* (Cambridge University Press, 1901) 26–7.

<sup>10</sup> Ibid.

<sup>11</sup> Steve Hedley, 'Sir Frederick Pollock and the Teaching of English Law' in Jonathan Bush and Alain Wijffels (eds), *Learning the Law: Teaching and the Transmission of English Law 1150-1900* (Hambledon Press, 1999) 407, 408.

<sup>12</sup> Ibid 410.

<sup>13</sup> Geoffrey Radcliffe and Geoffrey Cross, *The English Legal System* (Butterworth, 3<sup>rd</sup> ed, 1954).

<sup>14</sup> John Baker, *An Introduction to English Legal History* (Butterworths Lexis Nexis, 4<sup>th</sup> ed, 2002).

to legal history as the Downing Professor of the Law of England at Cambridge, and as Director of Studies for the Selden Society which is a key internationally recognised society devoted entirely to English legal history.

A group of academics carries on this rich tradition of authorship of modern English legal education writing. The doyen of this group is William Twining, the Quain Professor of Jurisprudence at University College London, whose seminal work *Blackstone's Tower: The English Law School* is based on the 46<sup>th</sup> series of Hamlyn Lectures, which he delivered in 1994.<sup>15</sup> In this he asks 'fundamental questions about what law schools are for, what is the nature of legal scholarship and whether it makes sense to talk of a core of the discipline.'<sup>16</sup> He also produced a preliminary analysis in answer to the question: 'are there any salient characteristics that differentiate English law teachers from the academic profession as a whole?'<sup>17</sup>

Fiona Cownie is an English academic who has been involved in the writing of three major texts on legal education. In *Legal Academics: Culture and Identities*<sup>18</sup> she explains that the purpose of the book is to 'provide an extended analysis of the "lived experience" of legal academics teaching and researching law in English universities.'<sup>19</sup> *Stakeholders in the Law School*<sup>20</sup> which she edited, continues this theme by examining the power relations in university law schools. In a legal education monograph, *A Great and Noble Occupation: The History of the Society of Legal Scholars*,<sup>21</sup> Cownie and Cocks cover the first 100 years of the Society of Legal Scholars, previously known as the Society of Public Teachers of Law (SPTL).

Cownie was also involved as a contributing author in a publication edited by David Hayton. In the first chapter, 'British University Law Schools in the Twenty-First Century' she and her co-author examine the changing nature of law teaching, which includes an acknowledgement that there is a

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<sup>15</sup> William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell, 1994).

<sup>16</sup> Ibid 211.

<sup>17</sup> Ibid.

<sup>18</sup> Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing, 2004).

<sup>19</sup> Ibid 1.

<sup>20</sup> Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010).

<sup>21</sup> Fiona Cownie and Ray Cocks, *A Great and Noble Occupation: The History of the Society of Legal Scholars* (Hart Publishing, 2009).

diversity now to be found in the various missions of university law schools, the individual background and aspirations of academic staff and the range of students in all kinds of courses.<sup>22</sup>

A history of a United Kingdom law teachers association parallel to that of the SPTL is provided in Stan Marsh's *History of the Association of Law Teachers*<sup>23</sup> which covers the first 25 years of that Association's history. This text is of interest in that it covers the transitional period when law teaching in the United Kingdom was extended beyond university law schools to polytechnics and further education colleges. It acknowledges the contribution made by the University of London's external Bachelor of Laws (LLB) and subsequently the Council of National Academic Awards, which validated law degrees through a newly formed Legal Studies Board in 1966. This provided the impetus for further development of legal education outside the university sector.<sup>24</sup>

In contrast to Twining, Cownie and Marsh—who represent mainstream English legal education commentators—Richard Susskind has emerged as an insightful interpreter of future trends in legal education, particularly on the effect that web-based legal information will have on the future teaching of law. His most recent book *Tomorrow's Lawyers*<sup>25</sup> reviews the need to extend the remit of the law school curriculum to include 'other disciplines such as risk management, project management, and legal knowledge management.'<sup>26</sup> He argues that 'in many law schools, law is taught as it was in the 1970s'<sup>27</sup> and that there is a need for students to be better prepared for legal practice in the future.

There is also a wealth of literature on legal education in the United States, most notably Robert Stevens's seminal work, *Law School: Legal Education in America from the 1850s to the 1980s*.<sup>28</sup> Stevens acknowledges that 'the most challenging aspect of the role of

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<sup>22</sup> Anthony Bradney and Fiona Cownie, 'British University Law Schools in the Twenty-First Century' in David Hayton (ed), *Law's Future(s): British Legal Developments in the 21st Century* (Hart Publishing, 2000) 1, 16–17.

<sup>23</sup> Stan Marsh, *A History of the Association of Law Teachers* (Sweet & Maxwell, 1990).

<sup>24</sup> Ibid 6.

<sup>25</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).

<sup>26</sup> Ibid 137.

<sup>27</sup> Ibid 136.

<sup>28</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983).

the law schools has been their function in the social evolution of law, lawyers, and higher education.’<sup>29</sup> While these concerns are echoed in contemporary Australian debates, this thesis does not canvass developments in American legal education in any detail. As subsequent chapters demonstrate, it is to England and Wales that Australia owes most of its early history in legal education.

### 3. Australian Origins: Legal Practitioners

Just as in England and Wales, the legal profession took the initiative in the Australian colonies in influencing how applicants were recognised for admission to legal practice. History reveals a fascinating story of the manner in which many applicants were recognised as legal practitioners by the courts without necessarily holding the appropriate qualifications. These would later be required of those being granted exemption by virtue of holding a formal academic qualification.

As explained by David Neal,<sup>30</sup> in the formative years of the legal system in New South Wales (NSW) discredited English or Irish lawyers who had been transported to NSW could gain recognition to practise as lawyers in NSW courts without having to re-qualify. A similar position existed in Western Australia where there was no formal system of tertiary legal education until 1927, so that from 1855 until the establishment of the University of Western Australia admission as a barrister depended on passing an examination conducted by the Supreme Court. There was, however, no alternative provision to undertake articles to qualify as a solicitor, known then as an attorney.<sup>31</sup> A history of the Bar Association of Queensland<sup>32</sup> explains why, prior to the founding of the University of Queensland Law School in 1933, the only persons who could practise as barristers in Queensland were immigrant barristers who had qualified in their home country, and Queensland nationals who had moved interstate or overseas to qualify.

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<sup>29</sup> Ibid xii.

<sup>30</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991).

<sup>31</sup> Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Press, 1980).

<sup>32</sup> Bar Association of Queensland, *History* <<http://www.qldbar.asn.au/index.php/about-the-bar/history>>.

#### 4. Australian Origins: Formal Qualifications

In contrast, other colonies and later states recognised at an early stage formal educational qualifications. These were either retained in parallel with professional qualifications or superseded such qualifications in order to enable applicants to be admitted as legal practitioners. This was especially true of the colonies of Victoria, South Australia and Tasmania, which established formal working law schools in the latter part of the 19<sup>th</sup> century.

These developments have been described in numerous law school histories, often commissioned to mark significant anniversaries. It is arguable whether these official histories qualify as scholarship for recognition within a formal literature review of this nature. However, the quality and unique nature of the histories of these law schools provide an unequalled opportunity to understand the development of formal legal education in Australia.

John Waugh's history of Melbourne Law School is not only all-embracing but also informative on the development of legal education throughout Australia.<sup>33</sup> The same can be said of the official history of the Sydney Law School which was published in 1991 to mark a century of law teaching in the university's city location.<sup>34</sup> The influence of these individual law school histories is not to be disregarded as they form the lifeblood of legal education in their narrative of legal studies. They are a valuable archival resource outlining the increasing sophistication of Australian law teaching.

Although the Sydney and Melbourne Law School histories might be recognised as major works in this area, most Australian law schools have published some form of account of their development. Some were specifically intended to mark their establishment, such as the University of NSW and Macquarie Law Schools which each celebrated 30 years of their existence with the publication of their histories in 2001<sup>35</sup>

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<sup>33</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007).

<sup>34</sup> John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (University of Sydney, 1991).

<sup>35</sup> Marion Dixon, *Thirty Up: The Story of the UNSW Law School 1971–2001* (University of New South Wales, 2001).

and 2005<sup>36</sup> respectively. In contrast, the University of Technology Sydney Law Faculty has published two histories; one in 1997<sup>37</sup> on its 20<sup>th</sup> anniversary and another in 2003<sup>38</sup> to mark its 25<sup>th</sup> anniversary.

These histories provide an interesting insight into the operation of law schools, not just information relating to increasing enrolments or the development of infrastructure but also on the changing behaviour of law students, their relationships with legal academics, and the development of more sophisticated teaching methods. *Law on North Terrace*,<sup>39</sup> a history of the first century of the Adelaide Law School (1883–1983) is an impressive example of such a publication, as is *100 Years*,<sup>40</sup> a similar centenary history of the University of Tasmania, Faculty of Law, (1893–1993). Both texts provide an interesting account of how their law schools dealt with the problems created by two world wars and the intervening Great Depression.

More recently, established law schools have seen advantage in having a readily accessible record of their development before there is a loss of the corporate memory. Two relatively recent publications marking law school anniversaries are *The Search for Excellence*<sup>41</sup> marking 20 years of Murdoch Law School and *Pericleans, Plumbers and Practitioners*,<sup>42</sup> reviewing the first 50 years of the Monash University Law School. The Murdoch Law School history takes advantage of the more sophisticated publishing techniques now available. Lavishly illustrated by colour photographs it could be regarded as being in the ‘coffee table’ book genre. Because of the relatively short time spans covered by the histories, both publications were able to incorporate personal accounts by students and staff from the time the law schools were founded.

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<sup>36</sup> Rosalind Croucher and Jennifer Shedden, *Retro 30: Thirty Years of Macquarie Law School* (Macquarie University, 2005).

<sup>37</sup> George Marsh, *UTS Law Faculty: The First Twenty Years* (University of Technology Sydney, 1997).

<sup>38</sup> George Marsh, *Verdict, 25 Years of UTS Law Faculty* (University of Technology Sydney, Law Faculty, 2002).

<sup>39</sup> Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School 1883–1983* (Faculty of Law, University of Adelaide, 1983).

<sup>40</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993).

<sup>41</sup> Philip Evans and Gabriel Moens (eds), *Murdoch Law School: The Search for Excellence* (Murdoch University, 2010).

<sup>42</sup> Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University Publishing, 2014).

## 5. Reports, Reviews and Inquiries

Only since World War II has legal education become a major subject of official reviews in Australia, either at the federal or state level. Mostly these originated from a referral to a law reform commission or were the subject of federal or state inquiry. Also various research projects have been generated by professional lawyers' societies or law teaching associations. These reports and inquiries provide an insight into different aspects and outcomes of legal education, which form the basis of this thesis.

Chapter 11 of the Martin Report (1964) is the seminal report, which laid the foundations and served as the benchmark for all future reviews into legal education.<sup>43</sup> It was invaluable for highlighting the 'past inadequacies of funding of law provided in comparison with the provisions made for other comparable disciplines.'<sup>44</sup> It was also unique in that it incorporated an historical background on both English and Australian legal education.<sup>45</sup>

In contrast, the Bowen Report (1979),<sup>46</sup> while being a report of a committee established by the NSW Government, had a major influence on subsequent developments in legal education beyond the boundaries of NSW.

In the modern post-war period most commentators would agree that the two most influential reports relating to legal education have been the Pearce Report (1987)<sup>47</sup> which followed an inquiry into tertiary legal education conducted for the Commonwealth Tertiary Education Commission; and the Australian Law Reform Commission's report in 2000, *Managing Justice: A Review of the Federal Civil Justice System* which incorporated a chapter devoted to education, training and accountability.<sup>48</sup>

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<sup>43</sup> Committee on the Future of Tertiary Education in Australia, 'Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission (The Martin Report)' (Government Printer, 1964).

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 49.

<sup>46</sup> Committee of Inquiry into Legal Education in New South Wales, 'Legal Education in New South Wales (The Bowen Report)' (Government Printer, 1979).

<sup>47</sup> Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)' (Australian Government Publishing Service, 1987).

<sup>48</sup> Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System, Report No 89' (2000).



## 6. Quasi-Official and Professional Reviews

During the past decade there has been a proliferation of reviews and discussion documents by and on behalf of quasi-governmental organisations, and the Council of Australian Law Deans (CALD).

An early report by Richard Johnstone and Sumitra Vignaendra, funded by the former Australian Universities Teaching Committee,<sup>49</sup> researched the correlation between learning outcomes and curriculum developments in law. This report formed the basis for two CALD reports, the first being 'Standards for Australian Law Schools'<sup>50</sup> adopted by CALD in March 2008 in the form of the 'Coogee Sands' Resolution. This was an important document in that it laid out an agreed set of standards with which all Australian law schools agreed to comply, although the standards were regarded as more aspirational than prescriptive. The second report<sup>51</sup> published in 2009 and which could be regarded as complementary to the Standards Report, was the outcome of research on how it was possible to achieve and sustain excellence in legal education within a changing learning environment. This report was funded by the former Australian Learning and Teaching Council (ALTC).

A further report with respect to legal education was published in 2010.<sup>52</sup> This was carried out by Sally Kift and Mark Israel who were two ALTC discipline scholars at the time and involved the development of six Threshold Learning Outcomes for incorporation in the LLB degree.

## 7. Law Students: Their Social Profile and Career Destinations

The increasing number of law students has led to research on their profile. Much of this has been concerned with the changing socio-economic backgrounds of students now

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<sup>49</sup> Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (A report commissioned by the Australian Universities Teaching Committee, Department of Education, Science and Training, 2003) <<http://www.cald.asn.au/docs>>.

<sup>50</sup> Christopher Roper with input from the CALD Standing Committee on Standards and Accreditation, 'Standards for Australian Law Schools Final Report' (Council of Australian Law Deans, 2008).

<sup>51</sup> Susanne Owen and Gary Davis, 'Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment: Project Final Report' (Australian Learning and Teaching Council and Council of Australian Law Deans, 2009).

<sup>52</sup> Sally Kift and Mark Israel, 'Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, 2010).

studying law in Australia, such as the project conducted in 1997 by John Goldring and Sumitra Vignaendra.<sup>53</sup> In a related study, David Barker and Anna Maloney examined the widening socio-economic background of law students in a monograph entitled *Access to Legal Education*.<sup>54</sup> Other reports reveal a growing interest regarding the careers of law graduates. As the first of these stated:

Where do law graduates go ... what do [they] do in their jobs? What factors, if any, have played a part in determining career destination?<sup>55</sup>

A further report based on this first study was published in 2000.<sup>56</sup> It illustrated a greater sophistication in the methodology and analysis which had been developed by the Centre for Legal Education under the supervision of its Director, Christopher Roper, who had overseen three of these reports.

The Centre for Legal Education, established in 1992, was responsible for the initiation of a number of reviews and subsequent publications, together with research monographs. During its most active period, when it was generously funded by the NSW Law Foundation, it had a major influence on the legal communities' reactions to, and views of, contemporary legal education. A cross-section of its more significant studies include those relating to continuing legal education. Two of these, *Senior Solicitors and their Participation in Continuing Legal Education*<sup>57</sup> and *Foundations for Continuing Legal Education*,<sup>58</sup> were authored by Christopher Roper. Another one, *A Study of the Continuing Legal Education Needs of Beginning Solicitors*<sup>59</sup> which incorporates a wideranging literature review on the topic, was authored by John Nelson.<sup>60</sup>

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<sup>53</sup> John Goldring and Sumitra Vignaendra, *A Social Profile of New Law Students in the Australian Capital Territory, New South Wales and Victoria* (Law Foundation of New South Wales, 1997).

<sup>54</sup> David Barker and Anna Maloney, *Access to Legal Education* (Centre for Legal Education, 1996).

<sup>55</sup> Sumitra Vignaendra, *Australian Law Graduates' Career Destinations* (Centre for Legal Education, 1998).

<sup>56</sup> Maria Karras and Christopher Roper, *The Career Destinations of Australian Law Graduates: First Report of a Five Year Study* (Centre for Legal Education (NSW), University of Newcastle, 2000).

<sup>57</sup> Christopher Roper, *Senior Solicitors and their Participation in Continuing Legal Education* (Centre for Legal Education, 1993).

<sup>58</sup> Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999).

<sup>59</sup> John Nelson, *A Study of the Continuing Legal Education Needs of Beginning Solicitors* (Centre for Legal Education, 1993).

<sup>60</sup> Ibid 11–46.

## 8. Legal Education and Law Teaching Texts

Law teaching texts cover a vast area of interests, reflected in the development of the various and growing aspects of legal education. The advent of computerisation in the 21<sup>st</sup> century has seen a dramatic change in the demands made upon academics involved in legal education.

Michelle Sanson advocated innovative teaching via the incorporation of modern information technology. In 2009 she published with David Worswick and Thalia Anthony *Connecting with Law*,<sup>61</sup> a book structured to maximise the learning outcomes of first-year law students. This was followed in 2011 by *Excellence and Innovation in Legal Education*<sup>62</sup> co-authored with Sally Kift, Jill Cowley and Penelope Watson. Arguably this latter text encapsulates the responses required from the new generation of law teachers to the many challenges imposed on them by government, the legal profession and more sophisticated students.

## 9. Law Journals

Part of the intellectual discourse that characterises legal education is carried out through law journals. By this means many of the ideas and outcomes of legal education are communicated, and law journals have become the major published form for this exchange. In recent times the original purpose for publishing such journals has been extended. This has led to the expansion of what was originally regarded as an informal hierarchy of prestige, depending on the presumed scholarly reputation of the journal, to a formal ranking of such publications. This enabled a form of assessment to be developed to grade the quality of journals' contributing authors to measure the research outcomes of their respective law schools.<sup>63</sup>

Eventually this ranking exercise lost its original purpose and led to anomalies. Therefore in 2011 the Australian Research Council advised Kim Carr the federal Minister for Education, to withdraw the prescriptive rankings of journal quality because

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<sup>61</sup> Michelle Sanson, Thalia Anthony and David Worswick, *Connecting with Law* (Oxford University Press, 2009).

<sup>62</sup> Sally Kift et al, *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011).

<sup>63</sup> Mathias Siems, *The Problems with Law Journal Rankings* (22 June 2012) <<http://siemslegal.blogspot.co.uk/2012/06/problems-with-law-journal-rankings.html>>.

there is clear and consistent evidence that the rankings were being deployed inappropriately within some quarters of the sector in ways that could produce harmful outcomes, and based on a poor understanding of the actual role of the rankings. One common example was the setting of targets for publication in A and A\* journals by institutional research managers.<sup>64</sup>

Whatever the view of the value of law journals and their rankings, they obviously make a vital contribution to the content and quality of legal literature. Therefore consideration has to be given to the influence exerted by a number of law journals that have been integral to this thesis.

The *Australian Law Journal* (ALJ) is one of the most highly regarded Australian law journals among the practising profession. Founded in 1927 and published continuously since then the ALJ has always contributed a significant coverage of legal education, although it was never ranked in the highest echelon of the former *Excellence in Research for Australia* (ERA) rankings—having been ranked at Level ‘B’. Part of its value has also been that it has attracted as its contributors not just law academics but members of the judiciary and law practitioners.<sup>65</sup>

Another journal, the contents of which are entirely devoted to legal education, is the *Legal Education Review* which, since it was founded in 1989 at the ALTA Conference, has maintained an ongoing review of all aspects of Australian legal education.

The list of law journals published electronically on the Australasian Legal Information Institute (AustLII) Journals’ page—although not a definitive list of Australian law journals—is a good indicator of the range of currently published law journals, with the total number listed as 101.<sup>66</sup> Although many of these are journals devoted to specialist legal subjects, the list also reveals that most Australian law schools are responsible for publishing a general law journal, with some law schools publishing additional journals on a range of specialist law subjects.

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<sup>64</sup> Sunanda Creagh, *Journal Rankings Ditched: The Experts Respond* (1 June 2011) <<https://theconversation.com/journal-rankings-ditched-the-experts-respond-1598>>.

<sup>65</sup> Australian Law Journal The (ALJ), *About the Journal* (11 August 2015) <<http://sites.thomsonreuters.com.au/journals/category/the-australian-law-journal/>>.

<sup>66</sup> Australasian Legal Scholarship Library, *Databases* (1 September 2015) <<http://www.austlii.edu.au/au/journals/>>.

The *Melbourne University Law Review*, whilst it was first published in 1957<sup>67</sup> had been preceded by a former journal, *Re Judicatae*, which was originally published in 1935 although the first volume was not completed until 1938.<sup>68</sup>

As stated above, law journal rankings have been subjected to some criticism. As Margaret Thornton has observed:

From the perspective of university management, the short refereed article fostered by such journals is nevertheless preferred to maximise the monetary return. When competitive government money is based on satisfying basic criteria, many low-grade articles are produced.<sup>69</sup>

Thornton has also expanded on her argument by quoting Twining's statement that: 'In law, it is not too difficult to get published; it may not be so easy to get read.'

However, despite these criticisms, a more positive view was expressed by the editor of the *Law Quarterly Review* who, in answer to the question 'What are law journals for?', stated that:

a journal should not only be a medium of reportage but has a wider duty to legal scholarship and to the development of the law itself. It should provide a body of comment, analysis and criticism of the law, pointing out flaws, anomalies and longstanding misapprehensions. This criticism should embrace not only statutes and decisions but also books and other journals.<sup>70</sup>

## 10. Rationale for a Literature Review

While there has been a plethora of eminent authors writing about the history of English legal education, such as William Blackstone, Frederic Maitland, Frederick Pollock, John Baker and William Twining, there does not yet appear to be a similar group of distinguished authors within the Australian legal education scene. However, as indicated in this thesis, there are authors who have influenced the manner in which Australian legal education has developed. Michael Kirby named Alex Castles as one of

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<sup>67</sup> Melbourne University Law Review, *History* (16 February 2015) <<http://www.law.unimelb.edu.au/mulr/about/history>>.

<sup>68</sup> Ibid.

<sup>69</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 180.

<sup>70</sup> Jenny Uglow, 'Law Journals: Working Paper No 2' (Society of Public Teachers of Law, 1977) 12.

the early authors in this category, but others who might also be considered for inclusion are David Weisbrot, John Waugh, Michael Coper, John Goldring and Christopher Roper. Their names have continually been referred to as influential in recording the progress, or examining the concepts, of Australian legal education. Whilst there are ongoing changes to forms of Australian legal education publications—such as eBooks, electronic publishing of journals and the general digitising of legal information—there is still a need, even arguably a greater need, to retain quality literature on legal education.

Legal education is the most vital component for training future legal practitioners and those who wish to learn about the legal system without necessarily becoming lawyers. The scholarship of learning and teaching in legal education is therefore of the utmost importance and the relevant literature is an essential part of the success of this process. It is also a valuable source of information in recording the changing trends and attitudes in legal education in Australia since European settlement in 1788.

## Chapter 3

### Methodology

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#### 1. Identifying the Issues

This thesis is concerned with an historical review of Australian legal education. The research has involved the identification and description of the issues since the inception of legal education in Australia at the time of European settlement. This chapter details the manner in which the research has been carried out to reach the conclusions described in Chapter 11. This has involved the selection of a variety of research approaches and strategies, which contribute not only a descriptive account of how the history of Australian legal education has unfolded, but also suggest reasons why particular decisions were adopted, taking account of the fact that legal education has always generated controversy.

As Terry Hutchinson has acknowledged, research of this nature will incorporate a ‘conceptual framework which has at least three [overlapping] aspects—personal, legal and philosophical’.<sup>1</sup> In this respect, it is accepted that the thesis reflects personal views and experiences of the author, who has been involved with legal education for over 40 years both in the United Kingdom and Australia. An account of many of these experiences has been presented at conferences or been published in legal journals, monographs or legal text books.

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<sup>1</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010) 186.

The legal aspects of the research have been multifarious, representing the ever widening forms of official influence that have developed and now govern legal education, whether at federal or state level. The establishment and growth of university-based legal education in Australia during the second half of the 19<sup>th</sup> century has now arguably involved: ‘Managerialism ... the new form of governmentality within the university that enables new knowledge to be mediated and harnessed by the state.’<sup>2</sup>

However, as the thesis unfolds, it will be seen that any doctrinal dimension to the research has been subordinated within an historical approach. As to a theoretical or conceptual approach, the thesis endeavours to acknowledge the essential differences that have arisen with regard to systems of legal training.<sup>3</sup> It is argued that university-based legal education helps to underpin a broad educational experience that is nonetheless sufficient to provide adequate professional training in the law. Of this process it has been said: ‘Education, training and accountability play a critical role in shaping the “legal culture”—and thus in determining how well the system operates in practice.’<sup>4</sup>

## 2. Appropriate Methodology

The nature of the research topic gives rise to a question regarding a formal choice of methodology. It might be expected that the appropriate method to be adopted would be a form of doctrinal research and analysis. Certainly, some of the research does involve a doctrinal approach, particularly insofar as it involves an exposition of the legislative framework regulating legal education and admission to practice in Australia. However, much of the research does not conform to the standard doctrinal research method, described by Pearce, Campbell and Harding as:

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<sup>2</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 110.

<sup>3</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 99.

<sup>4</sup> Australian Law Reform Commission, ‘*Managing Justice: A Review of the Federal Civil Justice System*, Report No 89’ (2000) 114 [2.3].



Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.<sup>5</sup>

If a doctrinal approach were adopted, this would involve an examination of the formal legal sources regulating legal education in Australia, now and in the past, such as the formal rules regarding admission to practice. While this might be a useful exercise, the outcome would present an incomplete history of legal education in Australia as it would mean not only the omission of many relevant sources but the exclusion of the social and cultural environment in which legal education has evolved.

## 2.1 Archival and historical

The choice of methodologies in the conduct of this project has reflected the complex subject matter of the thesis. With regard to the adoption of archival and historical techniques, questions arise as to the location and analysis of archival data. There is a large mass of primary resources retained in institutional archives, together with material of an informal nature that could have a major influence on the outcome of the questions raised in the thesis.

Much information on legal history is held on an informal basis by the individual organisations concerned. This is especially true of ad hoc law associations, many of which—in contrast to the United Kingdom Society of Legal Scholars<sup>6</sup>—have never retained a formal set of documents recording their day-to-day activities. This has meant that for the examination of primary documents the author has had to rely on a systematic inspection of records either retained in relevant institutions on an informal basis or those that have been transferred to university, institutional or public libraries. Until quite recently such organisations have often not availed themselves of the archival facilities of the National Library<sup>7</sup> or the Australian Archives,<sup>8</sup> and even then there are problems of demarcation as to whether the retention of such records is a federal or state

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<sup>5</sup> Dennis Pearce, Enid Campbell and Don Harding, *'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)'* (Australian Government Publishing Service, 1987) 17.

<sup>6</sup> Fiona Cownie and Ray Cocks, *A Great and Noble Occupation: The History of the Society of Legal Scholars* (Hart Publishing, 2009) v.

<sup>7</sup> *National Library Act 1960* (Cth).

<sup>8</sup> *Archives Act 1983* (Cth).

responsibility. Whilst the digitisation of some primary and secondary sources have rendered them more easily accessible, not all relevant documents have been retained in this process. The author has been aided by the fact that his association with many of the organisations referred to in the thesis has meant that he has been able to refer to his personal records of his involvement with these institutions.

Obtaining information from secondary sources has been less problematical. Legal education in Australia has been the subject of publishing activities in the form of pamphlets, monographs, journals and books. This has been especially true from the beginning of the 20<sup>th</sup> century onwards.

The tradition of most law schools has been to publish a flagship law journal, usually in the form of articles on matters of general legal interest and, as a result, quite a number have incorporated some information on the development of legal education. These have also been a useful source of anecdotal information regarding the activities of staff and students at various stages of the law school's development.

Apart from individual law school journals, other publications have had an important role in recording activities relating to Australian legal education. An important contribution has been made by a select group of specialised journals principally concerned with legal education. Already mentioned in the literature review in Chapter 2, and further discussed with respect to the Australasian Law Teachers Association (ALTA) in Chapter 8, is the *Legal Education Review*,<sup>9</sup> published annually since 1989 under the auspices of ALTA. Its United Kingdom equivalent is the *International Law Teacher*, which often publishes articles on issues involving Australian legal education.<sup>10</sup>

The *Legal Education Digest*,<sup>11</sup> first published in 1992, is another publication supported financially by ALTA but which has been published on a quarterly basis—now tri-annually—by the Centre for Legal Education. Each issue includes 12 or 13 articles which have been précised into a more readable form for its subscribers.

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<sup>9</sup> Australasian Law Teachers Association, *The Legal Education Review* <[www.ler.edu.au](http://www.ler.edu.au)>.

<sup>10</sup> See eg Paula Baron and Lillian Corbin, 'Thinking Like a Lawyer/Acting Like a Professional: Communities of Practice as a Means of Challenging Orthodox Legal Education' (2012) 46(2) *The Law Teacher* 100.

<sup>11</sup> Centre for Legal Education, *The Legal Education Digest* <[www.centreforlegaleducation.edu.au/digest](http://www.centreforlegaleducation.edu.au/digest)>.

The *Australian Law Journal* has, since its first publication in 1927, been another important publication for recording activities relating to legal education, whether it be the inaugural meeting of the Association of Australian Law Schools or the appointment of a new university law dean.<sup>12</sup>

One of the most productive sources of information for this thesis has been official law school histories, or university histories that incorporate an account of the development of an individual law school. The fact that most law school histories have been published to celebrate a significant anniversary since the establishment of their law school has meant that the history of some law schools can be traced back to the evolution of legal education from the middle of the 19<sup>th</sup> century. The histories of the early law schools—for the University of Sydney (1856),<sup>13</sup> the University of Melbourne (1857),<sup>14</sup> the University of Adelaide (1883)<sup>15</sup> and the University of Tasmania (1893)<sup>16</sup>—discuss not only the activities that contributed to the ethos of the law school but other information reflecting contemporary opinions about legal education requirements or training for entry into the legal profession.

## 2.2 Empirical

This thesis has also adopted an empirical methodology by collecting qualitative data through semi-structured interviews of legal personalities who have had a leading role in modern legal education in Australia. These data provided additional evidence as to how individual law academics, and others involved in the delivery of legal education, have contributed to its development.

To ascertain the real-life experience of those involved in the development of legal education, there was a need for an empirical method that was sufficiently flexible to accommodate the differences between individuals, their educational roles, and the time period in which they operated. The undertaking of semi-structured interviews assisted in

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<sup>12</sup> Thomson Reuters, *Australian Law Journal*

<<http://sites.thomsonreuters.com.au/journals/category/the-australian-law-journal/>>.

<sup>13</sup> John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (University of Sydney, 1991).

<sup>14</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007).

<sup>15</sup> Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School 1883–1983* (Faculty of Law, University of Adelaide, 1983).

<sup>16</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993).

ascertaining how, in the view of the interviewees, previous and current forms of legal instruction have been influenced internally—by those closely involved in teaching and developing the legal curricula—and externally—by those involved in government funding and policy decisions, professional legal bodies and the legal community generally.

### 2.3 The Semi-Structured Interviews

Qualitative interviews were conducted of a select number of legal personalities to ascertain their insights and awareness on the influence of legal education from their respective roles as law academics, deans and heads of law schools, legal practitioners, members of the judiciary or other law-related employment (such as in-house counsel, legal administrators and public service officials and policy makers).

The empirical study comprised 20 respondents, of whom 75 per cent were male and 25 per cent female. Their ages ranged from 23 years (a recent President of the Australian Law Students Association) to 87 years (a retired barrister). Wherever possible, interview subjects were chosen to obtain an Australia-wide geographical perspective, conscious of the fact that the regulatory environment for legal education has often differed from one state or territory to another. A full listing of the participants can be found in **Appendix 1**, and the core questions they were asked can be found in **Appendix 2**.

The interview process was divided into several stages, as devised by Kvale and Brinkman, to include ‘thematising, designing, interviewing, transcribing, analysing, verifying and reporting.’<sup>17</sup> The participants were interviewed in a one-to-one setting in order to elicit individual information about their pre-university, law school and professional experience. The interviews were semi-structured so as to leave room for the interviewee to include his or her own emphasis of the topic, although prior to the interview each respondent was provided with a list of questions to ensure structure and consistency in the process. The interviews typically lasted 60–90 minutes and were voice-recorded. The interviews were subsequently transcribed and the information

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<sup>17</sup> Steinar Kvale and Svend Brinkmann, *Interviews: Learning the Craft of Qualitative Research Interviewing* (SAGE Publications, 2<sup>nd</sup> ed, 2009) 97.

obtained then incorporated into relevant sections of the thesis. The interviews proved to be an invaluable source of information, especially where the respondent played a key role at an important juncture in the development of legal education, such as a member of a governing body or as a senior law school manager.

### 3. Contribution of the selected methodologies to the thesis

When Sir John Baker, one of legal history's most eminent contributors, was questioned about his choice of a methodology for undertaking his esteemed legal history, he responded that 'after due reflection, I have come to the conclusion that I have no easily describable method, perhaps no method at all apart from the indulgence of curiosity.'<sup>18</sup> Later in this extract Baker clarifies his situation and makes a statement that places his approach in perspective: 'The historian, like the lawyer, has to find something above and beyond the sources—a story, a changing institution, or an evolving idea.'<sup>19</sup>

However, contrary to Baker, it is relevant to reflect on how the selection of methodologies can affect the outcome of a thesis and this one in particular. As explained by Morris and Murphy: 'Methodology is crucially important—it provides the underpinnings both to your research and to your arguments based on your research.'<sup>20</sup> In this respect there is an expectation that the choice of the legal research methodologies for this thesis will strengthen and give an edge to the subject matter of the project. The selection of archival/historical methods was obvious given the nature of the topic. The informal sources of much of the research have been vital to supporting the evidence with regard to the development of the vast array of Australian law schools and, in particular, the part played in their maturing as educational institutions.

In the same way, the purpose of historical analysis was to supply supporting evidence of the evolution and evaluation of the formal sources of legal education and their contribution to the development of both the legal community and the legal profession. The inclusion of empirical legal research provided additional evidence on how individual legal academics, and others involved in the delivery of legal education, have

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<sup>18</sup> John Baker, 'Reflections on "Doing" History' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2013) 7, 7.

<sup>19</sup> Ibid 16.

<sup>20</sup> Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing, 2011) 29.

contributed to its development. The qualitative analysis adopted with regard to the interviews has supplied additional evidence about the historical development of Australian legal education and its impact on those who have passed through it.

## Chapter 4

### Early Development: 1788 to 1930

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#### 1. Foundations of Australian Legal Education: The English Influence

The early development of legal education in New South Wales (NSW) and, subsequently, in the remainder of Australia was heavily dependent on the requirements for entry into the legal profession in England and Wales.

The development of education and training for the legal profession in the United Kingdom can be traced back to the 13<sup>th</sup> century when an organised legal profession in England began to evolve.<sup>1</sup>

During the Middle Ages the Inns of Court—Lincoln’s Inn, Inner Temple, Middle Temple and Gray’s Inn—were founded. By the 15<sup>th</sup> century these Inns, together with the

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<sup>1</sup> Geoffrey Radcliffe and Geoffrey Cross, *The English Legal System* (Butterworth, 3rd ed, 1954) 375.

Chancery Inns, formed a law school nearly equal in size to the University of Cambridge (Cambridge).<sup>2</sup> The inns operated like universities. Students who had previously studied at an Inn of Chancery applied for admission as students to an Inn of Court. Their period as students or ‘inner barristers’ involved being present at courts, participating in moots, attending lectures or ‘readings’ and joining colleagues for meals. On completion of their training, students graduated by being called to the Bar, taking on the status of an ‘utter barrister’. A barrister of at least ten years’ standing was selected twice a year, during the lent and summer vacations, to provide a course of lectures, known as ‘readings’, to the students in the inn. Once readers had attended ‘readings’ they became benchers, due to fulfilling judicial roles sitting on the bench of moots conducted within the inn. Eventually, these readers or benchers administered the inns which included selecting candidates for admission to the Bar.<sup>3</sup>

The branch of the legal profession incorporating ‘solicitors’ appeared in the 15<sup>th</sup> century. The name derived from their function of ‘soliciting causes’. This role was originally occupied by young lawyers, but the earliest solicitors were ‘probably “in-house” lawyers to religious houses and large landowners’.<sup>4</sup> Gradually, despite the opposition of the Star Chamber, by the 17<sup>th</sup> century solicitors became a separate branch of the legal profession.<sup>5</sup> Their status was formalised in 1739 by the establishment of a ‘Society of Gentlemen Practisers in the Courts of Law and Equity.’<sup>6</sup> This was the forerunner of the ‘Law Society founded in 1827, incorporated by charter in 1831 and which provided lectures for articled clerks.’

The perception of the Inns of Court as the Third University of England came to an end with the advent of the English Civil War (1644–1651). Sir John Baker is of the view that this also marked the period when:

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<sup>2</sup> John Baker, *An Introduction to English Legal History* (Butterworths Lexis Nexis, 4th ed, 2002) 161.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid* 163.

<sup>5</sup> *ibid.*

<sup>6</sup> John Baker, *Legal Education in London 1250-1850* (Selden Society, 2007) 38.



the law was no longer ‘common learning’ but case-law in the stricter sense. That revolution in the concept of law reduced the importance of oral instruction at the inns of court and prepared the way for its collapse.<sup>7</sup>

There were subsequent various attempts by individual Inns of Court to reinstate their role as the premier law-teaching establishment. These were unsuccessful. Consequently:

By the eighteenth century no one could seriously compare the inns of court with a university, and Blackstone wrote pessimistically that ‘in the inns of court all sorts of regimen and academic superintendence, either with regard to morals or studies, are found impracticable and therefore entirely neglected’.<sup>8</sup>

Dr William Blackstone commenced lectures on English law at the University of Oxford (Oxford) in 1753. A Chair in Law (the Vinerian Chair of English Law) was established in 1758, followed by the Downing Chair of Laws of England at Cambridge in 1800. At the University of London John Austin commenced lectures in law and Andrew Amos held the first Chair in English Law in 1828. However, it was not until 1839 that the University awarded the first degrees in common law.<sup>9</sup>

This review of the early development of English legal education is relevant to that which eventually transpired in New South Wales and, subsequently, the rest of Australia.

## 2. Legal Education in the Australian Colonies and the States

The colony of NSW was initially governed by military law followed by the gradual introduction of civil law. However, there was already a need by the beginning of the 19<sup>th</sup> century for some form of judicial administration and, consequently, the admission and recognition of lawyers to participate in this judicial process. This chapter identifies this early recognition of legal practitioners who could appear before the courts as they gradually became constituted.

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<sup>7</sup> John Baker, *The Third University of England* (Selden Society, 1990) 21.

<sup>8</sup> *ibid.*

<sup>9</sup> Baker, above n 2, 171.

By the middle of the century there was also a need for legal training within the Australian colonies. This chapter will trace the development of both the introduction and control by the Supreme Courts of the various colonies of the qualifications to be attained by lawyers to enable them to practice within the courts. Finally, this chapter will examine the development of the early law schools in universities, which were gradually founded in each of the colonial and state capital cities.

## 2.1. New South Wales

NSW was originally settled by Europeans in 1788. However, the first judges did not arrive in the state until 1810. Indeed until 1808 convict attorneys advised the Governor and assisted the courts.<sup>10</sup> There was a political divide in the early population of NSW between the Exclusives and the Emancipists. The former comprised those who had come to the colony as free persons, such as former members of the NSW Corps, new wealthy free settlers, current members of the military garrisons in the colony, and colonial officials. In comparison, the Emancipists mainly comprised former convicts but also included less wealthy free settlers and those opposed to the influence of the Exclusives. In the early 1820s the leadership of the Emancipists included two free lawyers, W C Wentworth and Robert Wardell, and one ex-convict, Edward Eager.<sup>11</sup> Significantly, these two groups disagreed on the weight to attach to a person's respectability to accept them as a member of the legal profession. The Exclusives opposed the recognition of former convicts, who subsequently satisfied the general property qualification, as free participants in court processes.<sup>12</sup>

In 1810 the only lawyers in NSW were three former convicts, George Crossley, George Chartres and Edward Eagar, all of whom had been lawyers in England or Ireland. They were subsequently supplemented by two English solicitors subsidised by the Colonial Office to practise in the colony. The arrival of the two qualified lawyers called into doubt the ongoing right of the emancipist lawyers to continue to practise, because their right had been conditional on the absence of qualified lawyers.<sup>13</sup> On 1 May 1815, when

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<sup>10</sup> David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991) 99.

<sup>11</sup> *ibid* 18.

<sup>12</sup> *ibid* 19.

<sup>13</sup> *ibid* 100.

the new Supreme Court established under the Second Charter of Justice met for the first time, Justice Jeffery Bent refused to admit any of the three emancipist lawyers. He approved only the admission of W H Moore, one of the two qualified lawyers from England; the other had not yet arrived.<sup>14</sup> There was a stand-off between Governor Macquarie, who supported the admission of the three emancipist lawyers, and Justice Bent, who adjourned the court until 28 May 1815. The court remained closed until October 1816 when the two qualified lawyers were available to practise in the court, their number being increased to five by 1819. The dispute was resolved by the dismissal, on 11 December 1816, of Justice Bent by the Colonial Secretary, Lord Bathurst.<sup>15</sup>

Also to be considered are the educational requirements to qualify potential lawyers for admission. Qualifications for admission were originally derived from a British statute of 1729 (2 Geo II, c23). These required 'applicants for admission to have been admitted as solicitors in England, Scotland or Ireland to have qualified by serving a clerkship of five years with a NSW practitioner, subject perhaps, to an examination as to fitness'.<sup>16</sup>

Subsequently, various changes were made to the admission requirements for attorneys and barristers. *The New South Wales Act 1823* (Imp), established the Supreme Court of NSW in its present form. It provided for a fused profession permitting a practitioner to act either as a barrister or an attorney, the latter becoming known as a solicitor. This was amended in 1829 with the imposition of a divided profession, the amendment coming into operation in 1834.<sup>17</sup> Under these changes a potential attorney was required to serve five years as an articled clerk in the employment of a qualified practitioner in either NSW, Great Britain or Ireland but there was no such provision for barristers. Therefore anyone wishing to be admitted as a barrister in NSW had to have been previously admitted as a barrister or advocate in either Great Britain or Ireland.<sup>18</sup>

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<sup>14</sup> Charles Currey, *The Brothers Bent: Judge Advocate Ellis Bent and Judge Jeffery Hart Bent* (Sydney University Press, 1968) 149.

<sup>15</sup> *ibid.*

<sup>16</sup> Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111, 114.

<sup>17</sup> *ibid* 115.

<sup>18</sup> *ibid.*

The NSW Barristers Admission Board was established on 18 June 1848 by the *Barristers Admissions Act 1848* (Imp).<sup>19</sup> This was the first recorded legislation in Australia regulating the admission of lawyers in NSW. It stipulated the necessary educational requirements to qualify a candidate for admission, in addition to ‘*being a person of good fame and character.*’ The candidate was to be examined in the Ancient Classics (Greek and Latin), Mathematics, Law and any other branch of knowledge deemed appropriate by the Board. The Board was to consist of the three judges of the NSW Supreme Court, the Attorney General and two barristers elected annually by the practising barristers of the Supreme Court. However, this legislation permitted the Supreme Court to continue to admit barristers of England or Ireland, or advocates of Scotland, in accordance with the original provision in the Third Charter of Justice (1823).

The Barristers Admission Board was later supplemented by a Solicitors Admission Board. They merged in 1958 to form the Joint Admission Board. This had an important influence in maintaining the educational standards of those who sought admission to practice as barristers in NSW.

Two years after the establishment of the Barristers Admission Board, the University of Sydney was incorporated in 1850. During the inaugural ceremony for the foundation of the university, the Vice-Provost, Sir Charles Nicholson, said the purpose of the University was to provide ‘those higher means of instruction by which men may be fitted to discharge the duties and offices belonging to the higher grades in society,’ adding that these would include ‘enlightened statesmen, useful magistrates and learned and able lawyers.’<sup>20</sup> There was no provision for teaching law at the new University of Sydney so that, in 1857, legislation was enacted to confer privileges on the graduates of the University by exempting those with the University’s Master and Bachelors of Arts qualifications from examinations for the Bar.<sup>21</sup> The *Graduates of Other Universities Act 1859* (NSW) extended this privilege to any person with a degree in arts, medicine, or

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<sup>19</sup> *An Act to Regulate the Admission in Certain Cases of Barrister of the Supreme Court of New South Wales Act 1848* (11 Vic., No 57).

<sup>20</sup> John Bennett (ed), *A History of the New South Wales Bar* (Law Book Company, 1969) 221.

<sup>21</sup> *Sydney University Graduates Act 1857* (NSW).

law from Oxford or Cambridge or from a university established by Imperial statute, colonial Act or Royal Charter.

In his inaugural address Nicholson also envisaged ‘the early introduction of Lectures on Jurisprudence’, but no law lectures took place until 1859. This was despite the fact that the University Senate adopted by-laws in December 1855 which established a Faculty of Law which ‘consisted of a Chair in English Jurisprudence and, until other chairs in the Faculty were founded, a Board of Examiners to test the qualifications of candidates for degrees in Law.’<sup>22</sup> The by-laws also stipulated that:

candidates for the LLB were required to attend the lectures of the Professor of Jurisprudence, and to submit to examinations in civil and international law; constitutional law of England; and general law of England. No candidate was to be admitted to the degree until the expiration of one academic year from his graduation in Arts.<sup>23</sup>

These by-laws subsequently received the approval of the Executive Council in 1856. However, there was further delay until September 1858 when John Fletcher Hargrave was appointed Reader in General Jurisprudence and delivered his first course of lectures. These lectures on jurisprudence were described as:

being part of a University System of Education, and the studies in Jurisprudence leading us back into all ages of the world, and into the greatest depths of philosophy, ancient and modern, will necessarily compel us to take enlarged views of every topic before us; and after a time will create an instinctive habit of examining and testing every topic of Jurisprudence with reference to its widest possible relations to the progressive development of society.<sup>24</sup>

Hargrave, who retained his role as Reader at the University until 1865 when he was appointed as a judge of the NSW Supreme Court, was a prolific teacher. Besides teaching at the University he also taught on a wide variety of legal topics delivering lectures in the Supreme Court, the Law Institute, the School of Arts and throughout

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<sup>22</sup> Clifford Turney, Ursula Bygott and Peter Chippendale, *Australia's First: A History of the University of Sydney* (Hale & Iremonger, 1991) 115.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid* 71.

country NSW.<sup>25</sup> Hargrave and his successor experienced a major problem that was common to the University generally at that time; notably, the ability to attract students. In his evidence to a Select Committee of the NSW Legislative Assembly, which had been convened in 1859 to report on the progress of the University, Hargrave attributed the low numbers in his first law classes to two factors. The first was a clash with the examinations for students studying for the Arts degree. The second was the problem of the distance of the university campus from the city, particularly for those students who were articled clerks.<sup>26</sup>

There were other difficulties arising from the attempt to formalise legal education at the university. The major one, which will surface at regular intervals throughout this thesis, was the validity of a university law course in providing a qualification for professional legal practice, as had been the case with the legal studies previously conducted in the English Inns of Court.

The problems of recognition of the status of the lectures at the University of Sydney was compounded by the refusal of the Barristers Admission Board to recognise the results of an examination which Hargrave had set in his first year of teaching law. The reasons for this refusal were unclear.

Consequently, Hargrave resigned from his position as Reader. His successor, Judge Alfred MacFarlane, continued to experience the same problems. Therefore the lectures were discontinued in 1869.

This setback did not prevent the University pursuing the establishment of an active Faculty of Law. A Board of Examiners had been appointed in 1863 which was responsible for conducting examinations in civil and international law, constitutional history and constitutional law of England and the general law of England. These examinations were open to graduates in Arts and led to the law degrees of the LLB (1864) and LLD (1866). However, no formal teaching was given in these law subjects.

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<sup>25</sup> *ibid* 224.

<sup>26</sup> Martin, above n 16, 126.

Studies were conducted by private reading, with the role of the university being solely that of an examining body.<sup>27</sup>

The *Barristers Admission Act 1879* (NSW) dispensed with the rule that a pass in the examinations in Classics and Mathematics was necessary for admission. A candidate was also permitted to substitute the additional subjects of Logic and French language and literature for Greek.<sup>28</sup>

A major advance was made in forming a law school at the University of Sydney with the appointment in 1878 of Sir William J Manning as the Chancellor of the University. He was a judge of the Supreme Court and a former Attorney General. In his first address to the University he referred to newly-introduced Supreme Court rules and how these implied a greater role for the University in providing legal education for barristers, both at the preliminary and final stages of their examination. He noted that the University would be ‘taking a prominent part in direct legal training’.<sup>29</sup>

Further progress was made in establishing a fully constituted Sydney Law School with the appointment of a committee in 1885 to consider the establishment of Schools of Jurisprudence and Modern History.<sup>30</sup> A further committee was appointed in March 1886 to enquire into the establishment of a School of Law not Jurisprudence, subsequently reporting in May that it was not practical for financial reasons to proceed with this proposal.<sup>31</sup>

English-born merchant, John Henry Challis, conferred a bequest of £250,000 to the University on his death in 1880. Consequently, in 1888 a Committee was appointed to make provision for the expenditure of the Challis bequest. It recommended the establishment of a Professorship and four lectureships in law be paid out of the bequest. This finally led to the establishment of the University of Sydney Faculty of Law in 1890 with the appointment of Pitt Cobbett to both its first Chair of Law<sup>32</sup> and, in 1891, its

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<sup>27</sup>    ibid 128.

<sup>28</sup>    ibid 130.

<sup>29</sup>    ibid 131.

<sup>30</sup>    ibid 135.

<sup>31</sup>    ibid 139.

<sup>32</sup>    University of Sydney, *About the Law School: History* (24 June 2013) <<http://sydney.edu.au/law/about/history.shtml>>.

foundation Dean of the Law Faculty.<sup>33</sup> In the major history of Sydney Law School Cobbett has been described by Justice Hutley as ‘the dominant figure in legal education in New South Wales.’<sup>34</sup> Such was the influence of Cobbett on the development of the law school that this same history states that: ‘in many essential features the law school retains the imprint of Pitt Cobbett.’<sup>35</sup>

In July 1909 Cobbett submitted his resignation on the grounds of ill-health with the termination of his appointment to be effective from 31 December 1909.<sup>36</sup> His successor, both as Dean and Challis Professor, was John Peden, a barrister with an extensive practice in equity and probate who had been appointed as a part-time lecturer at the Law School in 1902.<sup>37</sup> As Dean, Peden was much more involved with affairs outside the Law School than his predecessor, being a member of the NSW Legislative Chamber from 1917 to 1946 and serving as its President from 1929 to 1946.<sup>38</sup> A gradual increase in enrolments took place during his term as Dean (Figure 4.1), although there was a reduction of 25 per cent during World War I which was more than compensated for by the trebling in numbers after the end of the War. Interestingly, the economic depression of the early 1930s had a relatively small impact on enrolments. This might have been because Sydney Law School was the only law school in NSW and law students came from comparatively wealthier groups of society. Figure 4.1 also indicates the dramatic reduction in enrolments to 77 in 1942, when Peden retired and Australia was experiencing the full effect of World War II on all aspects of Australian society.

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<sup>33</sup> John Bennett, 'Out of Nothing ... Professor Pitt Cobbett 1890-1909' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 34.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

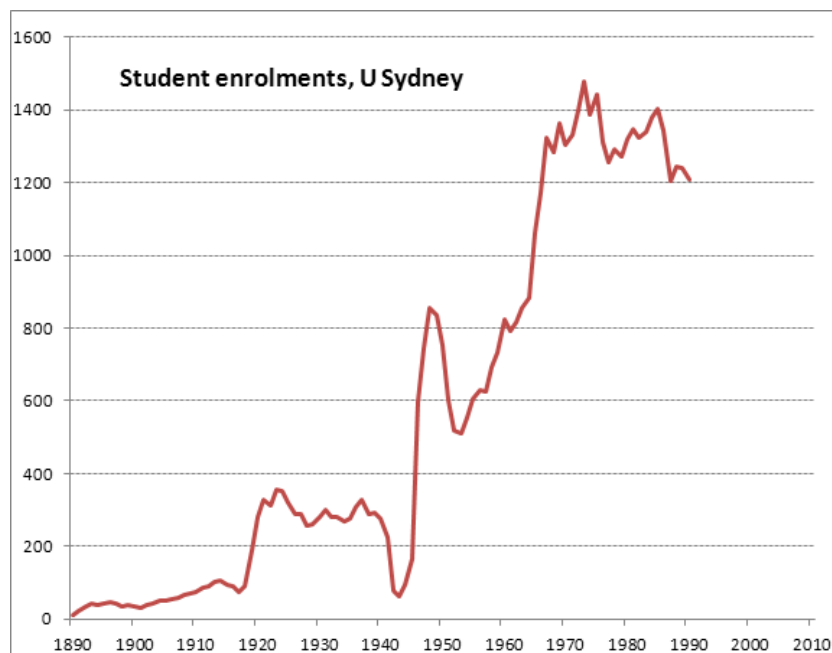
<sup>36</sup> *ibid.* 48.

<sup>37</sup> Judy Mackinolty, 'Learned Practitioners 1910-1941' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 57, 57.

<sup>38</sup> *ibid.*



Figure 4.1. Law Enrolments, University of Sydney, 1890–1990



Source: Derived from John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 208–9.

## 2.2. Victoria

The beginning of a structured legal system in what was to become the colony of Victoria occurred when:

William Meek, Melbourne's first attorney or solicitor, arrived in September 1838, followed in January 1839 by Robert Deane. Three barristers—EJ Brewster, James Croke and Redmond Barry—arrived in November 1839. Mr Justice Willis, the first Resident Judge at Port Phillip of the Supreme Court of New South Wales, admitted six barristers to practise on 12 April, 1841 and fourteen attorneys on 8 May 1841.<sup>39</sup>

Until Victoria was created as a separate colony from NSW in 1851 its lawyers were subject to the same restrictions on admission to practise as provided for by the Supreme Court of New South Wales and subsequently the NSW Barristers Admission Board.<sup>40</sup>

<sup>39</sup> Peter Balmford, *eMelbourne: The City Past & Present* The University of Melbourne <[www.emelbourne.net.au/biogs/EM00846b.htm](http://www.emelbourne.net.au/biogs/EM00846b.htm)>.

<sup>40</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 5.

However, the problems that existed between the University of Sydney and the NSW Supreme Court Boards of Admission during most of the 19<sup>th</sup> century did not occur between the University of Melbourne and the Supreme Court of Victoria. The University of Melbourne was established in 1851 and began teaching in 1855 but, at this stage, the curriculum did not include legal studies. In 1857 law was added to the teaching program to attract more students. Fortunately the University's first Chancellor, Redmond Barry, besides being Chairman of the Victorian Barristers Admission Board, was also a judge of the Supreme Court of Victoria. As Supreme Court judges were responsible for introducing the rules for admission to practise in the Court, the new admission rules exempted University of Melbourne law graduates from having to sit the Supreme Court's law examinations.<sup>41</sup>

Law teaching at the University of Melbourne had a modest beginning with the appointment of a single 'Reader or Lecturer'—the title of Reader disappearing in 1873. The first Lecturer was Richard Clarke Sewell, previously an English academic lawyer, who was already practising at the Melbourne Bar. However, for various reasons including heavy court commitments, his teaching was unsuccessful and, on his resignation in 1861, he was replaced by Henry Chapman.

This appointment brought a new dimension to the teaching of law in the Melbourne Law School. Chapman had previous extensive legal experience in Canada, the United Kingdom and New Zealand, including his appointments as a judge of the Supreme Court in Wellington, New Zealand and Colonial Secretary of Van Diemen's Land. Apart from maintaining his practice as a barrister, his ongoing role as an elected member of the Legislative Council of Victoria and his two terms as Attorney-General of Victoria meant that there were only intermittent periods when he was able to fulfil his role as a Reader at Melbourne Law School. However, some of his notes still survive and give a flavour of the teaching that was carried out in the law school during the 1860s. According to Waugh, Chapman's notes cover:

many topics of the first year of the course, including contracts, personal property, the court system and an introduction to constitutional law. His lecture notes on contract had nothing to say about the general principles of formation and content that loomed large for

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<sup>41</sup> *ibid* 7.

later teachers, but centred on particular kinds of contracts and the various grounds of incapacity and illegality. His coverage of personal property was like-wise taxonomic rather than analytic, cataloguing forms of property and ways of acquiring title.<sup>42</sup>

After completing his third period as Reader in 1864 Chapman returned to New Zealand on his reappointment there as a judge of the Supreme Court.

The demands of practice and judicial obligations meant that there were constant changes in the appointments to the teaching staff of the law school, and the law school history tells of a protest by the law students in February 1860 on finding themselves without a lecturer at the start of term.<sup>43</sup>

The first Melbourne academic to have a major impact on the operation of the law school was William Hearn, a professor of history and political economy, although he had studied law and had been admitted to practice as a barrister in Dublin.<sup>44</sup> In 1857 he commenced his involvement with the law course by acting as an examiner. When the law degree was formalised, he lectured LLB students in Ancient History and Constitutional Law, two of the compulsory subjects in the degree. He was obviously a very innovative teacher, as one Melbourne arts student has described:

He would, soon after lectures began for the year, sort out from his class a troupe who formed the *dramatis personae* in his little drama of 'Legal Duties and Rights'— the cast included a perpetual plaintiff who was the victim successively of a burglar with homicidal tendencies, a usurious moneylender and other predators—Cases have been known of men taking up jurisprudence as an extra subject, merely because it was such a pleasant way of spending a morning hour.<sup>45</sup>

Hearn's progression to Dean of the Faculty of Law in 1873 was via a tortuous route. His ambition to be elected to the Victorian Legislature led the Chancellor to separate the post of Dean from a professorial chair. This enabled Hearn to re-stand for parliament while retaining the position of Dean, which incorporated the same salary and tenure of a

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<sup>42</sup>     *ibid* 26.

<sup>43</sup>     *ibid* 29.

<sup>44</sup>     *ibid* 31.

<sup>45</sup>     *ibid* 32.

professorial position without any restrictions on his political activities.<sup>46</sup> Despite Hearn's machinations the status of law teaching within the University was raised by the establishment of a Law Faculty. This was based on recommendations contained in a University Council committee report convened by George Mackay. Mackay reportedly based his model for a University of Melbourne Law Faculty on that of 'the modern law Schools' of London and Dublin.<sup>47</sup>

In 1857 the Law Faculty was established by statute which provided that it should consist of the Dean, all lecturers (who were then all working part-time) and all lawyers who were members of the University Council, whether members of the judiciary, barristers or solicitors. This arrangement subsisted well into the 20<sup>th</sup> century.<sup>48</sup>

The appropriate location of the Melbourne Law School was an interesting issue—and one that is relevant to the development of many law schools in Australia and internationally. In the early days of the Melbourne Law School, the lecture rooms, office and library were located at the university, as was the housing of professors and their families, who lived in the law faculty building.<sup>49</sup> However, the majority of the law students were part-time and objected to having to travel from the city to the university for their law classes. This issue was exacerbated in 1880 when a new court complex was completed in William Street in the centre of the city. As a result of a petition by students studying property law, it was agreed that most classes be conducted within this new building in the future. This suited most of the law students and many of the law lecturers, who were also mostly working part-time.

The records of Melbourne Law School during this period indicate not only divisions between full-time and part-time students as to where classes should be held but also the competing demands by the Court for the increasing use of its facilities for its own needs. This left the law school to conduct its classes in increasingly unsatisfactory teaching facilities within the court complex. Teaching continued in the city within the court premises well into the 20<sup>th</sup> century. However, the provision of better facilities on the university campus, as well as the construction in 1926 of new courts by the

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<sup>46</sup>     ibid 40.

<sup>47</sup>     ibid 38.

<sup>48</sup>     ibid.

<sup>49</sup>     ibid 43.

Commonwealth government for use of the High Court of Australia and later the Federal Court, meant that all teaching was subsequently conducted within the university precincts.<sup>50</sup> It has been said that:

For the forty years during which they were held largely at the law courts, the location of the law lectures linked the course to the profession even more strongly than did the preponderance of barristers among the lecturers ... By coincidence, the move back to the university prefigured a renewed emphasis on the academic, rather than the vocational side of the law course.<sup>51</sup>

### 2.3. Tasmania

An organisation to represent lawyers in Tasmania (Van Diemen's Land as it was then known) was founded as early as 1845. On 29 October of that year a meeting of lawyers resolved that 'The Van Diemen's Land Law Society' be established with the objects as set out below:

to promote fair and honourable practise among the Members of the profession—to promote propriety of conduct in articulated Clerks to attend to applications for Admission—to oppose improper applications to take such measures as may be requisite to prevent persons not admitted from practising—and to offer to the proper authorities from time to time such suggestions respecting the Practice in any of the Courts, and respecting alterations of the same as may appear useful.<sup>52</sup>

It would appear that the Society had only a limited existence because, while it is mentioned in the 1848 Royal Kalendar and Almanac, there is no further reference to it in subsequent editions.<sup>53</sup> One theory for its demise was the lack of contact, mainly due to the distance between the two main towns in Tasmania—Hobart and Launceston. This also led to antagonism between the north and south of the island as the northerners believed southerners considered themselves to be superior. This form of inferiority nearly led to the premature end of the University of Tasmania law school even before its foundation. Further evidence of this antipathy is seen in the establishment in 1888 of a

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<sup>50</sup> ibid 46.

<sup>51</sup> ibid.

<sup>52</sup> *History of the Law Society of Tasmania* <lst.org.au/about/history/>.

<sup>53</sup> ibid.

successor society, the Southern Law Society, to serve only the needs of legal practitioners residing and practising within the limits of the southern district of Tasmania.<sup>54</sup> Not surprisingly, in the same year a similar meeting was held in Launceston, which led to the establishment of the Northern Law Society to serve the needs of those legal practitioners in the northern district of Tasmania.<sup>55</sup>

The antagonism between northern and southern Tasmanian sections of the legal profession was also evidenced in the discussions that led to the establishment of the University of Tasmania. Despite a great deal of opposition by northern Tasmanians to the inception of a university in Tasmania, the University was established in 1890.

The Faculty of Law of the university was established by the University of Tasmania Council on 6 October 1893, and the meeting to convene its operations took place in Hobart on 14 March 1894.<sup>56</sup> Prior to the commencement of legal studies at the university, qualification of a lawyer in Tasmania involved apprenticeship as an articled clerk as well as success in the local Law Society examinations. In addition, in the absence of a university, students could study for an Associate of Arts qualification conducted by the Tasmanian Council of Education.<sup>57</sup> The three leading members at the inaugural meeting held on 14 March 1894 were Andrew Inglis Clark, the Attorney-General of Tasmania, James Backhouse Walker, a qualified solicitor and University Vice-Chancellor 1896–1899, and Jethro Brown, who had obtained first class honours at St. John's College Cambridge and qualified as a barrister in England. Brown was elected by the University Council to be the first lecturer in law and history at the University. He was also subsequently elected as Dean of the Faculty of Law.<sup>58</sup>

Despite their being 32 articled clerks in Hobart, together with a further group in Launceston, who might have been expected to form the core of the initial intake, there was less than a dozen students who ultimately enrolled in the inaugural course in 1893. As with most early Australian law schools there was a wide divide between practical and theoretical legal studies, with the articled clerks needing to be convinced of the

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<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993) 1.

<sup>57</sup> *ibid.* 2.

<sup>58</sup> *ibid.* 1–4.

necessity of studying non-practical subjects such as jurisprudence, Roman law and international law.<sup>59</sup> Another unanticipated problem was the fact that most articled clerks were not able to satisfy the matriculation requirements of the University, which involved a knowledge of, and qualifications in, English language and literature, history and Latin, together with an additional language, arithmetic and a science. This problem was solved by the University Senate resolving that legal practitioners could be admitted as students without examination provided they applied before the last day of 1896.<sup>60</sup>

Arrangements to facilitate the current articled clerks gaining entrance to the University were not reflected in the first enrolments for the LLB classes in 1893, when there were less than a dozen students enrolled in all the law programs within the Law Faculty, and only one candidate for the October law examination in that year. By 1900 only twelve law students had graduated, although this was no less a number than graduates in other disciplines across the University.<sup>61</sup>

Jethro Brown remained the sole lecturer in law, not only teaching all the law students in Hobart but having to teach on a fortnightly basis in Launceston. When there were insufficient enrolments there to justify him making visits he conducted his teaching by correspondence, posting questions to the students. During part of his tenure, two honorary readers, F Lodge and N E Lewis, were appointed to teach property and constitutional law respectively.<sup>62</sup>

In 1896 Brown received a further set-back when his salary of £500 per annum as a lecturer was reduced on the basis of economy. While the University attempted partially to alleviate the effect of this by redesignating his position as 'Professor', Brown held out for permission to practise at the Bar. Although the University initially resisted this request, it finally acceded to his demand but this did not prevent Brown from resigning his position in 1900.<sup>63</sup> He left Tasmania to take up a chair in law in London, followed by a similar position in Wales, before finally succeeding to a professorial position at the University of Adelaide. He was replaced by Dugald Gordon McDougall, who been a

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<sup>59</sup>     ibid 4.

<sup>60</sup>     ibid 5.

<sup>61</sup>     ibid 8–9.

<sup>62</sup>     ibid 9.

<sup>63</sup>     ibid 10.

graduate at Balliol College, Oxford, called to the Bar at the Inner Temple and awarded an LLM by the University of Melbourne.<sup>64</sup> McDougall was appointed Dean and Professor of Law at the University of Tasmania in 1900 until his retirement in 1932.<sup>65</sup> The isolated nature of Tasmania and the smallness of its legal profession had an effect on enrolments within the Law School. During McDougall's tenure as Dean there were just 112 LLBs awarded together with eight LLMs. During the whole of World War I there were only 11 law graduates although, like the University of Sydney, there does not seem to have been a substantial effect on the number of students graduating during the economic depression of the 1930s.

## 2.4. South Australia

Soon after the foundation of the University of Adelaide in 1874, action was taken in 1877 to establish a law school by the appointment of a Committee on Legal Education.<sup>66</sup> Initially the Committee was enthusiastic about the proposal and considered recommending the appointment of a professor and a lecturer in law as the inaugural staff of the proposed law school. Consideration was given to admitting all articled clerks in South Australia who had a judge's certificate to form the initial law student intake. It was also intended to make an exception for these articled clerks by admitting them even if they had not matriculated from the University. This latter proposition was based on the false premise that such a process had been adopted by the University of Melbourne in forming its law school, although, as mentioned previously, this had been the procedure followed in Tasmania. However, none of these assumptions finally mattered as the University decided that it was not financially viable to create a law school at that time.

Eventually, however, recognising the need to establish and fund a law program, the University Council resolved to vary a previous endowment by Walter Watson Hughes with respect to a Chair in English and Philosophy. It was intended that these subjects would, in future, be taught by a lecturer, with the Chair being solely devoted to teaching English. A proviso allowed for the professorial appointment to be additionally

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<sup>64</sup> ibid 12.

<sup>65</sup> ibid.

<sup>66</sup> Walter Duncan and Roger Leonard, *The University of Adelaide, 1874-1974* (Rigby Limited, 1973) 30.



renumerated if the incumbent agreed to undertake some teaching in the proposed law school. Although Edward E Morris was appointed to this Chair in October 1882, within a month he had withdrawn from the position, overwhelmed by the projected teaching load of not only English, but also jurisprudence, constitutional history, Roman law, ancient and modern history and political economy.

To avoid a repetition with any future appointment, the University reverted the Hughes Professorial Chair to the sole teaching of English and appointed Walter Ross Phillips as a new full-time lecturer-in-charge of law. Although the law school student cohort was only 26 in number, in his first year Phillips was still expected to teach across a wide range of subjects encompassing Roman law, property law, jurisprudence, constitutional law, law of obligations, international law and torts and procedure.

Near the end of Phillips' tenure as a lecturer in 1890, problems arose with regard to the recognition of Adelaide's law degree by the University of Melbourne. The basis for this objection was that the Melbourne law degree required a student to have a Bachelor of Arts degree as a prerequisite to entrance to the law school program but this was not a requirement for the Adelaide law degree. The University of Melbourne's concern was that many Melbourne students would be tempted to undertake the Adelaide law degree as an easier route to qualifying as a lawyer in Victoria. The problem was solved by the Senate of the University of Adelaide in 1890 amending its law degree curriculum to incorporate at least two years of the Arts course.<sup>67</sup> In the same year, Phillips was replaced by Frederick Pennefather whose teaching position was upgraded to that of a professorial chair. Pennefather, in turn, was replaced in 1897 by John Salmond. This appointment is worthy of special comment because Salmond is recognised as being one of the outstanding law academics of the modern era; his *Law of Torts*, (first published in 1907), remaining a standard work up until the present day in all common law jurisdictions. He is also remembered for his well-known text on jurisprudence. He had previously been a barrister in New Zealand where he subsequently returned to become Solicitor-General, and then a judge of the Supreme Court.<sup>68</sup>

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<sup>67</sup>     ibid 31.

<sup>68</sup>     ibid 32.

## 2.5. Western Australia

Not all the Australian colonies aspired to a local university law degree as a qualification to practise law. Despite that the University of Western Australia was established in 1911 there was no tertiary teaching of law in Western Australia until the founding of the law school in 1927. Prior to this period, while it was possible for members of the legal profession to act as both barristers and solicitors, they could not qualify as solicitors within the colony and subsequently the state. This was commented on in the colony's leading weekly newspaper, the *Inquirer*, whose editor stated in the 6 October 1870 edition that:

Gentlemen brought up to the Law, in the colony, are barristers only, being called to the bar after having studied as pupils for five years under a barrister of the Court ... Our Supreme Court does not condescend to take any notice of attorneys properly so called; there is abundant provision for suckling barristers, but not for incipient attorneys, and we believe we are right in saying that the Chief Justice does not recognise the right of the practitioners of the Court to take article clerks in the way that attorneys do at home.<sup>69</sup>

This statement emphasises the problem of qualifying as a legal practitioner at this time because, until 1855, there was no provision in Western Australia for becoming a member of the legal profession. While legislation in 1855 provided for an examination to qualify as a barrister, there was no alternative provision to undertake articles. A subsequent Supreme Court Ordinance in 1861, whilst requiring service in the office of a barrister, did not provide for a qualifying examination.<sup>70</sup>

An ancillary matter, but one of greater relevance as legal practice expanded within the colony, was the lack of law books; not only textbooks but also Imperial statutes and local Acts of Parliament. Practitioners and judicial officers brought their own law books with them when they moved to Western Australia—in 1844 it was claimed that there was only one adequate law library in the colony, which was located in the office of Messrs AH and GF Stole local solicitors and agents.<sup>71</sup>

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<sup>69</sup> Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (University of Western Australia Press, 1980) 72.

<sup>70</sup> *ibid* 93.

<sup>71</sup> *ibid* 74.

The establishment of the Faculty of Law at the University of Western Australia was very similar to the early situation at the University of Sydney in that although a Law Faculty had been established earlier it was not a teaching law school. This meant that law students in Western Australia had the choice of studying for a law degree, either in another state or overseas, or undertaking training as an articled clerk for five years whilst studying for the State Barristers Board examinations.

Despite that the Professorial Board of the University had already decided in June 1920 that the University would support the establishment of a Law Faculty with full teaching facilities, there was the usual long-drawn out negotiations which seem to have characterised the formation of most Australian law schools.. This was because the support of the Barristers Board was needed to accredit the curriculum and the recognition of the law degree for admission purposes as a legal practitioner in Western Australia. The structure of the law degree program was similar to that adopted earlier by the University of Adelaide and was likewise based on the University of Melbourne Law School model. This comprised a four year law LLB degree incorporating the first two years of Arts Degree subjects followed by two years of law subjects. The program also involved the LLB graduates undertaking three years of articles whilst the current five-year articled clerks who did not wish to transfer to the LLB course could study their law subjects over the length of their articles.<sup>72</sup>

Nevertheless the new law school could not become operative until the cost of its establishment and operation could be met. This meant that a plan in 1922 for its foundation required £1350 in the first year and £1650 for each succeeding year. These amounts were still beyond the means of the University so it was not until the Barristers' Board agreed to make an annual contribution of £500 per annum that the University Senate was able to adopt a formal resolution to bring it into operation. The Barristers' Board contribution was to be funded by levying a fee of £6 on each legal practitioner when applying for their annual practising certificate, in accordance with an amendment to the *Legal Practitioners Act 1893 (WA)*.<sup>73</sup>

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<sup>72</sup> Marion Dixon, *Looking Back: A Short History of the UWA Law School, 1927-1992* (University of Western Australia, 1992) 7.

<sup>73</sup> *ibid* 8.

The formal opening of the law school occurred at the beginning of 1928 with the commencement of law teaching under the aegis of Professor Frank Beasley, a graduate of both Oxford and the University of Sydney. Professor Beasley was to have a profound influence on the early development of the law school, serving first as Head of the Law School and then continuing as a professor until his retirement in 1963.

In its early years the law school was located with the rest of the University in Irwin Street, Perth. The buildings were not prepossessing and nicknamed 'Tin Pot Alley' but they did have the advantage of most law schools at this time in that their location suited the law students, most of whom were articled to law firms located nearby in the city. There were approximately 18 law clerks and some other arts degree students who were continuing on to the LLB degree. The lectures were programmed to take place from nine to ten in the morning and five to six in the evening, which fitted in with those students who were employed as articled clerks.

Professor Beasley was the only full-time member of the academic staff, being supported by a number of members of the local legal profession in a part-time capacity. A contemporary history of the law school states that: 'It was regarded as something of an honour to be appointed a visiting lecturer to the Law School, and the paltriness of the remuneration did not discourage even the most distinguished of practitioners from offering their services.'<sup>74</sup>

## **2.6. Queensland**

Queensland was another colony that suffered because of the lack of a law school prior to Federation. It was not until 1936 that the University of Queensland established a functioning School of Law.

Identifying the pre-requisites to practise law in Queensland during the 19<sup>th</sup> century is extremely difficult. It required the examination of the character and qualifications of each applicant to understand why they were appointed and whether their admission set a precedent.

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<sup>74</sup>      *ibid* 9.

Even though a Circuit Court opened in Brisbane in May 1850, it was not until 1857 that the *Supreme Court Act 1857* (NSW) widened the jurisdiction of the Supreme Court of NSW to include the Moreton Bay District. One of the first functions of the first resident judge, S F Fulford, was the promulgation of rules whereby barristers of the Supreme Court of NSW were also recognised by that court in the Moreton Bay District, which led to the establishment of a local Bar. The rules also extended the division between the two parts of the profession which persisted in NSW, those of barristers and attorneys (solicitors), in that solicitors were prevented from appearing without a barrister, (if there was one available) in cases which involved disputes in excess of £50.

The proclamation of Queensland as a separate colony in 1859 led to the establishment of a Roll of Queensland barristers. The *Supreme Court Constitution Act 1867* (Qld) maintained the ongoing distinction between barristers and solicitors, although the right for a solicitor to appear without a barrister was extended to disputes not exceeding £100. This Act also provided for the establishment of a Queensland Barristers Board. Both this and a subsequent Act of 1867 empowered the Supreme Court to make laws with respect to the admission of attorneys, solicitors and barristers. Barristers at this time, and up until the establishment of the University of Queensland Law School in 1936, were either immigrant barristers who had qualified in their home country, or native Queenslanders who had moved interstate or overseas to qualify before returning to their home state.

The formalisation of professional organisations to represent both sides of the legal profession in Queensland was completed on 7 August 1873 when a meeting of attorneys resolved to form a Queensland Law Society. This was followed on 12 June 1903 by a meeting of barristers in the Chambers of Sir Arthur Rutledge KC, the Queensland Attorney-General, when a resolution was adopted to form a Queensland Bar Association.<sup>75</sup>

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<sup>75</sup> *Early History of the Bar Association of Queensland*  
<[http://www.qldar.asn.au/index.php?Itemid=33&id=14&option=com\\_content&task=view](http://www.qldar.asn.au/index.php?Itemid=33&id=14&option=com_content&task=view)>.

### 3. Female Students

One change with respect to students during the period preceding the 1930s was the role of female students. The restrictions on women being awarded degrees of any status, let alone a law degree, was settled in their favour early on in Australian universities when compared with most English universities, particularly the Oxbridge universities (Oxford in 1920 and Cambridge in 1948). For example, the University of Adelaide sanctioned conferral of degrees on women as early as 1881.<sup>76</sup> The more pressing problem was whether women would be barred from practising as barristers and solicitors. Victoria enacted legislation in 1903 permitting Flos Greig, Melbourne's first female law graduate to be admitted to practise in the same year,<sup>77</sup> but in New South Wales, another woman Ada Evans, graduating from the Sydney Law School in 1902, was not permitted to be admitted as a barrister or solicitor until enabling legislation was passed in 1918.<sup>78</sup> Her struggle to become a lawyer illustrates the difficulties faced by women at this time. Her admission as a law student at the University of Sydney was rumoured to have occurred only because the Dean, Professor Pitt Cobbett, who was a strong opponent of women entering the legal profession, was absent on sabbatical leave. On his return from leave the Dean tried unsuccessfully to persuade Evans to transfer into medicine.<sup>79</sup> However, while she was the first woman to be admitted, she did not practise. Her reason was that the delay between graduating in 1902 and admission to the Bar in 1918 was such that 'she had been too long out of the legal world to practise her profession with credit.'<sup>80</sup> Thus it was Sybil Morrison who, in 1924, became the first practising female barrister in New South Wales, and Marie Byles the first female solicitor.<sup>81</sup>

The same problems were experienced by Edith Haynes in her efforts to gain admission to the Bar in Western Australia. Despite having been initially permitted to register as a student (she was articled to her father), she was refused admission to the intermediate examination by the Barristers Board in 1904. She challenged this refusal by launching a

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<sup>76</sup> Waugh, above n 40, 70.

<sup>77</sup> *ibid* 40, 70.

<sup>78</sup> Mackinolty, above n 37, 59.

<sup>79</sup> J.M.K Phillips, 'Sisters-in Law' in Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney, 1890-1940* (The University of Sydney, 1940) 62.

<sup>80</sup> *ibid*.

<sup>81</sup> *ibid* 63.

writ for mandamus against the Board in the Supreme Court of Western Australia, but her suit was rejected on the grounds that women were not entitled to be registered as members of the Bar in accordance with the *Legal Practitioners Act 1893* (WA). It was not until the *Women's Legal Status Act 1923* (WA) that the law was changed and women were allowed to be admitted to the Bar of Western Australia.

Similar legislation permitting the admission of women to practise law at the relevant state Bars had earlier been enacted in Tasmania (*Legal Practitioners Act 1904* (Tas)) and Queensland (*Legal Practitioners Act 1905* (Qld)).

#### 4. Lack of New Law Schools

The inter-war years (1919-1938) saw only two new law schools being established in Australia in states that until then had no law schools. These were the University of Western Australia in Perth in 1927 and the University of Queensland in Brisbane in 1936. The fact that the law school at the University of Western Australia was the only one established during the period under review reflects that legal education was not regarded at this time as a major factor in the development of the legal profession. As Professor David Weisbrot states: 'Following the example of the Vinerian chair in law at Oxford, perhaps the Australian university law schools tended to have one full-time dean/professor, with the rest of the teaching done part-time by legal practitioners.'<sup>82</sup> He also points out that: 'Until the 1930's only Sydney University had more than one full-time legal academic.'<sup>83</sup> Interestingly, up until the post-war period (after World War II) there was no 'significant and distinct class of legal academics'.<sup>84</sup> This meant that the Australian law school degrees 'reflected narrow vocational concerns.'<sup>85</sup>

#### 5. Teaching and Learning

At an Australian National University (ANU) College of Law Teacher/Student Forum seminar on 21 May 2010, Professor David Weisbrot suggested that if Christopher Landell, who was appointed as Dean of the Harvard Law School in 1870 and was the

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<sup>82</sup> David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990), 122.

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

originator of the Case Book Teaching System, returned to law teaching in 2010: 'He would hit the ground running',<sup>86</sup> implying that little had changed with respect to legal education methods over the subsequent 140 years.

This could be interpreted as an indictment of the quality of current law teaching or a compliment on law teaching methodology in common law countries, including Australia, in the early part of the 19<sup>th</sup> century and before that has stood the test of time.

Most comments on teaching methods at law schools during this period appear as part of documented law school histories or are reminiscences contained in biographies or autobiographies.

Judy Mackinolty recounts that Professor John Peden, Dean of the Sydney Law School 1910–1941 would announce to his class that he was not there 'to create pedants but learned practitioners.'<sup>87</sup> However, she was of the view that others would argue that 'competent legal technicians' would be a more accurate description. Miss Hay, clerk to the Faculty 1919–53, believed that Peden preferred to take students who had already completed two years of the University's Arts course so he could turn out practitioners equipped to earn their 'bread and butter'.

At both the Universities of Sydney and Melbourne most lectures were timetabled in the mornings and evenings to fit in with the working arrangements of articled clerks who were required to work in solicitors' offices during the day.

Myer Rosenblum, an articled clerk studying at the Sydney Law School (1927–1932), provides the following description of Sydney law students:

most ... were male articled clerks, who had spent previous hours carrying letters to solicitors or filing documents in court offices. The tired ones sought to occupy the benches at the back of the [class] room ... The lecturer read from his notes on the lectern in front of him and could hardly be heard by those on the back benches who were soon

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<sup>86</sup> David Weisbrot, 'Reimagining Legal Education in Australia' (Paper presented at the ANU Law Students Forum, ANU College of Law, 21 May 2010).

<sup>87</sup> Mackinolty, above n 37.S



lulled to sleep by his droning delivery. He did not mind the sleepers and seldom raised his eyes from his notes.<sup>88</sup>

Professor Derham of the University of Melbourne stated that one of the problems with law teaching was the lack of any proper facilities: 'An old room, some lawyers and a few books ... For too long, until the thirties of this century, it seems to have been an unexpressed or even sometimes expressed belief that legal education required nothing more ...'<sup>89</sup>

However, despite these perceived failings there was some innovation. At the University of Sydney, during World War I there is mention of the: 'Re-introduction of typed notes of lectures, which freed lecturers from the grind of dictating and enabled students to concentrate on explanation and illustration without slavish note-taking.'<sup>90</sup>

## 6. Reflections on the early development of legal education in Australia

An examination of Australian legal education at the close of the 19<sup>th</sup> century, a year before the proclamation of Federation, reveals the development of some early trends, even though only a century and a half had elapsed since European settlement on the continent. A major development relates to those early universities that had established law schools. These tertiary institutions were unsure about whether the major objective of the law degree was to qualify the graduate to gain entry into the legal profession, or whether it should also be designed to give law graduates an all-round education. At this stage, in both the Universities of Sydney and Melbourne and in the NSW Bar Admission Board, there was equal focus on satisfying the standards for a degree in Arts, with its expectation of a knowledge of Greek and Latin, and on promoting expertise in major legal subjects such as constitutional law, torts or civil and criminal procedure.

Another trend reflected the major division within the legal profession between barristers and solicitors, and the question of whether the profession should remain divided or be

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<sup>88</sup> Myer Rosenblum, 'The Articled Clerk 1927-1932' in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 83, 83.

<sup>89</sup> David Derham, *Legal Education in England and the USA* (University of Melbourne Gazette, 1954) 32.

<sup>90</sup> Mackinolty, above n 37, 71.

fused, with its consequential implications for the law curriculum. The history of the legal profession reveals that this was a major pre-occupation of both the profession and the judiciary, with Victoria and NSW opting for a divided profession while South Australia was satisfied with a fused one. It is difficult to ignore the influence of the debate in Victoria, with the *Legal Profession Act 1891* (Vic) confirming: ‘all existing members of each branch into barristers and solicitors with rights of practice in every recognised legal field.’<sup>91</sup> This led to the Melbourne Bar Association’s successful boycott against the legislation which continued until 1901.

Such division of opinions would have long-term implications for the character and composition of the legal curriculum in tertiary institutions and the requirements demanded by the various admission boards controlled by each state and territory Supreme Court.

The other main development relates to the nature of teaching. This incorporates not only the selection of law teachers—including whether they should be involved in practice, employed part-time or full-time, possess higher academic legal qualifications—but also the standard of the teaching accommodation, its proximity to the law courts, the provision of teaching materials and the availability of large and high quality law libraries. It is easy, with the benefit of hindsight, to reflect that although both legislatures and University Councils usually included a large number of qualified lawyers, they tended not to advocate for provision of these essential components of a successful law school. This lack of self-interest on behalf of the legal profession led to an unfortunate effect on the funding of legal education in the 20<sup>th</sup> and 21<sup>st</sup> centuries.

It might be appropriate to label this early part of the 20<sup>th</sup> century as ‘The Cinderella Period’—an expression used by an anonymous student at the University of Melbourne Law School in 1927 when describing the law school as the ‘Cinderella of the University’<sup>92</sup> because he regarded it as the poor relation of the University. This metaphor could also be applied to the status of Australian law schools at this time,

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<sup>91</sup> J. Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Law Book Company, 1979) 114.

<sup>92</sup> *ibid* 104.

which suffered from a similar lack of resources, resulting in an inferiority complex in those responsible for the provision of legal education.

It is difficult to extract events during the first three decades of the 20<sup>th</sup> century that might signal progresses in the development of Australian legal education. One of the characteristics of this period is that there was tendency for law school professors to be expected to have an English law degree and to be young. At the University of Melbourne:

The council specified that the new professor should be not much under thirty and not much over forty. The job was one for an intelligent, presentable young man with English qualifications and plenty of promise; it was not until 1947 that the university appointed a law professor who was over thirty years old or who had completed a doctorate, and not until 1951 that it appointed one who did not have an English university degree.<sup>93</sup>

During this period, deans of some law schools served for considerable periods of time, exercising a major influence over the development of legal education within their academic institutions.

At the University of Melbourne William Moore, who had legal qualifications from both the University of London and Cambridge, was appointed Dean and Professor of Law in 1893 at the age of 25. He served as Dean for 34 years until his retirement in 1927.<sup>94</sup>

Moore is unique in developing Australian legal education. He was the first law professor at the Melbourne Law School to visit law schools in the United States. He had pre-empted this interest in North American legal education when he appeared before the Royal Commission on the University of Melbourne in 1902 and stated that: 'What we have to learn we have to learn from America'.<sup>95</sup> An illustration of this progressive attitude was his efforts to observe American legal education teaching methods when he travelled to the United States in 1911.

On his visit to the law schools at Columbia University and Harvard University he focused on the case method which characterised law teaching in the United States then,

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<sup>93</sup>     ibid 48.

<sup>94</sup>     ibid 59.

<sup>95</sup>     ibid 80.

as it still does today. Like his counterpart Jethro Brown of Adelaide Law School, who had made an earlier visit to America in 1904 (when he was an academic at the University of Sydney), Moore realised that while the case method might be regarded as effective in the United States, the pre-conditions for this effectiveness—such as a large academic staff, graduate entry, casebooks and a substantial library—were not available at the Melbourne Law School.

Although these trends might suggest a rejection of the American approach to legal education, they might also be regarded as evidence that, even at the end of the 19<sup>th</sup> century, some Australian legal educators were not complacent about how law should be taught in Australian law schools. The history of Sydney Law School reflects Cobbett's view on necessary changes to the law school curriculum on his appointment in 1890 as Dean of the Sydney Law School:

Although himself a product and capable exponent of the English system of legal education, his knowledge of comparable courses elsewhere acquired through his command of international law encouraged him to esteem less the English, and admire more the American, approach to Law Schools. The former lived too much in the past, directing excessive attention to history and classical literature and leaving the realities of the law to be learned by experience. The latter elevated practice subjects to intellectual disciplines in their own right, producing, in Cobbett's estimation, lawyers of greater ability. He set out to shift the Sydney Law School's centre of gravity away from Blackstone and Stephen, and towards a study of the law as it was then practised in Australia from day to day.<sup>96</sup>

This account of the developing antecedents of Australian legal education reveals that, early on in its history, there is evidence of the conflicts which were to arise about whether the discipline of law should be principally concerned with practical training or incorporate more liberal aspects of a vocational education. From its evolution in New South Wales, and subsequently in the later colonies, the training of lawyers was very much a practical exercise with control being exercised by the judiciary as to the educational requirements which were mostly practical. The establishment of the early law schools gave rise to controversy from other established university disciplines which

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<sup>96</sup> Bennett, above n 33.

considered that law teaching was not an academic discipline but was more a practical vocation which had no place in a university. Thus many early Australian law degrees involved the study of classical subjects constituting part of an Arts Degree before the student could study any legal subjects and, even then, these were of limited number with a narrow curriculum. Certainly in New South Wales there was the added complication that the Barristers Admission Board was initially unwilling to accept many law subjects taught at the University of Sydney as providing exemption from the Board's admission examinations. The early outcome of this conflict meant that the legal profession was able to continue to exercise control over much of the law curriculum. This interconnection between the legal profession and legal education meant that most law teachers were legal practitioners teaching part-time and that there were very few full-time law teachers. These were usually restricted to one or two at each law school resulting in law deans and professors being overworked and the law schools being chronically underfunded. There is therefore good reason for supporting the statement that law was the Cinderella discipline at universities and, as will be seen in the later chapters of this thesis, it has only been comparatively recently that legal education has become regarded as a major university discipline.



## **Chapter 5**

### **The Waiting Years—1930 to 1960**

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#### **1. Introduction**

Between 1930 and 1960 legal education showed little inclination to change or innovate. In many ways Australian society was dealing with the aftermath of World War I and then the economic problems of the Great Depression. The latter part of the period encompassed World War II—a conflict which, because of its profound impact on Australia, gave rise to an expectation of change in the country’s major institutions. This included the law, which in turn had an indirect impact on legal education. During this time only two new law schools were established in Australia and there were no official inquiries or reports at Commonwealth, State or Territory level as to improvements or changes to the legal education system. Nor do there appear to have been any changes to law school curricula or methods of teaching. Arguably this was an indication of either stability or complacency—or even stagnation—within the legal education system at this time. Therefore, the term ‘the waiting years’ seems an appropriate title for this chapter.

William Twining, a highly regarded English law academic, reflects on a similar experience at this time in England and Wales while also commenting on the paucity of full-time law teachers (also a problem in Australia) when he states that:

One of the recurrent themes that runs through debates and histories of legal education in most common law countries is the low prestige of law schools and the low status of academic lawyers, both within the university and in the eyes of the profession. ... This broad picture is supported by the available statistics. In 1909 there were reported to be 109 teachers of law, although how many were genuinely full-time is uncertain; by 1933–34 this had only increased to 130 and the number seems to have been about the same in 1945. As we shall see, the contrast with developments after the Second World War could hardly be greater.<sup>1</sup>

He also makes a telling point about the history of legal education at this time in England and Wales which is relevant to Australia, particularly with regard to the subjects to be incorporated into a law degree and whether studying for a university law degree was helpful in training legal practitioners:

Naturally these generalisations and bare statistics need to be taken with a pinch of salt. Histories of legal education prior to 1945 are patchy, and the complex story of development in the last fifty years has yet to be told in any detail. Nevertheless, the standard accounts provide strong support for the proposition that the modern English law school is in most important respects a post Second World War creation. I propose to accept this interpretation, subject to two caveats: First, this kind of analysis is by no means unique to law. As late as 1900 most of the academic subjects we know today had barely been accepted. A similar story could be told about the struggle for acceptance and the institutionalisation of English literature or psychology or sociology or geography, to say nothing of more recent or more esoteric subjects. Secondly, there are some important continuities. Some surviving ideas, attitudes and practices can be traced back much further than 1945: the pre-eminence of Oxford and Cambridge; ideas about institutional autonomy and academic freedom; single honours degrees; English legal positivism; and professional scepticism about the relevance of university law as a preparation for practice are relevant examples.<sup>2</sup>

Twining tends to be more ambivalent regarding the status of law schools in the United States at this time. However, the intense debate regarding the effectiveness of the case method of teaching and its influence on modern legal education is evidence that American law academics, such as Roscoe Pound and Karl Llewellyn, had a genuine

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<sup>1</sup> William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell, 1994) 25–6.

<sup>2</sup> *ibid.*



concern for the development of modern forms of legal education during this post 1930s period.<sup>3</sup> Even as late as 1944 Llewellyn was continuing his campaign against the case method system as the principal author of the 1944 Association of American Law Schools' Curriculum Committee's Report, which advocated the problem method as an alternative to the traditional case method form of teaching in North America.<sup>4</sup>

It is important to look for the positives during this apparently quiescent period for Australian legal education.

## 2. University of Queensland Law Faculty

The University of Queensland law faculty commenced teaching in 1936 although a shadow law faculty was established on the University's founding in 1910. This was very similar to the early experience at the University of Sydney. This meant that for more than two-and-a-half decades the Queensland law faculty existed in theory only, affording the University the opportunity of conferring honorary law degrees on those whom the University decreed worthy of such an honour. However, it was not until 1920 that a committee was formed to consider changing the structure of the law faculty to an active one. Whilst the committee recommended the further postponement of this decision, it approved the introduction of some law courses that could be incorporated into the University's arts curriculum and be made available to students who intended to practise at the Bar. As in many other states, students could be admitted to practise law if they held law degrees awarded by other universities. However, most took advantage of sitting the exams of the Barristers' and Solicitors' Boards which came under the aegis of the Supreme Court of Queensland's Admission Board.

A further step towards autonomy for the law faculty occurred in 1923 when a bequest was made to the University in the sum of £550 per annum. This was in memory of a local barrister and politician, Sir James Garrick KC, for the founding of a Professorial Chair in Law to be known as the Garrick Chair of Law. The first appointment to this Chair was that of F W S. Cumbrae-Stewart, a former Registrar of the University, who

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<sup>3</sup> Karl Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1930) 44 *Harvard Law Review* 1222.

<sup>4</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983) 214–15.

held the position until 1936 when he was replaced by Professor York-Hedges. The Garrick Chair is the oldest named professorial chair at the University of Queensland and is held today by Professor James Allan.

In 1935 the University received a further stimulus for the activation of the law faculty when the proprietor of a Brisbane department store, Thomas Charles Beirne, who was also the warden of the University, pledged £20,000 (the equivalent of approximately \$3 million today) to establish ‘a functioning law school.’ This came into operation in 1936.<sup>5</sup>

One of the first law students to graduate from the law faculty in 1939 was Harry Talbot Gibbs later to become Sir Harry Gibbs, Chief Justice of the High Court. He was also one of the first students to graduate with First Class Honours. He and a colleague, Tom Matthews, sought free admission to the Queensland Bar on 31 May 1939.. They relied on a provision in the admission rules that exempted holders of First Class Honours from making any such payment. Although the Queensland Barristers Board opposed their proposition, the Supreme Court of Queensland held in favour of the applicants with Douglas J stating: ‘I am very pleased that these young men, who have qualified themselves by obtaining distinction, should have their work recognised in some tangible form.’<sup>6</sup> This precedent, excusing honours law graduates from paying admission fees, remained in operation until 2001 when the rules were changed.<sup>7</sup>

### 3. Establishment of the Law Council of Australia

Interestingly, up to the early part of the 1930s there appeared to be little desire on the part of the various branches of the law to meet or co-operate on matters of mutual interest. Consequently, legal education, which requires the interest and support of both the judiciary and the legal profession, could only suffer.

However, in 1933 there was the first thawing of this attitude with the first conference of the Legal Societies of Australia on 18–20 April at the Law Society of South Australia.

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<sup>5</sup> TC Beirne School of Law, *Heritage and History* (8 December 2014) University of Queensland <<http://www.law.uq.edu.au/heritage-and-history>>.

<sup>6</sup> [1939] Case 32 QWN 52, 54.

<sup>7</sup> Michael White and A Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) 44.

Not only was there an adoption of a draft constitution for a Law Council of Australia, but, much more importantly, there was the unanimous adoption of a set of resolutions which would have a long term influence on the future of legal education in Australia. These resolutions incorporated the requirement that every practitioner is fully qualified [with]:

- a) A sound legal knowledge proved by examination of good standard.
- b) In the case of solicitors, by training in practice.
- c) An adequate knowledge of professional ethics.
- d) A sufficient standard of general education.
- e) By good character.<sup>8</sup>

The importance of establishing such an Australian Law Society and its potential to influence the development of a universal system of legal education in Australia was not lost on the *Australian Law Journal* which stated:

The formation of an Australian Law Society is a project which deserves the support and active co-operation of the profession throughout Australia and to which this Journal is prepared to lend the fullest measure of co-operation and assistance. ... In addition to the general advantages of co-operation, there are many specific spheres, such as ... legal education ... in which such co-operation will be of benefit both to the public and the profession. It is perhaps not too much to hope that the time will yet arrive when the student of law will be able to complete his education by a course of undergraduate and also, maybe, post-graduate, work in one or more of the Universities according to the special facilities offered by different Law Schools for the study of subjects in which he is particularly interested; when having been admitted in one State he will be able to obtain admission in another State with the minimum of restriction; and when, if practising before the Courts of such other State, he will be dealing with legislation which on questions unaffected by purely local considerations, will be the same in both nomenclature and contents, as that in the State of his admission. And even, if this happy state of affairs cannot be realised in its entirety, steps may still be able to be taken towards it which will benefit both the community and the profession.<sup>9</sup>

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<sup>8</sup> Current Topics, 'First Conference of the Legal Societies of Australia' (1933) 7 *Australian Law Journal* 1.

<sup>9</sup> *ibid* 2.

A further outcome of the establishment of the Law Council of Australia was the organisation of the first Australian Legal Convention in Melbourne on 30 October 1935 with the purpose: ‘to advance the study of the law and to improve and develop the law.’<sup>10</sup>

The fact that a further Convention was held the following year was indicative of the aim of the Law Council, which in the words of the President (F Villeneuve Smith) was ‘two-fold in its nature, first to weld the legal profession into a homogeneous whole, and to act as an articulate organ which can express the views of the whole of the profession in Australia.’<sup>11</sup>

Although the Law Council had a wide remit (as it still does today), it was (and has been) able to advocate the promotion and attainment of high standards in legal education.

#### 4. The Great Depression

The effects of the Great Depression in Australia, 1929–1932 and World War II, 1939–1945, on existing law schools and their students were far reaching. Putting this narrative into context, what was occurring in legal education reflected the effects of the Depression throughout Australia. Accounts of the period state that:

World prices fell dramatically making much of Australia’s primary production uneconomic. By 1930, Australia was suffering acutely, with unemployment at 19%. ... By 1932, the number of jobless had grown to 337,000. In the financial year 1932–33, wages fell to 80% of the 1928–29 level.<sup>12</sup>

In addition:

In 1933 nearly one-third of the bread-winners of the country were unemployed. Most other groups suffered in much the same way. Not that Australia was unique in this respect. But the experience of the depression certainly burned deeply into the soul of the Australian public, instilling a determination that ‘it shall not happen again’. True it ended

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<sup>10</sup> Supplement, ‘Australian Legal Convention, 1935’ (1935) 9 *Australian Law Journal* 1.

<sup>11</sup> Supplement, ‘Australian Legal Convention, 1936’ (1936) 10 *Australian Law Journal* 1.

<sup>12</sup> Bryce Fraser (ed), *The Great Depression ‘Booms and Slumps’*, The Macquarie Book of Events (Macquarie Library, 1983) 223.

the unjustified, unquestioning optimism of the twenties: ‘but it remains the bitterest memory of a generation’.<sup>13</sup>

It could be argued that law students should not have been affected in the same way by the Great Depression as their contemporaries in other faculties, but this incorrectly assumes that all students came from privileged backgrounds. Law School histories contain a mixed reaction to this period, which was described in a University of Adelaide publication as the ‘lean years’.<sup>14</sup> In addition to the financial hardship suffered by many students, there was a burden placed on administrators of law schools, particularly Deans and Heads of schools. The accounts of how law schools fared during this time vary depending on the focus adopted by their contributors. However, there is evidence that some students suffered financially. Consequently, there was a drop in enrolments and this affected the finances of the law schools which were already suffering from a tightening of funds made available to them by their universities. The accounts contained in the available law school histories have a certain unanimity about the shared experiences of law students during this period.

A report about the history of the Adelaide Law School states that as the ‘third decade of the [twentieth] century began to draw to an end the relatively carefree days of the post-war years were beginning to pass into the years of depression which were to blight the lives of so many in the 1930s.’<sup>15</sup> The report makes an interesting point regarding the financial status of law students in South Australia in the 1920s compared with those in the 1930s. It argues that, in the 1920s, the majority of students appeared to have been recruited from private schools and were relatively free from the financial pressures of earning a living after graduation. However, there was a reversal of this situation in the 1930s with a larger proportion of law students coming from the state education system who had financial difficulties in paying their university fees and other tertiary educational expenses. This proposition is supported by evidence that in the 1930s Depression years: ‘More students, probably, than in the decade before scrounged and

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<sup>13</sup> Alan Shaw, *The Story of Australia* (Faber and Faber, 1972) 239.

<sup>14</sup> Walter Duncan and Roger Leonard, *The University of Adelaide, 1874-1974* (Rigby Limited, 1973) 66.

<sup>15</sup> Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace, 1883-1983* (University of Adelaide, 1983) 28.

scrimped and worked to pay at least part of their fees; more parents, certainly, made sacrifices, so that their children could qualify in law and earn a living.’<sup>16</sup>

While students at the University of Western Australia were undergoing a similar difficult experience in the Depression years, there is an amusing mention of the fact that the law school and its students were able to retain their sense of humour: ‘However, it is pleasing to note that, though the heavens looked likely to fall, essential matters must take precedence: on 4 April 1930 they granted to Eric Burgess and HV Reilly exemption from attending lectures between 5 and 6 pm in view of the *necessity* to train for the boat race.’<sup>17</sup>

At the University of Melbourne the law school was assisted in alleviating staffing problems caused by the Depression by a grant from the Supreme Court of Victoria, which enabled it to appoint a second professor. However, the Depression caused financial problems for the state government and the university which prevented the law school from expanding during this period.

While there was no dramatic reduction in student numbers at the University of Melbourne, there is evidence that many law students were forced to enrol or transfer to the articled clerks’ and managing clerks’ courses (from 30% in 1928 to 45% in 1933). The law school’s history states that: ‘For some with money for the fees, study would have been an alternative to scarce employment; for others whose families might have supported them in better times, working their way through the course as articled clerks became their only way into the law.’<sup>18</sup>

## 5. World War II

The situation at the University of Melbourne Law School did not improve during World War II. Training law students was a lower priority than conscripting male students for military service. Obviously some were exempt from military service, such as on

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<sup>16</sup> ibid 29.

<sup>17</sup> Marion Dixon, *Looking Back: A Short History of the UWA Law School, 1927-1992* (University of Western Australia, 1992) 10.

<sup>18</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 129.

medical grounds or because of employment in reserved occupations.<sup>19</sup> However, there was a scheme of national controls which permitted the law school to operate a small quota system whereby up to eight students in each course year, selected on academic merit, could be exempted from military service. The scheme also provided that one-third of the exempted students could receive means-tested assistance. Students could accept or decline the offer of such a reserved place.<sup>20</sup>

The Sydney Law School during war time was unique in that—whilst there had been the advent of an Australian Comforts Fund which provided Australian servicemen and women with a variety of goods such as sporting equipment, stationery, food and clothing—it established its own Law School Comforts Fund on 10 July 1940. Although this was a Sydney Law School initiative, benefits of the fund were not confined to former or current members of the law school but made available to any lawyers or articulated clerks serving in the military forces. As Keith Jones in a Sydney Law School History states: ‘Its aim was to keep legal men and law students in the services in touch with the Law School and the profession, and with each other, and to send them articles not obtained from other sources. ... the prime object of the Fund was to keep those on the roll regularly supplied with reading matter.’<sup>21</sup>

While the larger law schools were able to cope with difficulties posed by the War the situation for the smaller law schools was much more problematic. At the University of Western Australia Law School, because Professor Frank Beasley the Dean and only full-time academic staff member returned to active service at the outbreak of the war, the University suspended teaching in 1942 and 1943. It was only on the return of Professor Beasley in 1944 that the Law School was able to resume teaching. However, in the 1944 class there were only five students, two of whom were under eighteen years of age, and the remaining three exempt from military service.<sup>22</sup>

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<sup>19</sup>    ibid 139.

<sup>20</sup>    ibid 99.

<sup>21</sup>    Keith Jones, ‘The Law School Comforts Fund’ in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University, 1991) 99, 99.

<sup>22</sup>    Dixon, above n 17, 14.

There was a similar situation at the University of Tasmania, Faculty of Law, where consideration was given to the closure of the Law School during the War.<sup>23</sup> However, due to the presence of some women students and disabled male students, classes continued. Nevertheless while five students who had completed pre-war courses were able to graduate in 1940, there were no further graduating students until 1945 when a sole female student, Norma Winifred, graduated.

A major after-effect of the War was the maturity of the men and women who returned to complete their legal education after having served in the military forces. Because of their increased ages and their war experience they had a different attitude towards their studies, their law teachers and the law school administration compared with students who had come straight from school. At Sydney this approach was summed up by John Ward, a lecturer at the Law School, in the following way: ‘When I went back to the Law School in 1945, the return of a large number of men and women from the war had begun. They dominated student attitudes with their determination to get on with their work and graduate quickly.’<sup>24</sup>

There were similar experiences of other law schools at this time. At the University of Melbourne Law School ‘[i]n 1946 there was an influx of ex-servicemen—near 100 in lectures.’<sup>25</sup> It was recognised that by ‘[t]heir age and maturity, as well as their sheer numbers, they effectively transformed the law school.’<sup>26</sup> Obviously many of them felt that they could interact on an equal basis with the academic staff and, in the same way, teaching staff who had served in the armed forces during the War also returned with a different attitude towards both the law school and their students. As at Sydney Law School, the returned service personnel at Melbourne Law School ‘[w]ere a conduit to a more worldly life,’ and wanted to ‘[g]et out into the work world.’<sup>27</sup> Another interesting aspect of the post-war effect on legal education was the provision for most ex-service personnel of financial support by the Commonwealth Rehabilitation Training Scheme (CRTS). As noted in the Adelaide Law School History:

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<sup>23</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993) 31.

<sup>24</sup> Jones, above n 21, 98.

<sup>25</sup> Waugh, above n 18, 143.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*



What distinguished the student body of the Law School during the years 1946–1950 was not only the greater numbers but also the beginning of the infusion of much new blood into the law from families outside the established ranks of the profession and also a sense of urgency to succeed. Most of the ex-servicemen had to succeed because failure to do so could result in loss of their Commonwealth Rehabilitation Training Scheme allowance.<sup>28</sup>

## 6. Post-War Reconstruction and Reflection

The immediate post-war period could be regarded by those involved in the law—whether as members of the judiciary, the legal profession or the legal academy—as one which retained the former processes of the law. It could also be viewed as a period of reflection on the reinstatement of the traditions and values that had permeated legal education prior to World War II. But, as has been pointed out above, there were changes in attitude of those involved in legal education, particularly by returned service personnel, whether law students or academic law staff. Yet at this time there was little indication of the changes that were to come in the 1960s and the 1970s. As Michael Coper has stated: ‘Law teaching had been undertaken largely by busy practitioners, rushing in to give lectures before or after court or their day at the office.’<sup>29</sup> This approach was reflected by the fact that, other than the Dean or a long-standing professor, most of the law school staff was employed part-time. It is estimated that there were only: ‘15 full-time teachers Australia-wide in the immediate post-World War II period.’<sup>30</sup>

This reluctance by university governing bodies to appoint full-time members of staff to Australian law schools is illustrated by the University of Tasmania’s Faculty of Law. The responsibilities of the Dean (an office held by Kenneth Shatwell at that time), were under consideration as part of the University’s post-war reconstruction planning. The university planning report called for: ‘A new full-time lecturer ...required immediately to reinforce the Professor, who should not be obliged to teach more than three subjects.’<sup>31</sup> The report went on to state that the Professor’s load ‘is, and always had

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<sup>28</sup> Castles, Ligertwood and Kelly, above n 15, 51.

<sup>29</sup> Michael Coper, ‘Law Reform and Legal Education: Uniting Separate Worlds’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

<sup>30</sup> *ibid.*

<sup>31</sup> Davis, above n 23, 36.

been, completely unreasonable.’<sup>32</sup> It added that: ‘It must be reduced by a half to allow time for administration, liaison between the University and the profession, intensive work with honours students, increased class and tutorial work, experiment with new methods, and effective research.’<sup>33</sup>

A similar situation arose at the University of Western Australia Law School where in 1944 the Dean, Professor Beasley, had returned from war service to resume teaching on his own. When the demands of increased post-war enrolments encouraged him to secure the appointment in 1946 of an additional member of the academic staff, the official law school history reports that the ‘[Barristers’] Board wrote to the University expressing the apparently gratuitous view that the additional senior lectureship was, in its opinion, not necessary.’<sup>34</sup> In fact, a second academic position was not established nor an appointment made until 1947. Similarly, at the University of Adelaide Law School, Arthur Campbell, the Professor of Law, was the only full-time member of the teaching staff throughout the 1930s and remained so until his death in 1949. Dick Blackburn then took over as the Bonython Professor of Law in 1950.<sup>35</sup>

At the two main Australian law schools, Sydney and Melbourne, there was greater focus on the appointment of full-time academics. At the Sydney Law School in 1950 there were two full-time Professors; Kenneth Shatwell, the Dean, who had previously been at the University of Tasmania, and Julius Stone. One of the first actions of the new Dean on his arrival at Sydney in 1947 was ‘[t]o pack off his two full-time lecturers in turn to Oxford to take their doctorates.’<sup>36</sup> Similarly at the University of Melbourne Law School, there were two Professors, Bailey and Paton, who together with ‘[t]he two senior lecturers (Sawyer and Turner) made up the whole of the full-time academic staff immediately after World War II. They were joined in 1949 by Harold Ford who was appointed as a senior lecturer.’<sup>37</sup>

One might ask how lectures and tutorials were carried out in the respective law schools at this time. The answer lies in the reliance that all law schools placed on the

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<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> Dixon, above n 17, 15.

<sup>35</sup> Castles, Ligertwood and Kelly, above n 15, 57.

<sup>36</sup> Jones, above n 21, 116.

<sup>37</sup> Waugh, above n 18, 147.

contribution of part-time lecturers. It was an accepted part of the culture of legal education that the major contribution to law teaching would be carried out by part-time staff, typically legal practitioners. This was seen as one of the great strengths of legal education. The changes that were gradually emerging with the introduction of full-time law academics (which led, for example, to the full-time teaching staff at the University of Melbourne doubling from five to ten in 1955) were not readily accepted by either the judiciary or the profession. As W Morrison writes in the Sydney Law School History:

The extent to which subjects which had been taken over by lecturers who had been encouraged to develop their academic activities in preference to developing their experience did not pass without comment. Norman Cowper, my master solicitor, wanted to know what all these academics are doing in *our* law school. The profession was coming to identify less with the School. I found during a visit to Melbourne that the then Chief Justice of the High Court of Australia, Sir John Latham, was not in favour of the taking over of professional subjects by academic lecturers though the same process was proceeding in the Law School of the University of Melbourne.<sup>38</sup>

Just as the establishment of the Law Council of Australia in 1933 heralded a new spirit of co-operation between the state and territorial law societies, so on 5 June 1946 at the Law Faculty of the University of Sydney, there was a similar exercise in mutual assistance when the first meeting took place of what was to become the Australian Universities Law Schools Association. This was subsequently re-named in 1988 as the Australasian Law Teachers Association. Although an examination of this and other such law academic associations is detailed in Chapter 8, it is relevant to note its influence here. Its significance was described in the official account as follows: ‘In Australia, there has not been in the past, at least to the knowledge of present Faculty members, any federal organization of the law schools as such.’<sup>39</sup> The official account acknowledged that: ‘Individualism has its advantages, but in the post-war world, with its problems of teaching personnel, content of the curriculum, increasing student numbers, there is a need for the Universities to pull together and assist each other as far as possible.’<sup>40</sup>

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<sup>38</sup> Jones, above n 21, 116.

<sup>39</sup> Note, ‘Australian Universities Law Schools Association’ (1946) 20 *Australian Law Journal* 99.

<sup>40</sup> *ibid.*

Before closing this chapter, which signals the end of the immediate post-war period, there is one more important event which marked both the end of the period and the advent of a new era in legal education. This was the establishment in 1960 of ‘a seventh law school in the national capital, at the Australian National University.’<sup>41</sup>

## 7. The Australian National University Law School

The Australian National University (ANU) has been described as a ‘university unique in Australia and the world, and—after 50 years—so it remains.’<sup>42</sup> The use of the word ‘unique’ was correct at that time because one of its founders, and also subsequently its fourth Chancellor, Herbert Cole (‘Nugget’) Coombes, stated when it was being established in 1946 ‘that it will be a full research university.’<sup>43</sup>

However, the ANU’s origins go back further to 1929 when the Canberra University College was established with a ‘loose arrangement with the University of Melbourne’.<sup>44</sup> It enrolled its first students at the beginning of 1930. This institution conducted most of its teaching on a part-time basis and there was no face-to-face teaching of law but only correspondence courses. In 1937 the appointment of two part-time law teachers led to the commencement of lectures in Constitutional History, Legal History and Jurisprudence. However, with the advent of World War II teaching law came to an end. With the cessation of the War in 1945 lectures in law recommenced. Teaching was still being undertaken by part-time academics until the appointment in 1949 of Dr John Gunter Fleming as the University College’s first full-time lecturer. Dr Fleming was, in due course, to become a highly regarded legal academic with an international reputation in the law of torts. He had previously been a lecturer at King’s College, London but had been concerned as to his future prospects for promotion in England and so moved to Australia. In 1950 he was appointed as senior lecturer and, in 1955, he was the first

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<sup>41</sup> Coper, above n 29.

<sup>42</sup> Stephen Foster and Margaret Varghese (eds), *The Making of the Australian National University 1946-1996* (Australian National University, 1996) ix.

<sup>43</sup> *ibid* 3.

<sup>44</sup> *ibid* 8.

appointment to the Robert Garran Chair in Law. This was followed by him being elected in 1959 as Dean of the newly established Faculty of Law at the College.<sup>45</sup>

Canberra University College existed in parallel to the ANU, which had been founded in 1946 as a research only university.<sup>46</sup> At this time the ANU comprised four Schools. In 1950 Associate Professor of Law at the University of Melbourne, Geoffrey Sawyer, was appointed to a Chair of Law in the School of Social Sciences at the ANU. He became recognised as a major contributor to research in Australian government, law and politics. He remained as a professor at the ANU until his retirement in 1974.<sup>47</sup>

In 1960 the *Australian National University Act 1946* (Cth) was amended by the *Australian National University Act 1960* (Cth) which reconstituted the Australian National University by merging the Canberra University College with the Australian National University. The four research schools which had been part of the ANU were incorporated into the Institute of Advanced Studies and the College was designated as the School of General Studies, forming the fifth school of the restructured university.

In 1960 the Law Faculty of the ANU was established within the School of General Studies. Some commentators have regarded the Law School as the last of the traditional law schools, while others have regarded it as the beginning of the Second Wave. In reality, it was a bridge between two worlds. Its foundation Dean was Professor Harold Ford. Professor Fleming had resigned and moved overseas to a professorial position at the Law School at the University of California, Berkeley where he stayed for the remainder of his career as a law academic. Professor Ford, recognised as a leading expert in commercial law and trusts, was replaced in February 1961 as Dean by Professor James Richardson. His period as Dean was marked by the introduction of tutorials into the school curriculum and also by the publication in 1964 of the first edition of a law school journal entitled the *Federal Law Review*.

In 1971 the Legal Workshop Course was introduced to provide a six month qualifying course for those who wished to be admitted as legal practitioners. At the time it was

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<sup>45</sup> Mark Lunney, 'Legal Emigres and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494, 508–9.

<sup>46</sup> Hannah Forsyth, *A History of the Modern Australian University* (NewSouth Publishing, 2014) 22.

<sup>47</sup> Australian National University, *Centre for International & Public Law* (11 December 2013) <<http://law.anu.edu.au/cip/about-geoffrey-sawyer/thats>>.

regarded as an innovative programme, being described as ‘a novel alternative to taking articles as a means of entering the profession.’<sup>48</sup>

Over the next twenty years ANU had ten different deans, many of whom served two or more terms in rotation with their colleagues.<sup>49</sup> Of this most distinguished group of law deans the two most outstanding must be the late Professor Lesley Zines<sup>50</sup> and Professor Dennis Pearce.<sup>51</sup> Of the modern era possibly the most influential of the ANU Deans has been Professor Michael Coper who occupied the position of Dean until the end of 2012, the longest serving period of any ANU Law Dean.<sup>52</sup>

The ANU Law Faculty was renamed the ANU College of Law in 2006. This change of title gave rise to a challenge by the Sydney-based ‘College of Law’ due to the similarity of their names, so that now the prefix ‘ANU’ has to be used as a prefix to ‘College of Law’.<sup>53</sup>

The ANU College of Law has continued to expand since its foundation in 1960 and has 1400 undergraduate and postgraduate students and an annual intake of approximately 300 students. It has built an enviable reputation in constitutional, international and environmental law, and operates eight research centres including the Centre for International and Public Law and the Australian Centre for Environmental Law.

## 8. Conclusion

The period 1930 to 1960 covered by this chapter is remarkable in that it gives the impression there was little activity in the development of legal education, an experience that appears to have been replicated in Australia society itself. Patrick Morgan has described this period in the following terms:

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<sup>48</sup> Foster and Varghese, above n 42, 203.

<sup>49</sup> Laura Walmsley (ed), *A Guide to the ANU Law School & Its Courses 1993* (Orange Book, 1992) 10–13.

<sup>50</sup> Geoffrey Lindell and Oliver Mendelsohn, ‘Encounter with Constitutional Law Gave Leslie Zines his Life’s Calling and Uni its Reputation’, *The Australian, Business Review* 6 June 2014 <<http://www.theaustralian.com.au/business/legal-affairs/encounter-with-constitutional-law-gave-leslie-zines-his-lifes-calling-and-uni-its-reputation/story-e6frg97x-1226944912884?nk=32b21adb9522b7afd86a9394f9490d51>>.

<sup>51</sup> Australian National University, *Our People: ANU College of Law, Dennis Pearce* (19 February 2015) <<http://law.anu.edu.au/staff/dennis-pearce-ao>>.

<sup>52</sup> Australian National University, *Our People: ANU College of Law, Michael Coper* (19 February 2015) <<http://law.anu.edu.au/staff/Michael-coper>>.

<sup>53</sup> *College of Law Limited v Australian National University* [2013] FCA 492 (23 May 2013).

There has been a strange silence about the first fifty years of the twentieth century life in Australia. The generation who lived through those years don't recollect or talk about them very much. The period, especially the years between the wars, has become a forgotten, or at least a suppressed time, a no-man's land which shuts off history from the present.<sup>54</sup>

While Michael Coper has stated that: 'The addition in 1960 of a seventh law school in the national capital, at the Australian National University, did nothing to disturb this pattern,'<sup>55</sup> it did, in fact, herald an era of the establishment of a number of new law schools which he acknowledges 'transformed the dominant pattern of legal education as it had existed in Australia for a century, reflecting to an extent the degree of broader social change from the 1960s on.'<sup>56</sup>

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<sup>54</sup> Patrick Morgan, 'Keeping it in the Family' (1974) May-June *Quadrant* 10.

<sup>55</sup> Coper, above n 29, 391.

<sup>56</sup> *ibid.*





## **Chapter 6**

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## 1. Introduction

During the three decades after the establishment in 1960 of the Australian National University (ANU) Faculty of Law there was an impetus to expand Australian law schools. Perhaps the expanding economy at the time increased the demand for additional lawyers. There was also a view 'That any course at a university should be open to all who were qualified for it and wished to undertake it,'<sup>1</sup> which was supported by various government reports on tertiary education at this time (reviewed in Chapters 8 and 10). This perception also reflected a change of attitude in the school leavers of the 1960s who were the initial post-war generation (the 'baby boomers'). Increasingly, the majority stayed at school until Year 12 (then 6<sup>th</sup> form) and were the first members of their families to go to university. This was partly due to the creation of fee-free tertiary education after the election of the Whitlam Government on 5 December 1972, which led to the expansion of Australian law schools.

There was also a noticeable change during this period in law teaching in Australia. Not only was this reflected in the increased number of tertiary law teachers (due to the increase of law students and an expansion of law schools), but also in the calibre of law teachers. Chapters 4 and 5 illustrate a trend of law teachers being engaged part-time, balancing teaching with practising law—the latter being their primary focus. However, from 1960 onwards there was a greater focus on learning skills incorporating a more

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<sup>1</sup> Peter Balmford, 'The Foundation of Monash Law School' (1989) 15 *Monash University Law Review* 139, 155.

conceptual approach to the study of law. These changes in the nature and quality of law teaching required a shift in the qualities and approach of those appointed as law teachers. The majority were now required to serve full-time with little or no time to devote to legal practice. As Michael Coper has observed up until this time the focus of legal teaching 'was strongly professional and vocational'.<sup>2</sup>

The increased emphasis on conceptual learning replicated what had occurred in the United States in 1870 when Christopher Langdell introduced the 'Casebook' method of teaching into Harvard Law School. This led to the appointment of what was described by Robert Stevens as 'the first of a new breed of academic lawyer, a law graduate with limited experience of practice who was appointed for his scholarly and teaching potential.'<sup>3</sup> There was a similar pattern in the previous composition of North American law teachers: 'law professors had been either practitioners taking a few hours away from the office to conduct classes, or full-time teachers who had had extensive experience as practitioners before appointment.'<sup>4</sup>

This shift in the experience of law teachers led to differences in the approach to teaching law in the law schools established during this period, which in this thesis will be called the 'Second-Wave' law schools. These were the first moves away from what were regarded as the prevailing forms of legal education, which emphasised:

that studying law is mainly a matter of acquiring knowledge; that coverage is more important than depth; that what legal subjects one covers in primary legal education is more important than whether they are good vehicles for intellectual training; and that one is finished with academic study, critical analysis and even reading as soon as one graduates.<sup>5</sup>

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<sup>2</sup> Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

<sup>3</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983) 38.

<sup>4</sup> Ibid.

<sup>5</sup> William Twining, 'Preparing Lawyers for the Twenty-first Century' (1992) 3(1) *Legal Education Review* 1, 2.

These views would be gradually replaced by what has been described as the 'truisms' of legal education transformed into practical working principles.<sup>6</sup> This new thinking advocated:

that education is a life-long enterprise; that most higher education should be self-education; that the main role of undergraduate education is learning how to learn; that standard distinctions between academic and practical, theory and practical, theory and practice, liberal and vocational are false dichotomies that are mischievous as well as misleading; and that any body of lawyers worth preserving must take seriously its claims to be a learned profession.<sup>7</sup>

However, it would be a mistake to suppose each of the 'Second-Wave' schools was established with the same objectives. Nevertheless, the law schools under scrutiny in this chapter illustrate the statement made in 1978 by Michael Kirby in his then role as the first Chair of the Australian Law Reform Commission (ALRC) that: 'there is not a shadow of doubt that legal education both in content and method will change rapidly in the last quarter of this century.'<sup>8</sup>

In support of this view Kirby quoted Professor Derham, the foundation Dean of Monash University (Monash) Law School who had told a conference in 1976:

We are now ... in a period of profound and rapid change in our society ... The work of bringing our 'black letter law' into tune with the needs of the time is arduous and exacting work calling for high scholarship and developed legal skills ... If it is not done, not only lawyers but the law itself will fall into disrepute.<sup>9</sup>

## 2. Monash University Law School

An extra law school in Victoria outside the University of Melbourne was established in 1963 because Melbourne's original law school was unable to satisfy the demand for an expansion in legal education within the State.<sup>10</sup>

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<sup>6</sup> Ibid 9.

<sup>7</sup> Ibid 2.

<sup>8</sup> Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales, 1978) 9.

<sup>9</sup> Ibid.

<sup>10</sup> Balmford, above n 1, 146.

When Monash was founded in 1958,<sup>11</sup> becoming the first university in Victoria since the University of Melbourne was established in 1853, it was intended that the teaching of law would commence in 1965. However, the opening of the Monash Law School was brought forward from 1965 to 1963 following a letter from Professor Zelman Cowen, the Dean of the Law Faculty at the University of Melbourne, to the Vice-Chancellor of Monash, Dr Matheson. The letter stated that Melbourne Law School had received in excess of 600 applications from potential law students but that it would only be able to accept half this number in accordance with a quota set by the University of Melbourne for first-year entry in 1961.<sup>12</sup> Zelman Cowen expressed a preference for a second law school in Victoria, which was supported by Vernon Wilcox, a senior partner in a leading firm of city solicitors in Melbourne; GC Wyatt, the President of the Victorian Law Institute; and Sir Edmund Herring, the Chief Justice of Victoria, who was also the President of the Victorian Council of Legal Education.<sup>13</sup>

There was another interesting development when the opening of Monash Law School was being discussed. This was the unprecedented action by the Victorian Council of Legal Education in establishing a temporary law course in 1962 under the aegis of the Council of the Royal Melbourne Institute of Technology (RMIT), with participating students allowed to use the libraries of the Supreme Court of Victoria and the Law Institute of Victoria. Although temporary, the course operated for 21 years. During this time 545 students completed the course and qualified for admission, while others subsequently transferred to Monash Law School where they completed their academic requirements for admission.<sup>14</sup> The Council of Legal Education's qualifying course from the 1960s to the 1980s allowed RMIT (now a university) to claim that it was the legitimate successor to the legal practitioners' course formerly taught at its institution.

Monash's Professorial Board recommended: 'That a Dean of the Faculty of Law be appointed as soon as possible, with the first duty of making recommendations to the Council upon the best way of establishing a Faculty of Law,' and that 'law students

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<sup>11</sup> *The Monash University Act 1958* (Vic).

<sup>12</sup> Balmford, above n 1, 146.

<sup>13</sup> *Ibid* 148.

<sup>14</sup> *Ibid* 150.

should not be accepted until adequate additional finance is available.’<sup>15</sup> Monash was in the process of making a submission on finance to the Australian Universities Commission, the main governmental body at that time, so that it was able to amend its application to request financing for the staff and buildings of the new law school. While the Australian Universities Commission was able to fund the staffing of the law faculty, it was unable to support a new building to accommodate the new law school during the 1964–66 triennium. Although no funds were available for the construction of a new law school building, the funding for the staffing of a law program encouraged Monash to proceed to establish the law school.

The selection of a dean of high standing and eminence was axiomatic in enabling the new law school to set high standards in education and to attract well qualified and experienced law academics. In this respect, the appointment of Professor (later Sir) David Derham, the then Professor of Jurisprudence at the University of Melbourne, was an inspired choice. Having accepted the position in October 1963, Professor Derham was required to remain at the Melbourne Law Faculty until 1964, but this did not prevent him from immediately developing a curriculum for the new Monash Law School.

## 2.1 Alternative Approach to the Law Curriculum

The focus of the new law program at Monash was on transferable legal skills, incorporating small group teaching. The new Dean proposed the following four subjects for the introductory first year of the law school program: ‘An introductory legal subject; Criminal Law—to introduce students to a case law subject; British History; and one subject to be chosen from Economics 1, Politics 1, and Philosophy 1, or a Language subject or a Literature subject.’<sup>16</sup> This innovative first-year program led to a three-year degree entitled BA (Law), which subsequently became a degree of Bachelor of Jurisprudence as Professor Derham had envisaged. In addition, the Dean envisaged that these first-year candidates might also proceed to a Bachelor of Laws (LLB) (Pass degree), taken over four years, or an LLB (Honours) over five years. This meant that Monash students could be awarded a combined BA/LLB on the basis of four years’

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<sup>15</sup> Ibid 152.

<sup>16</sup> Ibid 165.

study. The philosophy underlining this proposed law program was contained in a statement by Professor Derham that: 'All lawyers should be pounded with advanced law and educated.'<sup>17</sup>

## 2.2 The Law Library

Professor Derham characterised the approach and qualities of other foundation deans of this era in that he had a highly individualistic and innovative approach to teaching law, which was far removed from that of traditional law schools. The establishment of the new library at Monash was an excellent example of this approach.

Professor Derham sought the approval of the Monash Professorial Board for the appointment of Professor Frank Beasley, who was retiring from a Chair of Law which he had held at the University of Western Australia since 1927. Professor Derham informed the Board that not only did Professor Beasley have contacts with: 'Every law library in the world' but also that: 'Few men knew more than [him] about the sources and the techniques of building up a collection of law books.'<sup>18</sup> The Board approved, appointing Professor Beasley to a special lectureship involving the law library.

To stock the library, Professor Derham arranged the acquisition of law libraries from two former judges of the Supreme Court of Victoria, Sir Charles Gavan Duffy, deceased, and Sir Charles Lowe, who had retired. By the end of its first year in 1964 Monash Law School possessed a substantial library of 10,000 volumes, which increased to 138,000 volumes by 1989.<sup>19</sup>

## 2.3 The Commencement of Teaching

One of the major problems faced by Monash in attracting staff and students was its relative remoteness, 24 kilometres by road, from the centre of Melbourne. This was exacerbated by the need to involve legal practitioners, who obviously were based near the courts, and students who needed to develop connections with the legal profession mainly situated in the central business district (CBD). Professor Derham highlighted his approach to solving the 'Topography' problem in his 'Plan for a New Law School':

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<sup>17</sup> Ibid 167.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid 168.

Monash University is so far away from the centre of legal activities in Melbourne that it is not possible for a law school primarily concerned with full-time university students, and established in the Monash grounds, to meet the need in teaching for continuous influence from those engaged in the actual practice of the law by making practitioners responsible for much of the teaching in the school, as has been done in other Australian Law Schools. It is clear that full-time academic members of the profession will have to be responsible for all courses conducted at Monash, and that new methods for meeting the need for close contact with actual practice will have to be devised.<sup>20</sup>

In appointing staff to the new law school, the foundation Dean took care to balance the need for full-time staff with the benefit of involving practitioners, who could only teach part-time. Because of his previous involvement with the University of Melbourne, Professor Derham was able to attract both full-time staff and current members of Melbourne Law School who were able to teach part-time, together with a limited number of barristers and solicitors, who were willing to fit in part-time teaching with the demands of a legal practice.<sup>21</sup>

There was some anticipated instability regarding the admission of students because most students applying to Monash Law School preferred an offer from Melbourne Law School. In the first week of the first year of enrolments at Monash, after 150 applicants had accepted offers and enrolled, many withdrew once they received a late offer from Melbourne. This had a knock-on effect at Monash Law School as it had to make further offers to maintain its target number of 150 first-year law students. The students who had been selected for the first-year course were interviewed by a member of full-time staff so that they would be fully aware of the nature of the proposed law program, particularly the first-year courses.<sup>22</sup>

Despite these setbacks there was a feeling of optimism within the new law school which was reflected by Professor Derham in his introduction to the first edition of *In Gremio Legis* ['In the bosom of the law'], the new Monash student law society publication:

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<sup>20</sup> Ibid 170.

<sup>21</sup> Ibid 172.

<sup>22</sup> Ibid 173.



The Monash Law School began in a tremendous hurry. Students were enrolled at the beginning of 1964 before even the natures of their degree courses were fixed for the future. They have no place of their own in the University. They still face years of 'camping' in other faculties' buildings before proper facilities can be provided for them. In such circumstances it has been very pleasing indeed to see the growth of a vigorous and ambitious law students' society constituted by the energy and interest of the students themselves.<sup>23</sup>

## 2.4 Subsequent History

The optimism shown by Derham for the future of Monash Law School was, as its subsequent history indicates, well founded.<sup>24</sup> Like most law schools the type and nature of its improvements depended on the character of the law dean.

The two Deans who immediately followed on from Derham only served for a comparatively short period of time. Louis Waller, the direct successor to Derham had a term of only two years whilst Enid Campbell's was even shorter; one year (1971). However, she was unique in that she was the first woman to be appointed as the Dean of any Australian law school.

David Allan, the first to serve a full term as Dean after Derham, was described as 'a dynamic and innovative dean', responsible for inaugurating: 'Australia's first LLM [Master of Laws] by coursework, a Centre for Japanese Law, a continuing legal education program and the clinical education program.'<sup>25</sup> The latter incorporated community law centres where law students could give supervised legal advice to clients as part of their law degree. Patrick Nash, his successor as Dean from 1977 to 1980, was recognised for developing the law school's focus on Asia.

The opening year of Robert Baxt's appointment as Dean in 1980 was marked by the Law School being recognised as the largest in Australasia, with 1673 undergraduates and 52 full-time academic staff. Baxt, who completed two terms from 1980 and 1988, stamped his authority both within Monash Law School and externally as an authority on

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<sup>23</sup> David Derham, 'Introduction' in *Gremio Legis* (1964).

<sup>24</sup> Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University Publishing, 2014).

<sup>25</sup> Ibid 91.

commercial law. He set up a multidisciplinary course in competition law, and later cooperated with Harold Ford of the Melbourne Law School and Bob Officer of the Faculty of Economics in establishing a new course in securities regulation.

Charles Williams presided over the expansion of Monash Law School by internationalising the law program, incorporating exchanges with overseas university law schools in Malaysia and Italy.

Stephen Parker, a former Chair of the Council of Law Deans, was appointed in 1999 from Griffith University Law School to rejuvenate legal studies at Monash Law School, an exercise which he completed successfully, leading to his appointment as Deputy Vice-Chancellor of Monash, followed by him becoming Vice-Chancellor of the University of Canberra. His successor in 2004 was Arie Freiberg, another professor to complete two terms as Dean, who again not only raised the standard of Monash Law School by the active promotion of a research culture but also established a substantial surplus with respect to its finances.

The current Dean, Bryan Horrigan who commenced his term in 2012, is a corporate law specialist. On his appointment to Monash Law School in 2008 as Louis Waller Professor and Associate Dean, Research, he focused on further developing commercial law within the faculty, which led to the establishment in 2010 of a Commercial Law Group.

In speaking at a function to celebrate the fiftieth anniversary of the founding of Monash Law School, Chief Justice Robert French commented on its success, stating that: 'The history of the Monash University Law School over the past fifty years is worthy of celebration, not just by the Law School itself, but also by the community it serves.'<sup>26</sup>

### **3 University of New South Wales Law School**

There was an interesting parallel with the establishment of the second law school in Victoria when another school was created, in similar circumstances, in New South Wales (NSW) a few years later. Just as the University of Melbourne Law School had

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<sup>26</sup> Chief Justice Robert French, 'Pericleans, Plumbers and Practitioners Book Launch' (Speech Delivered at the Monash University Law School 50th Anniversary, Melbourne, 28 June 2014).

not been able to accept all qualified applicants for entrance, in 1964 the University of Sydney Law School found itself in an identical situation. A report by the Martin Committee, which was then reviewing the future of tertiary education in Australia, stated that: 'Lawyers seeking admission to independent practice should, wherever possible, have an education founded upon full-time studies at university level.'<sup>27</sup> Following this, representations were made to Professor (later Sir) Philip Baxter, the Vice-Chancellor of the University of New South Wales (UNSW), for it to establish a second law school in NSW.

### 3.1 Laying the Foundations

Compared with the establishment of other law schools—where often there had been opposition or even hostility to such a proposal—there was support, even enthusiasm, from both the NSW Bar Association and the NSW Law Society for the creation of a law school at UNSW.

As always with the setting up of a new university faculty, funding was problematical. Although the proposed UNSW Law School received support from the Australian Universities Commission, initially the NSW government was not supportive, with C B Cutler, the Deputy Premier and Minister for Education, informing the UNSW Vice-Chancellor in March 1966 that no state funds would be available at that time for such a proposal.<sup>28</sup> However, there was subsequently a change of attitude on the part of the NSW government with an undertaking that such funding would commence in 1970.<sup>29</sup>

### 3.2 Selecting a New Dean of Law

The appointment of the inaugural Dean of Law at UNSW involved a change of approach in the profile for the position and the manner of selection. Part of this has been attributed to the attitude of Sir Philip Baxter the UNSW Vice-Chancellor, who was of the view that such positions should be occupied, where appropriate, by members of the practising profession and not necessarily by university academics.

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<sup>27</sup> Commonwealth of Australia, 'Report of the Committee on the Future of Tertiary Education in Australia to the Universities Commission (The Martin Report)' (1964) 49.

<sup>28</sup> Marion Dixon, *Thirty Up: The Story of the UNSW Law School 1971-2001* (University of New South Wales, 2001) 2.

<sup>29</sup> Ibid.

One of the persons consulted was Professor David Derham, the Foundation Dean of Monash Law School, to whom Sir Philip explained that UNSW wished to appoint as the Foundation UNSW Dean of Law a 'senior member of the profession who could spend some time planning the course and the Faculty.'<sup>30</sup> The selection process also involved wide consultation with all the holders of leading judicial positions in NSW. The consensus view of those consulted was that the most appropriate person for the position was J H (Hal) Wootten QC. However, it was thought that he would not accept the position because of his current financial needs with a family of four children to educate. This supposition was reinforced by the fact that in 1969 it was common knowledge that he had already turned down two offers of a judicial position.

Nevertheless, the newly appointed Vice-Chancellor of UNSW, Professor Rupert Myers, decided that it would be worth approaching Hal Wootten with the offer of Foundation Dean. Wootten's response to the offer was: 'The only thing I knew about legal education was how bad my own was,'<sup>31</sup> to which Professor Myers responded: 'That might be a pretty good start.'<sup>32</sup> Wootten accepted the invitation, later stating that he found the offer 'irresistible'.<sup>33</sup>

### 3.3 Creating a New and Different Law School

Hal Wootten's appointment proved another inspired choice for a dean to lead a new Australian law faculty in the post-World War II years. Because of his background as a prominent member of the legal profession he was able to approach, and make demands of, UNSW in a way that might not have been acceptable from a conventional law academic. First, he resisted demands for UNSW Law School to commence operating in 1970, which had been the expectation of most of those involved with its formation. Secondly, he persuaded the Vice-Chancellor to permit him to use the year of 1970 to plan the new law school. These arrangements incorporated travel through Australia visiting other law schools and obtaining ideas on the best ways to operate a modern law school. It also offered him the chance to seek out law academics willing to accept the challenges of working in a law school that incorporated new concepts relating to legal

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid 2.

<sup>32</sup> Ibid 3.

<sup>33</sup> Ibid.

education, and to put these into operation. Wootten also extended this study tour to law schools in England, Canada and the United States. He also attended the Annual Conference of the Association of American Law Schools, which took place in San Francisco in January 1970.

The new Dean also used the year's delay as a chance to appoint academic staff who supported his vision. UNSW Law School's records indicate that he selected his original academic staff from an eclectic variety of backgrounds. Robert Hayes, for example, was currently employed at Monash Law School, and brought with him the experience of having taught the innovative common law program at Monash.

Whilst in the United States, Wootten had met with George Garbesi of Loyola University, Los Angeles, who had previously established a colourful reputation when teaching for a limited period at the University of Sydney Law School (Sydney Law School) and who then became the first professorial appointment to the UNSW Law School.

Other initial appointments were Richard Chisholm, who had just completed a BCL at the University of Oxford and who subsequently became a Family Court Judge; Tony Blackshield, a specialist in Constitutional Law; Michael Coper, another specialist in Constitutional Law; and Garth Nettheim, then at Sydney Law School, who was appointed as Professor at UNSW and who would eventually become the third Dean of the UNSW Faculty of Law.<sup>34</sup>

Wootten approached fashioning the Law Faculty in a way that would satisfy his vision for a law school embodying modern law teaching methods, whilst creating a stimulating atmosphere for all involved with developing its reputation, whether as staff or students. The UNSW Law School's history contains a description by Rob Brian, its first law librarian, as to how he worked closely with Wootten in employing unorthodox methods to build up the law collection. In its first five years the collection reached 50 000

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<sup>34</sup> Ibid 5.

volumes, and it would currently be regarded as among the best law libraries in Australia.<sup>35</sup>

The influence of Monash Law School was seen not only in the development of the law library collection but in the original curriculum for the law program. Wootten devised a curriculum that envisaged a five-year combined degree in either Arts/Law or Commerce/Law. The program was divided into two semesters each year, including among its first-year subjects, legal research and writing, and incorporating an interactive approach to the teaching of all law subjects.<sup>36</sup>

### 3.4 Developing the Law School Ethos

In its early history, UNSW Law School injected dramatic change in the traditional attitudes of most other Australian law schools towards the teaching of law. An illustration of this was the view expressed by Wootten that 'discussion'<sup>37</sup> could play an important part in stimulating participation of law students, aided by the insistence on small classes. With his American background, this approach was interpreted by Garbesi as incorporating the Socratic method of law teaching whereby the teacher involved him or herself in a dialogue with the student. In this development of an interactive method of teaching Wootten sought the advice of Fred Katz, the Head of the UNSW Teaching and Education Research Centre (TERC).<sup>38</sup> This cooperation led to the videotaping of some of the early classes in order to assist staff in developing their teaching technique. At this stage of the school's development there was a radical view prevalent among early staff members, so much so that Garth Nettheim recollects some colleagues even posing the question: 'What are classes for?'<sup>39</sup>

This approach of questioning the conventional norms of legal education is also illustrated by UNSW Law School's introduction of continuous class assessment. A study by TERC indicated that there was a wide discrepancy as to how this assessment

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<sup>35</sup> Ibid 10.

<sup>36</sup> Ibid 14.

<sup>37</sup> Ibid 15.

<sup>38</sup> Ibid 17.

<sup>39</sup> Ibid.

scheme was administered by participating academics. Nevertheless, a majority of the students responding to a survey by TERC opted for the scheme to continue.<sup>40</sup>

### 3.5 Questioning the Law School Ethos

One of the advantages of UNSW Law School was that its early group of academics had been recruited or had applied because they shared similar views about the core focus of the new law school. Inevitably, later additions to the academic staff did not necessarily subscribe to these views. In the opinion of Tony Blackshield, a foundation member of the law school, part of this could be attributed to the original staff ignoring the importance of inculcating these newcomers into the virtues of the original vision for the law school.<sup>41</sup>

One of the proponents for change was Ronald Sackville, recruited from the University of Melbourne, who had been appointed as a UNSW Professor at the unusually early age of 28.<sup>42</sup> As soon as he commenced teaching at UNSW Law School in 1972 he challenged many of the basic concepts of the UNSW curriculum stating it was overcrowded with units and incorporated excessive compulsory content.<sup>43</sup> Wootten, the Dean, appears to have been unaffected by these criticisms, regarding them as representing vitality in UNSW Law School:

It is due less to changes in the law than to the continual quest of active scholars and teachers to find new meanings in their studies, new ways of looking at them, and fresh ways of presenting them. Show me a law school that does not have a bristling Curriculum Review Committee and I won't bother to look at it.<sup>44</sup>

This relaxed attitude of the Dean towards these types of academic controversy would stand him in good stead as the increasing size of the academic staff led to a development of two loose factions. One group favoured the retention of the original progressive forms of curriculum and assessment, and the other supported the development of a more traditional approach to legal education. This division of opinion led to mass meetings of

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid 19.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 20.

<sup>44</sup> Ibid.

both staff and students debating the merits of the various forms of assessments. The students voted in favour of the more traditional forms of assessment. Many members of staff considered that this decision was reached because a majority of the students regarded the alternative methods of assessment as likely to affect the standing of the degree, with a consequent ill-effect on their future employment prospects.<sup>45</sup>

While the progressive element of the law staff regarded this adverse vote as a defeat, they decided to do something positive to promote their radical views. Consequently, the idea of promoting a community legal centre was conceived, which eventually resulted in the establishment of the Redfern Legal Centre.<sup>46</sup>

### 3.6 Assessing the Law School in the 1970s

Research still indicates that 45 years on since the first undergraduate students enrolled at UNSW Law School, they are still differently motivated than those joining more conventional law schools. This viewpoint is supported by the results of a 2015 survey of 219 new undergraduate students carried out by TERC. The survey indicated that at least half the students had a state high school background and that there were very few who had parents with either a tertiary education or a background as lawyers. The survey also revealed that the motivating factor for most students enrolling at UNSW was their interest in law and legal work, with little emphasis on the financial rewards that they might enjoy as qualified lawyers. Another factor had been the opportunity to study the combined degree course in Commerce and Law, a program unique at that time to UNSW.<sup>47</sup>

In the 1970s, the inclusive nature and informality of the teaching combined to create an atmosphere of social consciousness. The fact that UNSW Law School was located in huts on the UNSW campus, with some teaching taking place on fine days outside on the lawns surrounding the law school buildings and even continuing in a nearby public house, somehow created a sense of social consciousness. This contributed to UNSW Law School quickly gaining a reputation for the promotion of social justice, which manifested itself in the establishment of numerous organisations committed to social

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<sup>45</sup> Ibid 21.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid 23.



change such as a Prisoners Action Group, NSW Society of Labour Lawyers and the Feminist Legal Action Group.<sup>48</sup>

The end of the visionary period for UNSW Law School was signalled when, after four years in the position, Wootten resigned as Dean on 28 June 1973, formally handing over the position to Harry Whitmore. Two months later, Wootten was appointed as a Justice of the Supreme Court of NSW.<sup>49</sup>

Whitmore, as successor, was faced with the challenge of introducing a more managerial approach to a rapidly expanding law school, both with regard to the dramatic increase in student numbers and, consequently, in academic staff, which by 1974 needed to be augmented by at least another twenty academics.<sup>50</sup> At the same time, he needed to balance the requirement for a more structured organisation of UNSW Law School's activities, while endeavouring to retain its pioneering approach to the progressive development of its curriculum and assessment. However, he remained Dean for only a short time, resigning with effect from 31 October 1975 when he was replaced by Garth Nettheim.<sup>51</sup>

Both Whitmore and Nettheim oversaw UNSW Law School during a time of social and political upheaval, which had an effect on the activities of the School. The most significant of these was the dismissal, on 11 November 1975, of Prime Minister Gough Whitlam by the Governor-General Sir John Kerr. Both of these notable personalities were well-known to many of the staff, especially those like Tony Blackshield who had a background in constitutional law. One outcome of the dismissal was a student demonstration against Sir John Kerr when he visited the UNSW campus in 1976. This led to the arrest of several students, including at least one staff member.<sup>52</sup>

### 3.7 Recruiting Prominent Law Academic Staff Members

During this period of political unrest, both Whitmore and Nettheim were recruiting more academic staff. A number of staff, such as Mark Weinberg, Mark Aronson and

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<sup>48</sup> Ibid 33.

<sup>49</sup> Ibid 39.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid 46.

<sup>52</sup> Ibid 48.

Michael Chesterman, were appointed. They were exceptionally well-qualified and were to have a profound effect on UNSW Law School and Australian legal education.

Balanced against these appointees were more experienced arrivals, such as Ivan Shearer who had worked as an adviser to the Lesotho Government and subsequently served two terms as Dean of the Law School. Another was David Weisbrot, a United States law graduate who had previously been Dean of the University of Papua New Guinea Law Faculty, and later became President of the ALRC. He has explained how it was a unique time to be involved in Australian legal education and what a great experience being a member of the UNSW Law Faculty proved to be.<sup>53</sup>

Finally there was Michael Coper, first appointed as a teaching fellow, then lecturer at UNSW, then Commissioner of the Inter-state Commission and, more recently, as Dean of the ANU College of Law—a role in which he was highly successful and long-serving. These examples are a microcosm of the quality of the earlier staff of UNSW Law School.

However, an ever-increasing staff meant that deans also had to deal with the consequential problem of acquiring more and better accommodation. The effect was a move by UNSW Law School in February 1976 from the huddled accommodation and other buildings to more permanent accommodation in the UNSW Library Tower.<sup>54</sup>

### 3.8 Launching Co-curricular Activities

Two events that epitomise the early radical approach of UNSW Law School are the publication of the first edition of the UNSW Law Journal and the founding of the Redfern Legal Centre.

The publication of the Law Journal had been envisaged when Whitmore was Dean; a sum of \$2000 had been earmarked for its production and an editorial committee established. However, the first edition was not published until early 1976 when Nettheim became Dean. At that time, it had a special quality which made it stand out among other Australian law school journals and reviews; it was a student-edited

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<sup>53</sup> Interview with David Weisbrot, Chair of the Australian Press Council (Sydney, 8 November 2013).

<sup>54</sup> Dixon, above n 28, 48.

publication similar to that of American law school reviews. The first edition had a foreword by Sir Laurence Street, the Chief Justice of the Supreme Court of NSW and an article by Sir Garfield Barwick, the Chief Justice of the High Court of Australia.<sup>55</sup> It continues the Law School's focus on social issues and it has established a high reputation for the quality of its articles and book reviews.<sup>56</sup>

The other event was the founding in March 1977 by some UNSW legal staff of the Redfern Legal Centre, which was described as a 'shopfront' legal service for the local community.<sup>57</sup>

### 3.9 Assessing the Later Years

The motivation to improve the quality of teaching and research at UNSW Law School has continued. During the three decades since the first Deanship of Nettheim, UNSW Law School has been led by a galaxy of talented law academics including Professors Ronald Sackville, Donald Harding, Ivan Shearer, Michael Chesterman and Paul Redmond. Each of these Deans left their mark, enhancing the Law School's reputation.

To Sackville may be attributed the introduction of the Socratic form of teaching. With Harding it was the creation of a clinical teaching facility, the Kingsford Legal Centre, which came into operation on 27 June 1981 and also served as a community legal centre. Ivan Shearer used his reputation as a leading international lawyer to enhance the standing of the Law School within the area of international law. Michael Chesterman was recognised for his expertise in developing the law of contempt, including defamation and free speech, which became a major topic in new courses at UNSW Law School. Finally, Paul Redmond's influence can be measured in his expertise in business associations and corporate law, together with the co-authorship of the text *Lawyers*, which was associated with a compulsory course taught at the Law School entitled *Law, Lawyers and Society*.

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<sup>55</sup> Sir Laurence Street, 'Foreword' (1975) 1 *University of New South Wales Law Journal* 1; Sir Garfield Barwick, 'Problems in Conservation' (1975) 1 *University of New South Wales Law Journal* 3.

<sup>56</sup> Dixon, above n 28, 54.

<sup>57</sup> Ibid 62.

Interviews with Andrew Mowbray,<sup>58</sup> who was at UNSW Law School during Sackville's Deanship, and Sophie York,<sup>59</sup> who was a student when Shearer was Dean, confirmed that small group teaching was still being used and that the high quality legal training provided at the Law School provided a solid foundation for legal practice.

The Hon Sir Gerard Brennan, the then Chief Justice of the High Court of Australia, at the 25<sup>th</sup> Anniversary of the Law Faculty Dinner, 18 July 1996 paid this tribute to the Law School:

I congratulate not only the University, the Deans, the Faculty and the visiting lecturers, but also the students who have together made the Law School an integral part of a community of learning. The repute stands high. The prospects of the future are higher yet.<sup>60</sup>

The current Dean, Professor David Dixon, presides over a law school which has 2675 students and 82 permanent staff<sup>61</sup> which in 2006 relocated to a new purpose-built building on the main university campus. In addition, it now has a campus in the Sydney CBD which is mainly utilised for teaching postgraduate and senior undergraduate students. In comparison to other Australian law schools it has maintained its dedication to small group teaching and also its unique Socratic approach to learning.

Excluding the Kingsford Legal Centre, UNSW Law School has twelve other research schools<sup>62</sup> of which the most prominent would be the Gilbert and Tobin Centre of Public Law.<sup>63</sup> It claims to: 'play a prominent independent role in public debate on issues vital to Australia's future', including 'Charters of rights, federal reform, reconciliation and native title, refugees' rights and migration law and the challenges of responding to

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<sup>58</sup> Interview with Andrew Mowbray (Sydney, 16 September 2014).

<sup>59</sup> Interview with Sophie York (Sydney, 1 August 2013).

<sup>60</sup> Gerard Sir Brennan, '25th Anniversary of the University of New South Wales Law School' (1997) 20(1) *University of New South Wales Law Journal* 210, 212–13.

<sup>61</sup> University of New South Wales, *Law: Facts in Brief* <<http://law.unsw.edu.au/about-us/facts-brief>>.

<sup>62</sup> University of New South Wales, *Law: Centres* <<http://www.law.unsw.edu.au/centres>>.

<sup>63</sup> University of New South Wales, *Law: Gilbert + Tobin Centre of Public Law* <[www.gtcentre.unsw.edu.au](http://www.gtcentre.unsw.edu.au)>.

terrorism.’<sup>64</sup> It is also recognised as the authority for charting the annual record of judges’ dissenting judgments in the High Court of Australia.

## 4 Macquarie University Law School

Macquarie University (Macquarie) was formally established in 1964 when the *Macquarie University Act 1964* (NSW) was enacted. The first Vice-Chancellor was Alexander George Mitchell who served in this position until 1975. Macquarie Law School was established in 1972, during his term of office.

Reportedly ‘Ern Wetherell, [NSW] Minister for Education in 1964 stated Law was to be the glamour faculty at the new Macquarie University.’<sup>65</sup> Just as with the earlier founding of UNSW Law School it was stated that other law schools in NSW could not satisfy the demand by those wishing to study law. The other reason for the establishment of this Law School was the need for a distance law program.

In accordance with the general teaching philosophy of Macquarie it was intended that—like all other studies offered—law would be interdisciplinary. As with other new law schools at this time the emphasis was to be on small group teaching because ‘Much depends on students having ample opportunity ... to participate in lively exchanges of ideas and points of view.’<sup>66</sup>

### 4.1 Early Academic Staff Appointments

In 1973, Peter Nygh was appointed both a Professor and the Foundation Head of Macquarie Law School. His was one of the first appointments. With a Doctor of Laws (LLD) from the University of Sydney and a Doctor of Juridical Science (SJD) from the University of Michigan he was a highly regarded lawyer in the traditional mould.<sup>67</sup> His expertise was family law, comparative law and private international law, being the author of the leading textbook on the latter subject, *Conflict of Laws in Australia*.<sup>68</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Bruce Mansfield and Mark Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989* (Macquarie University, Hale and Ironmonger, 1992) 276.

<sup>66</sup> Ibid.

<sup>67</sup> Margaret Herd (ed), *Who's Who in Australia* (Information Australia Group, 1999) 1280.

<sup>68</sup> Peter Nygh, *Conflict of Laws in Australia* (Butterworths, 1<sup>st</sup> ed, 1971).

The following year John Peden, the grandson of Sir John Peden, the former long serving Dean of the University of Sydney Law Faculty, was appointed also as a Professor of the Law School.

Both Nygh and Peden brought to Macquarie Law School a firm intention to create an alternative law school in Sydney, as had happened earlier at UNSW. This was exemplified by Peter Nygh in his public lecture delivered in 1975 entitled 'Lawyers for 1975': 'Lawyers are not at the moment equipped by training to enquire into the operation of the law in the real world and to weigh the various policy options which might be available.'<sup>69</sup>

Unconsciously, Macquarie Law School replicated much of what had taken place at the UNSW Law School in its earlier years. The staff came from either the more traditional Australian law schools or from overseas. Gill Boehringer, an American academic, came from Queen's University Belfast, although he had previously taught at the University of East Africa in Tanzania. Two other academics, Peter Kincaid and Michael Noone, had formerly been teaching at the University of Papua New Guinea whilst another, Michael Sassella, came from the University of Birmingham, United Kingdom.<sup>70</sup>

## 4.2 The Formative Years

Teaching of the first cohort of law students began in 1975. This included the provision in February of the first residential summer school for external (distance) students whilst the teaching of internal students commenced in March. Soon after, a group of students formed the Macquarie University Law Society (MULS) and, in September 1978, a combined group of academics, students and lawyers established a community legal centre for low income earners located in Macquarie Street, Parramatta—'Macquarie Legal Centre'.<sup>71</sup>

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<sup>69</sup> Rosalind Croucher and Jennifer Shedden, *Retro 30: Thirty Years of Macquarie Law School* (Macquarie University, 2005) 14.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

Again, as with UNSW Law School, there was an emphasis on tutorial-based seminar teaching to the complete exclusion of lectures, with 30 per cent of the total mark being based on class performance.<sup>72</sup>

In the early eighties there was a deliberate attempt to reconstruct the Macquarie law curriculum. This resulted in a new full-year course entitled 'History and Philosophy of Law', with the Torts course being replaced by a new subject—'Standards of Legal Responsibility' and Criminal Law by 'Personal Injury'. These changes to the curriculum could be largely attributed to the influence of two early appointments to the Law School, Gill Boerhinger and Drew Fraser both from North America. This shift in emphasis on the nature of law teaching at Macquarie created more than the normal tensions which arise with the advent of any change in the curriculum of a degree program.

At the same time there had been a change in the leadership of the Law School. Peden replaced Nygh as Dean in 1979, and was himself replaced by Professor John Goldring in 1981, who served as Dean until 1987. This combination of events led to considerable discord among the academic law staff, which attracted a great deal of publicity within the media particularly in *The Australian*. Its education reporter Christopher Dawson subsequently took it upon himself to run a regular weekly series following the events in the Law School in great detail. It also had unfortunate consequences for the Law School because in 1986 the Pearce Committee was conducting a review as part of a national assessment of legal education undertaken by the Commonwealth Tertiary Education Commission (CTEC). Although the recommendations of this Committee are discussed in Chapter 10 it is relevant to mention its findings here that Macquarie Law School '[s]hould be closed, phased out or divided due to irreconcilable differences'.<sup>73</sup>

It is crucial to analyse the reasons for these disputes and why they attracted such strong criticism from the Pearce Committee.

Problems at Macquarie arose on the appointment of Boerhinger and Fraser, who considered that it was detrimental for Australian law schools to deliver a doctrinal and

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<sup>72</sup> Ibid 37.

<sup>73</sup> Ibid 76.

vocational form of legal education based on legal positivism. They based their teaching philosophy on a pre-World War II curriculum pioneered by the Legal Realists at Columbia and Yale universities who 'sought to integrate law and the social sciences.'<sup>74</sup> A further movement, based on the work of the Legal Realists, known as Critical Legal Studies (CLS) developed in the United States after World War II.'<sup>75</sup> As described by Frank Carrigan, an ongoing law academic at Macquarie and supporter of CLS, 'a major theme of CLS was hostility to legal positivism.'<sup>76</sup> Thus the division between two competing philosophies created incompatible differences between the protagonists representing the opposing views.

Professor Bruce Kercher, who was at Macquarie Law School at this time, has described these events and their eventual outcome.

There was a lot of exaggeration in the press too. Eventually it broke into two factions and in the middle sat the majority of staff who watched the bombs fly overhead. Most of us ducked and tried to avoid the flak and got on with teaching and research.<sup>77</sup>

As the Law School History recounts: 'The irreconcilable differences were reconciled, or at least a truce was in place by the late eighties. The school survived the battering of the press and weathered the storm.'<sup>78</sup>

### 4.3 Renewal and Consolidation

The subsequent history of the Law School indicates that following Macquarie's restructuring in 1999 the Law School became a 'Division of Law' which incorporated the Departments of Law, Environment Law and Business Law. There was a further re-organisation in 2009 when the Division of Law was replaced by 'Macquarie Law School' with Business Law being transferred to the Faculty of Business and Economics.

Whilst there was a rapid change of deans in the 1990s including Tony Blackshield and Gill Boehringer, Rosalind Croucher's appointment as Dean from 1999 to 2008 led to

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<sup>74</sup> Frank Carrigan, 'They Make a Desert and Call it Peace' (2013) 23 *Legal Education Review* 313, 316.

<sup>75</sup> Ibid 317.

<sup>76</sup> Ibid.

<sup>77</sup> Croucher and Shedden, above n 69, 76.

<sup>78</sup> Ibid.



the Law School returning to some form of normality in the relationships between its various academic staff members. It is appropriate to recognise that the supporters of CLS at the Law School felt that they had been marginalised by structural changes, and that this was detrimental to the future academic standard of the Law School. These views have been articulated by Gill Boehringer<sup>79</sup> and two other members of the Law School, John Touchie and Scott Veitch.<sup>80</sup>

The current Dean of the Law School is Natalie Klein who was appointed in 2011, following on from Peter Radan (2009–2010). She is a highly regarded international law academic who presides over a Law School which has recorded a dramatic expansion in the area of legal research and publications.<sup>81</sup>

## 5 University of Technology, Sydney, Law School

The UTS Faculty of Law was originally established at the NSW Institute of Technology (NSWIT) in January 1975.<sup>82</sup> It was intended to replace the law extension course which was taught under the auspices of the Legal Practitioners Admission Board. However, for various reasons the law extension course has remained in operation.

Law had already been a component of the current Bachelor of Business degree at NSWIT and Dr R L Werner, its President, was asked to develop a course for a law degree. For this he sought the cooperation of Dick Godfrey-Smith, a Principal Lecturer in Law in the Business Faculty, together with David Flint, a Lecturer in Law and Pamela Neville, an Administrative Officer in the Registrar's Division.<sup>83</sup> The outcome was a practice-oriented course with a substantive core complemented by a number of parallel skills subjects. It was originally intended that the law degree would be offered on a part-time basis with a full-time component becoming operational at some future time.

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<sup>79</sup> Gill Boehringer, 'Infamy at Macquarie: Economic Rationalism and the New McCarthyism' (1999) 24(1) *Alternative Law Journal* 31.

<sup>80</sup> John Touchie and Scott Veitch, 'The Decline of Academic Reason' (1999) 24(1) *Alternative Law Journal* 26.

<sup>81</sup> Luke Salem, '40 Years of Macquarie Law' (2012) 18(4) *The Brief, Macquarie Law Society* 22.

<sup>82</sup> George Marsh (ed), *A History of the UTS Law Faculty 1977-1997* (Faculty of Law, UTS, 1997) 1.

<sup>83</sup> Ibid.

## 5.1 The Early Years

Following an international search, Geoffrey Bartholomew, an eminent academic lawyer, then a Professor of Law at the University of Singapore was appointed as the Foundation Dean in 1976.<sup>84</sup> Unlike the recruitment experience on the founding of UNSW Law School and Macquarie Law School, many of the academics who were to become the initial members of the NSWIT Law School were already lecturing in law in NSWIT's Faculty of Business, although there were a few such as Colin Ying (University of Singapore) and Douglas Glass (UNSW) who were recruited from other tertiary institutions.<sup>85</sup>

There were two features of the NSWIT law degree that distinguished it from the other Sydney metropolitan law schools. First, its course structure incorporated both core and skills subjects. Secondly, the composition of its student body was different, being composed mostly of mature age students, particularly women, because of the part-time nature of the course.<sup>86</sup> Although the course was structured as part-time over six years, some students were able to accelerate their studies by taking additional subjects or claiming exemptions, so that the first NSWIT LLB degrees were awarded on 15 May 1981. Coincidentally, the NSWIT Chancellor awarding the degrees was the former Foundation Dean of the UNSW Law School, the Hon Justice Hal Wootten.<sup>87</sup>

An early innovation of the Law School was the introduction of the Summer Program in 1983–84. This meant that students could undertake elective subjects during the long summer recess. The NSWIT Law School appears to have been the first faculty of any Australian university to introduce such a program. This has now become a regular feature of most university program, being replicated in the form of a third semester during the academic year.<sup>88</sup>

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid 2.

<sup>86</sup> Ibid 1.

<sup>87</sup> Ibid 3.

<sup>88</sup> Ibid 4.

## 5.2 Subsequent Developments

The UTS Law School has become recognised for its innovative approach to teaching and learning. This has partly arisen because of its location within a university of technology enabling it to offer 'practice-oriented education with a focus on integrated exposure to professional practice.'<sup>89</sup> When the Faculty disaffiliated from the College of Law in 1996 this led to the phasing out of the Skills Program and the incorporation of practical legal training (PLT) as an integral part of the undergraduate LLB program.<sup>90</sup> Another innovation was the introduction of the Masters of Law and Legal Practice (MLLP) degree in 1997. One outcome of this initiative was that the Law School became the first in Sydney to offer in 2009 the Juris Doctor (JD) graduate-level law qualification based upon the United States graduate degree.<sup>91</sup>

Two other postgraduate coursework programs reflected its innovative approach. The first was the introduction of a Masters of Intellectual Property which was the 'first (and until 2012 the only) university course to satisfy all the "board exam" requirements of the Professional Standards Board of Patent and Trade Mark Attorney.'<sup>92</sup> The second was the introduction in 1997 of the first Australian Masters course in Dispute Resolution which adopts both an interactive and a theoretical approach to its teaching.<sup>93</sup> Intellectual property has been reflected as an area of expertise in respect of the two recent deans of the Law School, Jill McKeogh (2005–2012) and Lesley Hitchens, the current Dean.

One of the most highly recognised activities of the UTS Law Faculty is its collaboration with the UNSW Law Faculty in supporting the Australasian Legal Information Institute (AustLII), which is located at UTS. This is claimed to be the largest free legal information database in the world.<sup>94</sup> The manner of its establishment and its subsequent widespread influence as a major provider of legal data and information is covered in Chapter 9.

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<sup>89</sup> Jill McKeogh, 'The Faculty of Law: Engage, Educate, Empower' in Debra Adelaide, Paul Ashton and Annette Salt (eds), *Stories From the Tower, UTS 1988-2013* (Xoun and University of Technology, Sydney, 2013) , 54.

<sup>90</sup> Ibid 55.

<sup>91</sup> Ibid 56.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 57.

## 6 Queensland University of Technology Law School

The Queensland Institute of Technology (QIT) as the Queensland University of Technology (QUT) was then known, opened in 1977.<sup>95</sup> Like UTS, Sydney, QIT owed its eventual university status to the outcome of the Dawkins Reforms. QIT and NSWIT were the first non-university tertiary institutions in Australia to offer Bachelor of Laws courses. Because the titles of both these institutions embrace the term 'technology' there has been an attempt to explain the relevance of this description in connection with the teaching of law. Professor Dennis Gibson, a former QUT Vice-Chancellor explained it in these terms:

A recent meeting of vice-chancellors of the five Australian Technology Network universities (all descended from former state institutes of technology) came up with the following working definition of technology in an attempt to encompass the extraordinary complexity of activity at these institutions: the application of creative thinking and ingenuity to the solution of definable and practical problems in all fields of human endeavour. In its commitment to creativity and practical problem solving, law at QIT/QUT—first the school and then the faculty—has exemplified this broad 'technological' tradition.<sup>96</sup>

The original premises for the Law School were located on the ground floor of a building which formed part of the Technical College quadrangle on the Gardens Point Campus of QUT. It had been described as 'modestly refurbished in garish orange with cheap green carpet which invited mowing in the wet season.'<sup>97</sup>

The initial academic members of the Law School were the newly appointed Head, Tom Cain, who had previously been responsible for administering the Law Extension course at the University of Sydney; David Gardiner who had also been teaching on the extension course; Ian Campbell (also from Sydney); and two local Queenslanders—Carmel McDonald and Jim Herlihy. This small group was recruited to undertake the teaching of the first intake of 110 full-time students who commenced their studies at the

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<sup>95</sup> Dennis Gibson, 'The University and the Law School' (1997) 13 *Queensland University of Technology Law Journal* 1.

<sup>96</sup> Ibid, 1.

<sup>97</sup> David Gardiner, 'The Law Faculty over Twenty Years' (1997) 13 *Queensland University of Technology Law Journal* 15, 15.

beginning of the 1977 academic year.<sup>98</sup> In addition to accommodating students studying for what was originally designated as a Bachelor of Arts (BA) in Law degree (subsequently converted to an LLB) at the request of the Queensland Law Society, the Law School commenced a Legal Practice course in 1978 to accommodate 13 foundation students. This was provided as an alternative to articles of clerkship and laid the foundation for a future practical legal training course at the Law School.<sup>99</sup>

The practical legal training course was originally founded on the Ormrod continuum of legal education and training.<sup>100</sup> This refers to the English and Welsh-based criteria for legal education established in 1974 by a Committee chaired by Sir Roger Ormrod, an English High Court Judge.<sup>101</sup> Besides establishing a group of seven core subjects (later increased to eight by the addition of the subject European Union Law) for any law degree leading to a qualification as a legal practitioner, it provided a practical training stage in the first part of this continuum, with the second part incorporating a year of supervised practice in legal employment. The Law School acknowledged its ongoing influence on the QUT PLT course as follows: 'Although the Ormrod model has been superseded in the discussion of legal education at a theoretical level, it still provides an accurate depiction of what actually occurs in mainstream practice in legal education and training in Australia.'<sup>102</sup>

'[T]he original objectives of the Course were those adopted at the Australian Professional Legal Conference in 1974.'<sup>103</sup> These objectives were to: 'Stress the development of professional values, skills, and technical and procedural competence in designated practice areas' and 'to prepare students as general practitioners rather than as specialists.'<sup>104</sup> Forty years later such a statement would be regarded as indicating an extremely narrow view of the objectives of legal education.

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<sup>98</sup> Ibid 16.

<sup>99</sup> Ibid 17.

<sup>100</sup> Allan Chay, 'Wal's Legacy: QUT'S Practical Legal Training Course' (1997) 13 *Queensland University of Technology Law Journal* 36.

<sup>101</sup> United Kingdom, 'Report of the Committee on Legal Education' (1974).

<sup>102</sup> Chay, above n 100, 36.

<sup>103</sup> Ibid 37.

<sup>104</sup> Ibid.

## 6.1 Developing the Part-time Student Intake

Reflecting on Tom Cain's background as the original director of the NSW Law Extension Course it is not surprising that QUT made early provision for the teaching of part-time law courses. As Cain states: 'We had a separate set of lectures and seminars, mostly in the evening, to suit the convenience of the part-time internal students, which was uncommon in 1977.'<sup>105</sup>

Apart from the part-time internal course there was a part-time external course, which was illustrative of Cain's forward-looking attention to detail and planning. Whilst the external students were taught by the same lecturers and tutors as the internal students, their teaching was supplemented by local coordinators and tutors. The students were supplied with individual subject study guides prepared by the lecturer in charge of the course and they were also given written exercises. In addition, they were supported by the establishment of basic law libraries in various parts of the state and by a number of weekend study schools in Brisbane. First and second-year students were assisted by telephone tutorials conducted by a tutor located in Brisbane. From 1983 a photocopying service was provided and in 1985 the quarterly student newsletter commenced.

Such was the success of the QIT/QUT external part-time course that the Pearce Committee commented in its Report: 'QIT's efforts in its external course were commendable and we think that it should take over sole responsibility for external legal studies in Queensland.'<sup>106</sup>

This commendation was to cause problems for the Law School when in 1987 there was a recommendation by the CTEC that QIT should take responsibility for the conduct of all external law studies throughout Australia. Tom Cain gave this proposition a great deal of thought but turned it down on the basis that it would upset the balance of the courses in the Law School. His reasons for refusal are interesting, considering that today most tertiary institutions would be tempted to adopt an expansionist role to such a proposition. These were:

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<sup>105</sup> Tom Cain, 'Reflections as Foundation Dean' (1997) 13 *Queensland University of Technology Law Journal* 3, 7.

<sup>106</sup> Ibid.

that a Law School of a reasonable size can run a good external LLB course when the number of external students is about 15 per cent of the total number of LLB students (and the number of external and part-time internal students is not more than 35–40 per cent of the total number of students) without upsetting the balance of courses and losing staff.<sup>107</sup>

## 6.2 QIT/QUT Law Library

Tom Cain's influence as Foundation Head of the Law School is illustrated by the manner in which the Law School gained control over the new law library at QIT. This is commented upon by David Gardiner in his reminiscences of the early days of the Law School. When describing the problems of the move by the Law School into the new main library building at QIT he states:

We were not the sole occupier of the premises and our strata title neighbours were not necessarily ones we should have been associating with and what was more they were the dominant occupants and controlled the body corporate. This was of course the University Librarian and the rest of Main Library and there was many a campaign and skirmish associated with the Law Library's operations being in conflict with those of Main Library.<sup>108</sup>

To Cain there was obviously no questioning as to whether the law library should come under the control of the Law School. In many tertiary institutions control of the law library has been a contentious issue for the Head of the Law School and the University Librarian, often requiring intervention and arbitration by the Vice-Chancellor or the Academic Board. Cain did not become embroiled in such discussions or arguments. He stated:

The Law School Library was the heart of the Law School. There were several reasons for it being part of the Law School and for the Law Librarians being members of my staff. I wanted to determine the content of the Library and the classification of books used. I also decided that we would acquire books rather than audio-visual material and that, in general, it would be a reference and not a lending library. I also decided that we would adopt the Moys classification, a feature of which is its separation of primary (statutes and law reports) and secondary (other) materials. Most of all, I wanted the Law Librarians to

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<sup>107</sup> Ibid 8.

<sup>108</sup> Gardiner, above n 97, 17.

have a teaching as well as a librarian role and to conduct courses for the students on how to use a law library.<sup>109</sup>

### 6.3 Evolution and Growth

This heading is adapted from an article by David Gardiner, which describes the development of the Law School after Tom Cain had retired as Foundation Dean in 1989 and when he was appointed as his successor. Despite the Pearce Report complimenting the QUT Law School on some of its practices when it was published in 1987, Gardiner was of the view that there was feeling for change among the majority of the Law School staff. This was reflected in the tripling in the number of the courses available, which included those offered by a new School of Justice within the Faculty together with a doubling in student numbers. The Law Faculty was also involved in a crucial curriculum review which incorporated a number of key changes to some former rigid curriculum requirements for admission to practice in Queensland and nationally. In 1992, the Law Faculty for the first time hosted the Australasian Law Teachers' Association (ALTA) Conference.

On his appointment in 1997 as Pro-Vice-Chancellor (Planning and Resources) of QUT Gardiner was replaced as Dean by Professor Malcolm Cope. The new Dean was faced with further increased student enrolment with dwindling resources due to cuts in QUT's operating grants and the consequent reduction in the operating grant to the Faculty.

In 2004, Michael Lavarch was appointed as Dean and Professor of the Faculty. He had been Attorney-General of Australia from 1993 to 1996 and Secretary-General of the Law Council of Australia from 2001 to 2004. During his term as Dean, which ended in 2012, he presided over an ongoing increase in students studying law at QUT, which totalled 3500 in 2011. The Law Faculty, in 2009, also hosted its second ALTA Conference. But Lavarch's chief role within legal education was to initiate a major development in the promotion of continuing legal education and legal profession reform. For his replacement as Executive Dean in 2013, QUT again appointed someone outside the law academic mainstream—John Humphrey, a Senior Partner in King & Wood, a leading Brisbane law firm.

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<sup>109</sup> Cain, above n 105, 8.



## 7 First-Wave Law Schools Revisited

Whilst the 'New-Wave' universities were developing, making a substantial impact on legal education, and facilitating the provision of many more new entrants into the legal profession, the traditional or elite universities, often known as the 'Sandstone' universities, were endeavouring to respond to the challenges presented by the Second-Wave and subsequent Third-Wave law schools (the latter the subject of Chapter 7). Initially, potential law students would prefer a traditional law school over a newly established one, illustrated above by the preference students had for Melbourne Law School over Monash Law School. However, as time passed and the number of law schools increased, students often elected to attend a newer law school for a variety of reasons. These included a more flexible timetable allowing part-time/evening attendance or a wider choice of elective subjects.

The histories of these traditional law schools indicate their transition to the present has followed many forms. However, the Universities of Sydney and Melbourne have continued to occupy premier positions within the various rankings of Australian law schools.

### 7.1 University of Sydney Law School

Following World War II, the University of Sydney Law School (Sydney Law School) experienced changes in its student enrolments. It had 1100 students in the years following the end of the war, but by 1953 this number had fallen to 650. Since that time the number has progressively increased. In 2015] it had 1700 undergraduate students, 1500 postgraduate coursework students and 100 postgraduate research students. The expanded academic staff in 2015 included 24 professorial chairs.<sup>110</sup>

Since the end of World War II the Law School has been accommodated in two separate buildings. The first, built in 1969, was located in the Sydney CBD<sup>111</sup> near the NSW Supreme Court, most of the principal barristers' chambers, and the office of the NSW Law Society. It covered 16 storeys and included a library which occupied four floors of

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<sup>110</sup> University of Sydney, *History of the Sydney Law School* <<http://sydney.edu.au/law/about/history/shtml>>.

<sup>111</sup> Ibid.

the building. Amid much controversy between those members of staff who wished to retain Sydney Law School's proximity to the law courts and to most of the Sydney legal profession, and those who considered it advantageous for it to be located on the University's main campus, in 2009 Sydney Law School moved to the main campus into a purpose-built state-of-the art building.<sup>112</sup>

During the early post-war period Sydney Law School maintained a traditional approach towards legal education. Michael Slattery, a former President of the NSW Bar Association and now a Justice of the NSW Supreme Court, recounts that in the early 1970s when he was a student at the Law School he wanted to study public international law but was told that it was not an elective in the curriculum.<sup>113</sup>

Colin Phegan, Dean from 1986 to 1989, was responsible for a challenging ALTA Conference hosted by Sydney Law School in 1988 which not only resulted in a change of name for the Association but also in highly charged discussions at the plenary sessions debate relating to the role of critical legal studies within the law curriculum and the developing importance of feminist legal studies.<sup>114</sup>

He was followed as Dean by James Crawford (1990–1992) who subsequently held a prestigious Chair of International Law at the University of Cambridge and became a Justice of the International Court of Justice in 2014. However, the modernisation of Sydney Law School should be attributed to David Weisbrot who was Dean from 1994 to 1997. During this period he initiated changes in the structure of Sydney Law School which enabled it to regain some of the prestige which it had lost to UNSW. He also progressed plans for Sydney Law School to move to the main University campus.<sup>115</sup>

This move took place during Gillian Triggs' term as Dean (2007–2012). Triggs presided over a further ALTA Conference, which Sydney Law School hosted in 2012. On her appointment as President of the Australian Human Rights Commission in 2012 she was

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<sup>112</sup> University of Sydney, *About the Law School* <[http://Sydney.edu.au/law/about/about\\_the\\_law\\_school.shtml](http://Sydney.edu.au/law/about/about_the_law_school.shtml)>.

<sup>113</sup> Interview with Hon. Justice Michael Slattery, NSW Supreme Court (Sydney, 10 December 2013).

<sup>114</sup> Graeme Cooper and John Wade, 'Editorial' (1989) 1(1) *Legal Education Review* 1.

<sup>115</sup> Interview with David Weisbrot, Chair of the Australian Press Council (Sydney, 8 November 2013).

replaced as Dean by Joellen Riley, an expert in Labour Law.<sup>116</sup> In 2012 Sydney Law School received the highest possible ranking of five in the 2012 Excellence in Research for Australia comparative table.<sup>117</sup>

## 7.2 University of Melbourne Law School

A major post-World War II event for the Melbourne Law School was the celebration in 1973 of the centenary of its founding by the staging of a banquet and a special degree-conferring ceremony. However, this event became overshadowed by what has been described as 'the worst period of internal conflict in the law school's history.'<sup>118</sup> Whilst this concerned decision-making processes within Melbourne Law School, ideological differences played a less significant part in these disagreements than at other law schools in Australia at this time.<sup>119</sup>

The replacement of elections by an appointment process for the selection for deans at the University and the subsequent appointment of Michael Crommelin as Dean in 1989 brought a long period of stability to Melbourne Law School. Michael Crommelin served as Dean for the period from 1989 to 2007, taking a year's break from 2002 to 2003 to teach at Georgetown University, when Ian Ramsay occupied the position. He returned again to this position for a short period from 2010 to 2011.<sup>120</sup> During Michael Crommelin's term as Dean, Melbourne Law School followed a more prescriptive targeted policy for maintaining its position as the top ranking law school in Australia. On completion of a new law school building in 2002 Melbourne Law School's management tacitly agreed to prioritise the needs of postgraduate law students, by giving them teaching and recreation rooms of exceptional standard within the upper floors of the building.

On the introduction of the first JD program in Australia in 1999, Melbourne Law School realised that its elite reputation meant that it could restrict its enrolment of law students

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<sup>116</sup> University of Sydney, *Faculty of Law: Professor Joellen Riley* (24 June 2013) <<http://sydney.edu.au/law/about/people/profiles/joellen.riley.php>>.

<sup>117</sup> University of Sydney, *Law Faculty, Highest Possible Research Ranking* <<http://sydney.edu.au/law/>>.

<sup>118</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 214, 221.

<sup>119</sup> Ibid 223.

<sup>120</sup> *Former Dean Michael Crommelin to Lead Melbourne Law School in 2010* <<http://newsroom.melbourne.edu/news/n.189>>.

intending to become practising lawyers to postgraduate JD students only. This ensured the financial stability of Melbourne Law School and enabled it to restrict its future student enrolment to manageable proportions, with consequential smaller class sizes and teaching loads for the law academic staff. Consequently, in 2007 Melbourne Law School accepted its final intake of LLB undergraduate students with these students graduating in 2012.<sup>121</sup>

Melbourne Law School then became a postgraduate law school under the leadership of Carolyn Evans, a human rights lawyer and an internationally recognised expert on religious freedom, the current Dean of Law.

### 7.3 University of Tasmania Law School

The University of Tasmania (UTAS) Law School, the oldest of the remaining four original law schools, is the only traditional law school located in a university not included in the Group of Eight Universities,<sup>122</sup> recognised as the premier Australian universities. UTAS Law School suffered for some years after World War II from a complete lack of support from UTAS in providing resources and adequate accommodation. This culminated in 1959 'with the total, if somewhat staggered, departure of its whole full-time staff.'<sup>123</sup>

However, when Norman Dunbar was appointed to a professorial chair at the end of that year UTAS Law School's situation began to gradually improve.<sup>124</sup> This culminated in 1973 when the Law School moved into a new building located in a central position on UTAS' campus. The site also provided a place for a new law library. Subsequently these facilities were enhanced by an extensive building program commencing in 1988 and completed to coincide with the Law Faculty's Centenary in 1993. This involved the provision of additional lecture theatres, computing facilities, a postgraduate teaching and communal area, and the enlargement of the law library.<sup>125</sup> Many of these improvements had come about because of recommendations by the Pearce Report

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<sup>121</sup> University of Melbourne, *Melbourne Law School: Timeline* <[www.law.unimelb.edu.au/melbourne-law-school/community/history/timeline](http://www.law.unimelb.edu.au/melbourne-law-school/community/history/timeline)>.

<sup>122</sup> *Group of Eight Official Website* <<http://www.go8.edu.au>>.

<sup>123</sup> Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993) 56.

<sup>124</sup> *Ibid* 57.

<sup>125</sup> *Ibid* 62.

which had commented on the gross underfunding of the Law Faculty.<sup>126</sup> However, the Committee also made strong recommendations to improve UTAS Law School's curriculum, taking exception to the manner in which the six months' legal practice course was taught. This was contrasted unfavourably with the PLT courses in the ACT and NSW, which were regarded as substitutes for serving articles.<sup>127</sup>

An outcome of the Pearce Report was the establishment of a Faculty Curriculum Review Committee, (the Chalmers Committee) to implement the Pearce recommendations, chaired by Don Chalmers, who was to become a longstanding member of the Faculty. The Chalmers Committee made the perceptive comment that: 'Law schools were like the Temple of Janus, facing both the needs of the profession and the requirements of a critical general attitude to the Law.'<sup>128</sup>

Another law academic to have a longstanding influence was Catherine (Kate) Warner. She commenced as a part-time tutor in 1972, became the first woman to obtain an LLM degree in Tasmania in 1978, was subsequently Dean of the Faculty, presided over the ALTA Conference held at UTAS Law School in 1995 and, in 2014, was appointed the first female Governor of Tasmania.<sup>129</sup>

The current dean of the Law Faculty is Professor Margaret Otlowski, an expert in health law, who presides over a law school which, besides offering undergraduate and graduate law programs, incorporates the Law School, the Tasmanian Law Reform Institute, the Centre for Law and Genetics, and the Centre for Legal Studies, the latter providing the PLT component for admission as a legal practitioner in Tasmania.<sup>130</sup>

#### 7.4 University of Adelaide Law School

Under the heading 'A New Era', a contemporary history of the Adelaide Law School describes the changes which took place there from 1949 onwards.<sup>131</sup> Like the

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<sup>126</sup> Ibid 77.

<sup>127</sup> Ibid 80.

<sup>128</sup> Ibid 84.

<sup>129</sup> Kate Warner, *First Female Tasmania Governor* (10 November 2014) <<http://www.dailytelegraph.com.au/news/breaking-news/first-woman-governor-for-tas>>.

<sup>130</sup> *About the Faculty of Law, Faculty of Law, University of Tasmania* (17 October 2014) <<http://www.utas.edu.au/law/about-the-faculty-of-law>>.

<sup>131</sup> Victor Edgeloe, 'The Adelaide Law School 1883-1983' (1983) 9(1) *Adelaide Law Review* 32.

experiences of most Australian law schools at this time, they involved a variation in the attendance pattern by most of the School's students in that the first three years became ones of full-time study, together with a curriculum restructure, which included new courses in legal history and ethics.<sup>132</sup> There was also a physical relocation of Adelaide Law School which culminated in 1967 in its final and current residence in a separate building, the 'Ligertwood Building', named after Sir George Ligertwood, one of the Law School's most distinguished graduates. This new building also incorporated the law library.<sup>133</sup>

On the 125<sup>th</sup> Anniversary of the Law School in 2008 the increase in full-time teaching staff was acknowledged. In 1949 this had consisted of only one academic, Professor Arthur Campbell; by 1960 this had increased to eight full-time law teachers, and in 2008 there were '40 members of full-time and adjunct faculty and many more practitioner-instructors teaching 1400 students.'<sup>134</sup>

At the current time the Law School, which is headed by the Dean, Professor John Williams,<sup>135</sup> forms part of the University of Adelaide's Faculty of the Professions.<sup>136</sup> It is one of the few Australian law schools to be awarded a prestigious four rank (above world average) in the Commonwealth Government Excellence for Research in Australia 2012 assessment rankings.<sup>137</sup> This research expertise is based on the following five major research centres or units: Bankruptcy and Insolvency Law, Ethics, Law and Society, Litigation Law Unit, Public Law and Policy, and Society, Law and Religion.<sup>138</sup> The South Australian Law Reform Institute (SALRI) is also based at the Law School. Established in 2010, SALRI was formed by an agreement between the Attorney-

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<sup>132</sup> Ibid 33.

<sup>133</sup> Paul Babie, '125 Years of Legal Education in South Australia' (2010) 31 *Adelaide Law Review* 107, 108.

<sup>134</sup> Ibid 109.

<sup>135</sup> University of Adelaide, *Adelaide Law School: Academic Staff* <<http://law.adelaide.edu.au/research/academics/>>.

<sup>136</sup> *Faculty of the Professions* <<http://www.adelaide.edu.au/professions/>>.

<sup>137</sup> QS Top Universities, *Worldwide University Rankings, Guides & Events* <<http://www.topuniversities.com/universities-rankings/university-subject-rankings/2014/law-legal-studies>>.

<sup>138</sup> CHECK URL University of Adelaide, *About Adelaide Law School* <<http://www.law.adelaide.edu.au/about/>>.

General of South Australia, the University of Adelaide and the Law Society of South Australia.<sup>139</sup>

## 7.5 University of Western Australia Law School

The early sixties marked the end of a remarkable era for the University of Western Australia (UWA) Law School when Frank Beasley, who had been appointed as its first Professor in September 1927, retired at the end of 1963 having served as Dean for 37 years. The history of UWA Law School describes the time leading up to his retirement as a period of gradual 'academicisation' of the Law Faculty, with the number of full-time teaching staff reaching five by 1958 while there were 112 students enrolled in the Faculty in 1961.

The sixties also celebrated the move of the Faculty to a purpose-built law school in 1961 which, because of the increased number of law students, required the construction of an extension completed by 1968. The growth in student numbers necessitated the imposition of a quota for entry from 1972 onwards.

In 1971 there had been a change in the law curriculum with all law students required to complete a prerequisite year in another faculty. This change eventually led to the introduction in 1984–85 of combined degrees, which allowed law students to gain a second non-law degree based on their preliminary year in another faculty, although this obviously required some years of additional university study to complete both courses. In 1977 a Legal Advice Bureau staffed by student and staff volunteers was established, and this has continued to operate.

The present UWA Law School reflects the policy generally of UWA by having abolished the undergraduate LLB degree in 2013 and replacing it with the Juris Doctor postgraduate degree, claiming that this change will 'better prepare the graduates for the challenges of contemporary practice.'<sup>140</sup> The current Dean, Professor Erika Techera, a

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<sup>139</sup> University of Adelaide, *Adelaide Law School: South Australian Law Reform Institute* <<http://law.adelaide.edu.au/research/law-reform-institute/>>.

<sup>140</sup> *The Law School, University of Western Australia* (26 November 2014) <<http://www.law.Uwa.edu.au/the-school/>>.

specialist in international and comparative environmental law,<sup>141</sup> presides over fifty law academics with a focus on two major research centres—a Centre for Mining, Energy and Natural Resources Law, and a Crime Research Centre.<sup>142</sup>

## 7.6 University of Queensland Law School

The early post-World War II phase for the University of Queensland (UQ) Law School was marked by two major events. One was the move by UQ Law School in 1949 to enhanced accommodation facilities in the Forgan Smith building located on the St Lucia campus of UQ. The other took place in 1952 when the Law Faculty's restructured undergraduate degree replaced a five-year combined Arts and Law degree.<sup>143</sup>

By 1962 enrolment numbers had increased to 267 students with 20 full-time staff by the mid-sixties. However, these students and staff increases were not matched by a corresponding increase in the funding of UQ Law School's facilities. This underfunding caused an increase in tension which culminated in 150 law students protesting with an all-night library 'study-in' (sit-in). This protest resulted in UQ undertaking to allocate \$3.25 million towards the redevelopment of UQ Law School and the Law Library.<sup>144</sup>

During the periods 1969–1974 and 1979–1985, UQ Law School was led by Kevin W Ryan in role as Garrick Professor of Law and, for the first period 1971–1974, as Head of the Department of Law and Dean.<sup>145</sup> He subsequently became a Judge of the Supreme Court of Queensland.<sup>146</sup>

In addition to the longstanding Garrick Chair of Law established in 1923 (see Chapter 5), UQ decided to inaugurate a further Chair of Law in honour of Sir Gerald Brennan, a graduate of UQ Law School who was appointed to the High Court of Australia in 1981, became Chief Justice in 1995 and retired in 1998. The Sir Gerald Brennan Chair of Law

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<sup>141</sup> University of Western Australia, *UWA Staff Profile: Professor Erika Techera* <[www.uwa.edu.au/people/erika.techera](http://www.uwa.edu.au/people/erika.techera)>.

<sup>142</sup> University of Western Australia, *Faculty of Law, Research* (30 August 2013) <[www.law.uwa.edu.au/research](http://www.law.uwa.edu.au/research)>.

<sup>143</sup> Gala Town and Gown Debate Programme, 'TC Beirne School of Law, 1936 to 2011' (31 August 2011) Queensland University School of Law.

<sup>144</sup> *Ibid* 7.

<sup>145</sup> Michael White, Ryan Gawrych and Saunders Kay (eds), *TC Beirne School of Law - 70th Anniversary* (2006) 145–6.

<sup>146</sup> University of Queensland, *TC Beirne School of Law; Heritage and History* <[www.law.uq.edu.au/heritage-and-history](http://www.law.uq.edu.au/heritage-and-history)>.



was created on 10 May 1999 with the first incumbent, Professor Tony Tarr appointed on 3 June 1999.<sup>147</sup>

To celebrate 75 years of teaching law in 2011, UQ Law School hosted a gala 'Town and Gown' debate, chaired by Justice Margaret McMurdo, a former law school graduate, on the topic 'It takes 75 years to make sense of the law.' The occasion was attended by over 190 guests from the legal profession, UQ and descendants of TC Beirne, who made the original grant which led to the founding of the Law School.<sup>148</sup>

The present Head of School and Dean of Law is Sarah Derrington, an expert in admiralty jurisdiction and practice, the carriage of goods by sea and marine insurance. She heads 50 members of staff and approximately 2000 students.<sup>149</sup> UQ Law School has a strong reputation for its research expertise with four research centres comprising: Australian Centre for Private Law, Centre for International Minerals and Energy Law, Centre for Public International and Comparative Law and a Marine and Shipping Unit.<sup>150</sup>

## 8 Conclusion

The period covered by this chapter marked some significant landmarks in the development of legal education, much of it brought about by the establishment of five new law schools. There was a change in the type of law academic now being attracted to teaching law. Many law students were graduating without the intention to practise law and yet the legal profession wished law schools to continue to focus on training for professional practice.

The two decades between 1960 and 1980 encompassed a period of steady growth for Australian legal education although it was principally focused within NSW, with three new law schools, and Victoria and Queensland, with one each. Monash and UNSW law schools were established because the original law schools of Melbourne and Sydney were unable to deal with the unexpected expansion of students seeking to undertake law

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<sup>147</sup> *History of the Sir Gerard Brennan Chair at the TC Beirne School of Law* <<http://www.law.uq.edu.au/history-of-the-sir-gerrard-brennan-chair>>.

<sup>148</sup> *Celebrating 75 Years of the TC Beirne School of Law* <<http://www.law.uqedu.au/celebrating-75-years>>.

<sup>149</sup> *TC Beirne School of Law* <<http://www.law.uq.edu.au>>.

<sup>150</sup> *TC Beirne School of Law* <<http://www.law.uq.edu.au/research-centres>>.

studies in Victoria and NSW. There was an equally strong reason for the founding of Macquarie Law School, which was required to incorporate a distance degree course for rural NSW law students. The quota for these students was 100 in 1975, and 125 in 1976.<sup>151</sup>

NSWIT/UTS received its enhanced status as a degree-awarding law school because of the perception of the Bowen Committee that its law degree, with its focus on part-time law courses, would eventually replace the Legal Practitioners Admission Board University of Sydney Law Extension Course. On a similar basis, QIT/QUT, apart from its intake of full-time law students, made provision for internal and external part-time law students.

Compared with the later established law schools throughout Australia these five 'Second-Wave' law schools, as they became known, had the advantage of being able to develop in a sequential manner with targeted groups of students awaiting enrolment in their programs.

A further more significant development with which the Second-Wave law schools should be associated has been described by Michael Coper as: 'The emergence of the idea of legal education as the study of law as an intellectual discipline in its own right.'<sup>152</sup> This development brought about a changing attitude in some law students who, in comparison to those graduating from the more traditional law schools, have:

little or no desire, at least initially, to engage in mainstream legal practice. These students come to law as an intellectual discipline rather than as vocational training, or are seeking the broad generic skills that a good legal education has such strong potential to impart and that are widely deployable across a range of occupations.<sup>153</sup>

There was a further paradox during this period as described by Paul Redmond:

Arguably, the most significant development in legal training during the last decade has been the abolition of the apprenticeship system of articles of clerkship in favour of

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<sup>151</sup> Committee of Inquiry into Legal Education in New South Wales, *'Legal Education in New South Wales (The Bowen Report)'* (Government Printer, 1979) 160.

<sup>152</sup> Coper, above n 2, 392.

<sup>153</sup> Ibid.

formal, institutionalized academic and skills training ... The recent creation in New South Wales of three further tertiary institutions conferring law degrees has hastened the movement there towards a higher proportion of graduate entrants.<sup>154</sup>

The challenge for legal educators was to create a law school ethos that, in Coper's words, combined the study of law as an intellectual discipline with the idea of legal training for professional practice.'<sup>155</sup> That challenge is addressed in the next chapter, which charts the enormous growth of law schools during the 'Third-Wave'.

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<sup>154</sup> Paul Redmond, 'Some Objectives in the Academic Study of the Legal Profession ' in Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales, 1978) , 199.

<sup>155</sup> Coper, above n 2, 392.



## Chapter 7

### An Avalanche of Law Schools: 'Third Wave' Law Schools—1989 to 2015

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#### 1. Heralding the Exploding Market for Legal Education

The period of Australian legal education commencing in 1989,<sup>1</sup> and heralding what became known as the 'Third Wave' law schools or 'An Avalanche of Law Schools,'<sup>2</sup> was the precursor for an unprecedented and unexpected expansion of law schools in Australia. This increase resulted in an additional 16 law schools being established between 1989 and 1997, with a further 10 in the first 15 years of the 21<sup>st</sup> century.

This chapter ascertains the reason for this increase in law schools and the effect this had on law teaching, legal research, legal education and the legal profession. It explores how

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<sup>1</sup> Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

<sup>2</sup> David Barker, 'An Avalanche of Law Schools: 1989 to 2013' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Canberra, 1 October 2013) 153.

and why the new law schools were established and questions whether there is a rational explanation for the increase. This expansion is ironic given that the Pearce Report in 1987 recommended against a further expansion of law schools in Australia: 'We do not think that there will be a need for a new law school, except perhaps in Queensland.'<sup>3</sup>

One explanation of this expansion is that it was an outcome of the Dawkins reforms, whereby the binary divide between the former universities and colleges of advanced education (CAEs) was abolished, which allowed more flexible programs for potential students. These reforms, which aimed to increase undergraduate student numbers as universities were given economies of scale, have been explained as follows:

In late 1987 a new, energetic minister, John Dawkins, took over the expanded portfolio of Employment, Education and Training. He signalled immediately that he was bent on reform publishing first a Green and then a White Paper which established a major blueprint for structural reform. He abolished the 'binary' system and encouraged, through a blend of pressure and coercion, the amalgamation and merger of a number of college and universities. The result was that where there had been 19 universities and 69 CAEs in Australia in the binary system there emerged by 1994, a new single system of 36 universities.<sup>4</sup>

However, while the reforms resulted in an increase in university student numbers they were not universally accepted as necessarily an improvement on the 'value of the undergraduate curriculum and teaching and learning.'<sup>5</sup>

The Dawkins reforms heralded an unprecedented growth of higher education students from 393 000 in 1987 to 650 000 in 1997.<sup>6</sup> Much of this increase was due to the change in the school leaving age: 'the massive growth in Year 12 retention from 1985 to the 1990s.'<sup>7</sup> This increase included, for the first time, many students from families where they were the first members who had ever had the opportunity of attending university.

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<sup>3</sup> Dennis Pearce, Enid Campbell and Don Harding, *'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)'* (Australian Government Publishing Service, 1987) 998 [25.14].

<sup>4</sup> John Sharpham, 'The Context for New Directions' in John Sharpham and Grant Harman (eds), *Australia's Future Universities* (University of New England Press, 1997) 23.

<sup>5</sup> Ibid 24.

<sup>6</sup> Ibid 14.

<sup>7</sup> Hannah Forsyth, *A History of the Modern Australian University* (NewSouth Publishing, 2014) 123.

Inevitably, some of these would be law students who might previously have been unable to gain entry into one of the more traditional law schools but could enter the newly established law schools because of their more egalitarian approach to enrolments. This was partly because the schools sought to maximise their recruitment. In addition, their former CAE background enabled them to offer more flexible courses, including a focus on combined and joint-degree programs incorporating law and another major subject area such as business, international studies or information technology. This also had the advantage of offering more flexibility in subsequent career opportunities after graduation.

Professor Margaret Thornton, a Professor of Law at the Australian National University (ANU), has been extremely forthright in her view that the Dawkins reforms have had an adverse effect on the development of universities: 'The Dawkins reforms, which brought an end to the binary system in Australia in 1988, signalled the beginning of the end of the idea of the university as envisaged by Newman, and its replacement with the idea of the university as a business.'<sup>8</sup>

Who Newman was, and his concept of a university, has been explained by Professor Coaldrake and Dr Lawrence Stedman in the following terms:

Cardinal Newman was a former Oxford University man, who was instrumental in the founding of the University of Dublin around the time when the reform of the ancient universities of England was well under way. His published series of lectures, produced in 1852 and entitled, *The Idea of a University*, set out eloquently the ideal of general education where a young man could develop civilised values and a philosophical mind through the study of the accumulated wisdom of the past. The university was the realisation of this ideal. His view was strongly non-utilitarian; knowledge was valuable for its own sake, not for the uses to which it could be put. Newman's university quite clearly kept separate the study of vocational or professional matters and was not concerned with research. If objects were scientific and philosophical discovery, he wrote, 'I do not see why a University should have any students'.<sup>9</sup>

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<sup>8</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 16.

<sup>9</sup> Peter Coaldrake and Lawrence Stedman, *On the Brink: Australia's Universities Confronting Their Future* (University of Queensland Press, 1998) 36–7.

With respect to law schools, Professor Thornton is even more scathing about the effect of the Dawkins reforms:

Law Schools that have been able to retain at least a vestige of autonomous faculty status through the recent upheavals are better able to withstand the depredations than those schools which form merely a constituent element of a mega-faculty, commonly dominated by business or management.<sup>10</sup>

Professor Thornton's theories about the general failure of the quality and governance of some of the newer law schools would not necessarily be accepted by all law academics. It is arguable that, as stated above, the Dawkins Reforms created an expansion of universities and university law schools in particular, which realised the expectation of more students wishing to study law. However, the creation of more law schools during this period does not seem to have quenched the demand for more law student places in Australian universities.

## **2. Characteristics of the 'Third Wave' Law Schools**

When considering the advent of so many new law schools in Australia post 1989, the challenge is to understand the underpinning of their establishment and to consider whether they are a true reflection of the changes which have come about in legal education and legal scholarship since 1989. In the Australian Law Reform Commission Report (ALRC) No 89 the early part of this period has been described as follows with regard to the ongoing development of legal education:

Over the past decade or so, legal education in Australia has undergone a period of unprecedented growth and change. To some extent, this parallels the dynamic change in the profession—characterised by rapid growth; moves towards national admission and practice; globalisation; the end of traditional statutory monopolies; the application of competition policy and competitive pressures; the rise of corporate 'mega firms'; the emergence of multi-disciplinary partnerships; increasing calls for public accountability; more demanding clients; and the influence of new information and communication

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<sup>10</sup> Thornton, above n 8, 18.



technologies—but many of the changes in legal education have been driven by other factors.<sup>11</sup>

Later in the Report there is a statement that might assist in explaining one of the reasons for this rapid expansion of law schools in Australia:

Law faculties are attractive propositions for universities, bringing prestige, professional links and excellent students, at a modest cost compared with comparable professional programs such as medicine, dentistry, veterinary science, architecture or engineering.<sup>12</sup>

When examining the expansion of legal education at this time it is helpful to identify the causes which may have brought about this change. Some assistance may be sought from a similar review that Michael Chesterman and David Weisbrot conducted with respect to law schools over an earlier period of the history of Australian legal education (early 1960s to 1987).<sup>13</sup> Whilst not all the five reasons advanced by Chesterman and Weisbrot are relevant to the current review, they do serve as a helpful starting point.

The changes identified by Chesterman and Weisbrot included the increase in the number of tertiary institutions offering full undergraduate degrees in law. These led to the virtual abolition of non-degree professional training courses provided by the profession, coupled with the fact that most of these new law schools still remained located in the capital cities. Secondly, they considered the changes in the degree programs offered by new institutions. Thirdly, there was a realisation that full-time law teaching had become a recognised academic career. Fourthly, during the period under review many of the law schools experienced radical movements among the academic staff, sometimes also involving the law students. Finally, they considered the influence of the newly appointed standing law reform commissions and other law reform committees on the development of research opportunities within the law schools. There was scope for law school staff to take unpaid leave and undertake secondments with these law reform bodies.

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<sup>11</sup> Australian Law Reform Commission, *'Managing Justice: A Review of the Federal Civil Justice System, Report No 89'* (2000) 117.

<sup>12</sup> Ibid 118.

<sup>13</sup> Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709.

Interestingly, there was a tendency for all of the earlier law schools to be located in the capital cities of each of the States and Territories. However, this pattern was partly reversed with the 'Third Wave' universities where the ratio was capital city universities 60 per cent, regional 40 per cent. Nevertheless, there is no sustained pattern across the States and Territories in this respect and of the seven law schools that have been established in New South Wales (NSW) since 1989, five of them; University of Wollongong (1990), University of Newcastle (1992), Southern Cross University (1993) University of New England (1993) and Charles Sturt University at Bathurst (2015) are located in regional centres. The University of Western Sydney (1994), whose principal campus is located in Parramatta in the outer Sydney conurbation, is also regarded as a regional university as it incorporates major campus locations in Campbelltown, and Richmond in rural NSW. The only new law school in Sydney is the University of Notre Dame (Sydney) which was originally an adjunct of the University of Notre Dame (Fremantle). It is now an independent university law school in its own right and a campus of the Australian Catholic University Thomas More Academy of Law located in North Sydney.

All the new schools in Victoria have been located in the capital, Melbourne. These are La Trobe University (1992), Deakin University (1992), Victoria University of Technology (2000), Royal Melbourne Institute of Technology University (2007) Australian Catholic University (2012) and the Swinburne University of Technology (2015).

Of the Queensland law schools, Bond University (1989) located on the Gold Coast was the first private university in Australia, and is a regional university, as is James Cook University (1989) with its two main campuses in Townsville and Cairns, and the Universities of Southern Queensland (2005) in Toowoomba, Central Queensland (2011) in Rockhampton and the University of the Sunshine Coast (2014) in Maroochydore. Of 'Third' Wave universities in Queensland only Griffith University (1992) is based in the capital, Brisbane.

Three of the new university law schools in Western Australia, Murdoch University (1990), Edith Cowan University (2005) and Curtin University (2012) are based in the

capital Perth, whilst the fourth, University of Notre Dame (Fremantle) is in the seaport of Fremantle adjoining Perth.

Flinders University (1992) and the University of South Australia (2007) are both located in Adelaide, South Australia's capital city.

The sole university law school in the Northern Territory is Charles Darwin University (1989), previously known as the Northern Territory University and located in the capital Darwin.

The one addition to the ANU in the Australian Capital Territory is the University of Canberra Law School (1993), also based in the capital Canberra.

### **3. Identifying Groups of New Law Schools**

Apart from the differences in location as between regional and urban campuses forming the basis for the new law schools, it is helpful to inquire whether there are other causes for the establishment of these new wave law schools. There is a major distinction between traditional law schools and those that are just a law degree program or course developed from, or remaining attached to, another main subject school or faculty, mostly in the business area. It could be argued that the latter barely satisfy the requirements for a law school as defined by the Council of Australian Law Deans (CALD). For the acceptance of an Australian Head of Law into membership of CALD, Clause 2.1 of the CALD Constitution requires that:

The members of the Council will be Deans, Heads or Director, by whatever name called of those Australian law schools listed in Appendix A [lists all current member law schools], at the date of adoption of this Constitution or later added to that list by resolution of an absolute majority of existing members.<sup>14</sup>

Clause 2.2 of the Constitution defines a 'law school' as '[a]ny university unit principally responsible for offering a degree in law, completion of which is recognised

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<sup>14</sup> Council of Australian Law Deans, 'Constitution' (1998) 1.

by a least one Australian admitting authority as satisfying most or all of that authority's academic requirements for admission to legal practice.'<sup>15</sup>

In addition to seeking recognition by the CALD, Australian law schools also have to ensure that their law degree programs satisfy the requirements of their State-admitting authorities, as stated in Clause 2.2.

#### 4. 'Third' Wave Law Schools by State and Territory

Noting the discussion above, it is interesting to examine the current composition of the new wave law schools to see if they satisfy what an observer would expect of a substantial, or maybe even a 'Real', law school.

##### 4.1 New South Wales

In NSW five of the six 'Third Wave' law schools were established during the earlier part of the first decade covered in this review—1990 to 1994. Each of these law schools are led by deans/heads who have the status of Professor, and each are reasonable sized with regard to both staff and students. The **University of Wollongong** is the oldest of the NSW 'Third Wave' law schools. It was established in 1990 with the late Professor John Goldring being appointed as its Foundation Dean. Professor Goldring was a highly regarded legal educator who had previously been a member of the ALRC and, prior to that, Professor and Head of the Macquarie Law School. He was succeeded in 1995 by Professor Helen Gamble, another highly respected law academic. Wollongong Law School has developed two research centres; the Australian National Centre for Ocean Resources and Security, and the Centre for Transnational Crime Prevention. The latter centre reflects the criminal law research and teaching background of the current Dean, Professor Luke McNamara, who was appointed in 2007. The Wollongong Law School has retained its independence as a Faculty of Law and is also one of a small number of law schools that still provides its own professional legal training program—practical legal training for both its own and external law students.

Another regional NSW law school was founded at the **University of Newcastle** in 1992. Law studies had previously been taught in the Faculty of Business prior to the

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<sup>15</sup> Ibid.

founding of the Newcastle Law School, which is now part of an enlarged Faculty of Law and Business. It remains comparatively small by contemporary Australian law school standards, with its first intake of students in 1993 consisting of 60 students and its overall current size in 2014 consisting of approximately 400 students. The Newcastle Law School was the first in NSW to initiate a practical legal training program for its students. It also conducts its own legal practice; the University of Newcastle Legal Centre. In interviews, both Kevin Lindgren, a former Law Professor and Dean of the Faculty of Economics and Commerce<sup>16</sup> and Professor Frank Bates, who taught law at the University from 1987 to 2010, have emphasised that there was a strong Department of Legal Studies at the University prior to the first law students commencing at Newcastle Law School in 1993.<sup>17</sup>

There is a close affinity between the law schools at the **University of New England (UNE) (Armidale)** and **Southern Cross University (SCU)**. They were originally both part of a network university formed in 1989 in accordance with the *University of New England Act, 1989* (NSW). This network university consisted of the former UNE, the former Armidale College of Advanced Education, the Northern Rivers College of Advanced Education and the Orange Agricultural College. As some commentators have stated: 'Australia's newest university, Southern Cross is a product of a Dawkins' amalgamation that didn't work. A marriage of the rather staid University of New England up on the tablelands with the go-getting, low status CAEs down on the coast never looked like surviving.'<sup>18</sup>

Following the enactment of the *University of New England Act 1993* (NSW) and the *Southern Cross University Act 1993* (NSW), the UNE was re-formed again in 1993 with one campus at Armidale, and the new SCU was established in 1993 at campuses in Lismore and Coffs Harbour.<sup>19</sup>

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<sup>16</sup> Interview with Kevin Lindgren, President of the Australian Academy of Law (Sydney, 9 August 2013).

<sup>17</sup> Interview with Frank Bates, Emeritus Professor, University of Newcastle School of Law (Sydney, 27 November 2013).

<sup>18</sup> Dean Ashenden, Sandra Milligan and Rod Quin, *Good Universities Guide to Management Education* (Mandarin, 1994) 103.

<sup>19</sup> University of New England, *About UNE: Amalgamation and its Aftermath* (9 December 2014) <[www.une.edu.au/about-une/a-world-of-learning/the-une-story](http://www.une.edu.au/about-une/a-world-of-learning/the-une-story)>.

The UNE School of Law is part of a Faculty of the Professions, having equal standing with other schools in the Faculty such as the Business School and the School of Education. The UNE School of Law is recognised as being one of the largest providers of distance legal education in Australia. In carrying out this part of its teaching it uses state-of-the-art electronic delivery methods. To assist in this form of teaching most of its lectures are podcast and study materials are available via electronic databases or are provided electronically through the library. The Australian Centre for Agriculture is also located at UNE. It is currently taking the lead in a project to promote the incorporation of rural legal subjects into the curriculum of LLB programs throughout Australia.

The original mission of the School of Law and Justice at SCU has been described by its Foundation Dean and Law Professor Jim Jackson as '[q]uite different from traditional law schools in Australia and in most other countries.'<sup>20</sup> In addition:

Its mission was much wider, it was not to concentrate only on Bachelor of Laws students, but was to develop a very extensive paralegal programme for students previously ignored in Australia. The School also had very strong connections to the New South Wales Department of Corrective Services and these were to also prove significant in the access, equity and articulation pathways that apply across all its programmes.<sup>21</sup>

In a similar way the SCU School of Law recognised its obligation to the rural community to ensure that law students were not left feeling isolated. It did this by adopting, where possible, a block teaching model. At the same time there was a focus on paralegal studies, which rank equally in value to law degree programs and also offer the opportunity to students to transfer, if they wish, to a subsequent law degree course. The motivating philosophy was that it would open up '[t]he study of law to a wider section of the community, and in particular to the regional community on the North Coast served by this University.'<sup>22</sup>

The role of the SCU School of Law has been helped by the fact that one of its early Chancellors, the Hon Andrew Rogers, had been a Judge of the Supreme Court of NSW;

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<sup>20</sup> Jim Jackson, 'Building an Accessible Law School - The Early Years: 1990-1996' (1997) 1 *Southern Cross University Law Review* 228.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 230.

and the current Chancellor, the Hon John Dowd, is also a former Judge of the same court. These appointments ensured there was sympathetic support for the School of Law from the top echelons of SCU.

The **Western Sydney University (WSU) Law School** (formerly the University of Western Sydney Law School) was in its earlier days very much a hybrid law school. Although law had been taught within the three former federated members of WSU; Hawkesbury, Macarthur and Nepean, it was only in the latter two that law schools were established. The original WSU Law School was founded on the Parramatta campus in 1993. An additional separate law school was established on the Campbelltown campus in 1994. They remained separate law schools until 1 January 2001 when the three former federated campus members of WSU were amalgamated. WSU then became one multi-campus university with both law schools merging into a single law school within the College of Law and Business.

Michael Adams, who was appointed as Professor and Head of WSU Law School in 2007, brought his experience as a highly innovative teacher and former winner of the prestigious Prime Minister's Australian Law Teachers Award, factors which enabled him to overhaul and modernise teaching methods at WSU Law School.<sup>23</sup> Consequently, in 2009 WSU Law School, under his leadership, hosted a most successful Australasian Law Teachers Association (ALTA) Conference—one of the rare occasions that this has been undertaken by a regional law school. In January 2012 WSU Law School became autonomous under a further reorganisation of WSU, with the head of school being redesignated as a Dean.

The **University of Notre Dame Law School (Sydney)** established in 2006 came well over a decade later than any of the other NSW 'Third Wave' law schools. Although the law school on the Sydney campus is regarded as a law school in its own right, the University of Notre Dame (Fremantle) literature states: 'The National College of Law of

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<sup>23</sup> Interview With Michael Adams, Dean of Law, University of Western Sydney (Sydney, 8 December 2013).

the University of Notre Dame Australia currently offers its Law courses on both its Fremantle and Sydney campuses.'<sup>24</sup>

Nevertheless, by CALD Standards the Notre Dame Law School (Sydney) is designated in the Appendix to its constitution as a separate law school. It also has an interesting role with its partner law school, Notre Dame (Fremantle), and the Australian Catholic University law school located in Melbourne in adopting 'an ethical and holistic approach to the service of law.'<sup>25</sup>

This independent status of the Notre Dame Law School (Sydney) contrasts the strategy adopted by the Australian Catholic University Law School, since renamed the Thomas More Academy of Law, which commenced in 2015, teaching a separate cohort of law students on its North Sydney Campus. With the other Catholic law schools and Bond University Law School, Notre Dame Law School (Sydney) forms part of a unique small group of Australian private university law schools.

Although in 2014 **Charles Sturt University** was the only public university in NSW not to have a law degree program, the Business Faculty had an impressive group of law courses across the programs of the University and there was a view that, as a prominent regional university, it should be providing the opportunity for those in regional NSW to undertake professional legal studies. The University therefore engaged Professor David Weisbrot, an experienced law academic and former President of the ALRC, as a consultant to advise on and prepare a viable law program that would be acceptable to the NSW Legal Practitioners Board.<sup>26</sup> His report was accepted in 2013,<sup>27</sup> and the University in 2014 appointed Stephen Redhead as Professor of Jurisprudence and Head of Law Designate in the Faculty of Arts. It is proposed that the new LLB program will commence in 2016.<sup>28</sup>

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<sup>24</sup> Council of Australian Law Deans, *Welcome from the Dean of Law, Sydney* <[www.nd.edu.au/sydney/schools/law/deanwelcome.shtml](http://www.nd.edu.au/sydney/schools/law/deanwelcome.shtml)>.

<sup>25</sup> Ibid.

<sup>26</sup> Interview with David Weisbrot, Chair of the Australian Press Council (Sydney, 8 October 2013).

<sup>27</sup> David Weisbrot, 'Report on the Feasibility and Suggested Design Principles for the Establishment of a New Law School at Charles Sturt University' (Charles Sturt University, 2013).

<sup>28</sup> Email from Michael Adams, Deputy Chairperson CALD to Stephen Redhead, 15 February, 2015.



## 4.2 Victoria

No doubt because of the early influence of the law schools at the Universities of Melbourne and Monash there appears to have been less frenetic desire in Victoria for an increase in university law schools compared with NSW.

**La Trobe Law School**, established in 1992 on La Trobe University's Melbourne campus was therefore an interesting development in that it was building on a foundation of the University's 20-year experience in legal studies education. La Trobe was founded in 1967 as Victoria's third university and had attempted to distinguish itself from its two traditional predecessor universities. This was emphasised by Craig McInnis and Simon Marginson in their successor report to the 1987 Pearce Report which stated:

La Trobe developed a reputation for critical approaches, particularly in the social science curriculum. The structure of schools rather than faculties symbolised the self-conscious effort of La Trobe to distinguish itself from the traditional model of university organisations. This was partly aimed at encouraging inter-disciplinary studies across the schools. Legal Studies offered its first courses in 1972 in the School of Social Sciences with emphasis on its inter-disciplinary qualities.<sup>29</sup>

The outcome from a restructuring of the university in 1992 was the establishment of a Law and Legal Studies School as part of a Faculty of Education, Economics and Social Science. The original intention was that with the introduction of the LLB into the new Law School's curriculum: 'La Trobe has maintained its emphasis on teaching law in a socio-legal framework and argues that much of the law curriculum is indistinguishable from the legal studies curriculum.'<sup>30</sup>

However, Margaret Thornton, a previous law professor at La Trobe in its formative years has commented that:

When an LLB was first mooted for La Trobe University, the intention was to draw on its socio-legal orientation, as legal studies had been taught to BA students for 20 years. A critical stance was facilitated by the fact that the Department of Legal Studies was located within an interdisciplinary School of Social Sciences. However, it was not very long

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<sup>29</sup> Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Centre for Study of Higher Education, University of Melbourne, 1994) 133.

<sup>30</sup> Ibid 134.

before socio-legal scholarship was traded in for commercial law and practical skills in order to offer what was perceived to be a more vocationally oriented LLB, as well as commercially oriented coursework masters degrees, short course attractive to the professions and consultancies.<sup>31</sup>

The situation at La Trobe was thus similar to that at the Macquarie Law School in Sydney, where similar differences arose between staff members regarding the distinction between a traditional and a socio-legal approach to law teaching.

Whilst La Trobe Law School now offers traditional law programs very similar to those studied at other Australian law schools, it still claims '[a] strong commitment to social justice, interdisciplinary enquiry, an international perspective and practical experience that links learning with legal practice.'<sup>32</sup>

**Deakin Law School** was also established in 1992 although Deakin University had been formed as one of the outcomes of the recommendations of the Ramsay Committee in 1970.<sup>33</sup> However, again because of the Dawkins reforms it dramatically increased in size, merging with Warrnambool Institute of Advanced Education in 1990 and Victoria College in 1991. Not only did this result in the student population increasing from approximately 8000 in 1990 to approximately 25 000 in 1995, it also meant that there were already a number of law academics teaching law to non-law students, mostly in the commercial/business subject departments of the original University and those of the merging institutions. It was therefore a natural outcome that a law school should be formed within the enlarged University located on both its Burwood and Geelong campuses. A unique feature of Deakin Law School was that it was the first law school in Victoria to offer distance learning law degrees in addition to traditional on-campus law degrees.

The creation of **Victoria Law School** is a story of dramatic changes to law teaching at an institution over an extremely short period of time. Prior to 2001 legal studies at Victoria University had been offered through the Faculty of Business (Department of

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<sup>31</sup> Thornton, above n 8, 41.

<sup>32</sup> La Trobe University, *Law Courses and Degrees* (9 December 2014) <[www.latrobe.edu.au/courses/feature/law](http://www.latrobe.edu.au/courses/feature/law)>.

<sup>33</sup> Committee on State Education, 'The Report of the Committee on State Education in Victoria (Ramsay Report)' (1960).

Legal and Executive Studies, or equivalent). In 1999 the law discipline at Victoria University was reviewed by a panel chaired by Professor Richard Cullen of Monash University. The outcome of this review was that the Faculty of Business was renamed the Faculty of Business and Law, and Victoria University appointed Professor Roman Tomasic (who had previously been the Head of Law at the Canberra College of Advanced Education) as its Foundation Professor of Law in 2000.<sup>34</sup> In November 2000 the Council of Legal Education approved Victoria University's practice-based LLB program with the first student cohort commencing studies for the LLB degree at the University's Footscray Park campus in 2001.<sup>35</sup>

Also in 2001 there was the official launch of the Sir Zelman Cowen Centre for Continuing Legal Education which took place on 4 September.<sup>36</sup> The Sir Zelman Cowen Centre is housed in the old Public Records Office building on Queen Street in the Melbourne Central Business District (CBD). As well as the Sir Zelman Cowan Centre, the building houses Victoria Law School's library.

Another outcome of these changes was that Victoria Law School operated its teaching on multiple campuses at Queen Street and Footscray Park. Therefore, within a period of just two years Victoria University inaugurated a new law school, with all the appropriate resources, on a prime site in the centre of Melbourne within the close proximity of both the Federal Court of Australia and the Supreme Court of Victoria. In this respect, Victoria Law School was better placed for contacts with both the judiciary and the legal profession than any other of its more traditional predecessor Victorian law schools.

The ongoing saga of the establishment of a law school at the **Royal Melbourne Institute of Technology University (RMIT)** reflects how persistence can achieve an outcome not originally anticipated. The Council of Legal Education instigated a law course at RMIT purely as an emergency measure to alleviate the lack of law school facilities in Victoria in 1962. This course operated until 1978, with 545 students completing it. Although the course ended in 1978, the RMIT Business Faculty

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<sup>34</sup> Victoria University, 'Annual Report' (Victoria University, 2000).

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

maintained an impressive group of lawyers teaching law-related subjects. After a break of 29 years, in 2007 RMIT introduced a Graduate Juris Doctor (JD) degree program leading to admission as a practising lawyer. This program was based within the RMIT Graduate School of Business and Law. The JD course was unique in that the Graduate School of Business and Law focused on only two programs apart from the JD, the others being a Master of Business Administration and a Master of Business Administration (Executive).

To justify the high cost of the JD course—\$70 560 in total—in 2010 the Graduate School of Business and Law was relocated to The Emily McPherson Building. This was a National Trust property on a prime site in the Melbourne CBD, which the University claimed incorporated 'the latest in multimedia technology, teaching and meeting spaces.'<sup>37</sup>

Another special feature of the JD course was that it deliberately enrolled only a limited number of students who were taught only at nights or weekends, with an alternative teaching mode of a full-time online program for students who moved overseas or interstate because of their work situation.

One of the most recent law schools to be established in Victoria is the one at the **Australian Catholic University (ACU)** (now re-named the **Thomas More Academy of Law**) which was instituted in Melbourne in March 2012 when the Foundation Dean, Professor Brian Fitzgerald, commenced his role. Professor Fitzgerald was a key appointment, having previously been both a specialist research Professor and Head of School at the Queensland University of Technology Law School as well as Head of the School of Law and Justice at SCU. It was intended that the ACU Law School should have a dual campus, with the commencement of law degree teaching at the Melbourne campus in 2013 and in Sydney in 2014. However, there seemed to be a change of policy with regard to the status of the ACU Law School after its establishment in Melbourne and the teaching of the first cohort of students had taken place in 2013. Whilst the ACU Law School retained its place as an integral part of the ACU Faculty Law and Business

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<sup>37</sup> Council of Australian Law Deans, *Studying Law in Australia: A Guide to Australia's Law Schools*, RMIT University -Message from the Dean (17 May 2010) <[www.cald.asn.au.alia/LawSchoolDeansMessage.asp?ID=31](http://www.cald.asn.au.alia/LawSchoolDeansMessage.asp?ID=31)>.

it also took on the title of the '**Thomas More Academy of Law**' with Chief Justice Robert French of the High Court of Australia formally launching the law school under this new name on 13 April 2014.<sup>38</sup>

The difference in teaching ethos characterised by both the ACU and Notre Dame Law Schools as private Catholic universities will be examined later in this chapter. However, like Notre Dame Law School, the Thomas More Academy of Law has emphasised its global connections with the premier United States Law Schools of Georgetown University in Washington and Fordham University in New York.

Nevertheless, there was still a further law school to be set up in Victoria which took place when the **Swinburne University of Technology** announced that it would commence teaching its first intake of law students in 2015. Based on the pattern of many of the new law schools established at this time the school was to be located within the combined Faculty of Business and Law's Hawthorn campus.<sup>39</sup> In view of the increasing criticism of the large number of students graduating from law schools, the newly appointed Dean, Professor Dan Hunter, sought to distinguish the focus of this new law school by the University emphasising that his background of: 'expertise in intellectual property, online environments, business innovation and public policy' would enable the law school to be linked 'to the university's vision to be a leader in science, technology and innovation'.<sup>40</sup>

### 4.3 Queensland

In 1989 **Bond Law School** at Bond University was the first law school to be established following the Pearce Committee's strictures against further law schools in Australia, although it had acknowledged that should there be need for one more law school it should be located in Queensland.<sup>41</sup> However, the Committee might not have contemplated making that statement if it had known that the outcome would result in

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<sup>38</sup> Australian Catholic University, *Thomas More Law School Opens* (2 May 2014) <[http://www.acu.edu.au/connect\\_with\\_acu/newsroom/news/media\\_releases/repository/](http://www.acu.edu.au/connect_with_acu/newsroom/news/media_releases/repository/)>.

<sup>39</sup> Swinburne University of Technology Media Centre, *Australia's Newest Law School Ready for Students in 2015* (24 November 2014) <<http://www.swinburne.edu.au/media-centre/news/2014/11/australias-newest-law-school-ready-for-students-in-2015.html>>.

<sup>40</sup> Swinburne University of Technology Media Centre, *Professor Dan Hunter Appointed Dean of Swinburne Law School* (19 August 2014) <<http://www.swinburne.edu.au/media-centre/news/2014/08/professor-dan-hunter-appointed-dean-of-swinburne-law-school-.html>>.

<sup>41</sup> Pearce, Campbell and Harding, above n 3.

the establishment of the first law school at an Australian private university, Bond University on the Gold Coast in Queensland. Its commencement was hardly promising. Eric Colvin, a foundation professor at the law school, has described how '[i]n May of 1989, the school welcomed its first students, 97 adventurous spirits who waded through the sea of mud engulfing a half-completed campus.'<sup>42</sup> Because of its private status it was not constrained by the bureaucracy encountered by law schools in the public universities, nor did it have the financial burden of cross-subsidising other subject disciplines. For this reason it was able to recruit a significant number of highly regarded law academics from other Australian law schools and overseas. These included Professor Tony Tarr, the Foundation Dean of the School, Adjunct Professor John Farrar, a New Zealander who later became Dean from 1993–95 and Acting Vice-Chancellor of the University 1995–96, Professor Colvin from Canada, later appointed Dean in 1996, and Professor Jim Corkery. Professor Colvin explained the independent status of Bond University as follows:

Being private also meant that we could operate in innovative ways. We would look to models from commercial enterprise rather than public sector bureaucracies. There would be collective goals but individual responsibility for making a contribution; the authority-structure would be flat and the lines of reporting would be short; there would be sanctions for poor or mediocre performance but rewards for achievement.<sup>43</sup>

Another advantage that Bond Law School had over many other Australian law schools was that it could operate with weekly tutorials involving small interactive groups. It also taught on a three semester a year basis, which meant that students were able to study more intensively and thus complete their degree more quickly. It was also one of the first law schools to introduce student evaluation of all subjects every semester.

The success of Bond Law School's focus on incorporating training in practical skills into the curriculum could be measured by its triumph in the 1999 Australian Round of the Jessup International Law Moot Competition. As Colvin comments: 'This was the first time that the Australian Round had been won by any team outside the *big eight* universities, and also the first time that it had been won by any team from

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<sup>42</sup> Eric Colvin, 'Bond Law School: Reflection on the First Ten Years' (1999) 10 *Bond Law Review* 1.

<sup>43</sup> Ibid 163.

Queensland.’<sup>44</sup> The other issue at Bond Law School which is a cause for ongoing discussion throughout the legal community is finding a balance between ‘divergent academic and professional concerns in legal education.’<sup>45</sup> This does not appear to have caused any dissension at Bond Law School. The view there appears to be:

That divergence has never been accepted at Bond. We have taken the structure of good professional practice as setting a framework for law as an academic discipline. The practice of law is not, or at least should not be, a trade. It is a learned profession with theoretical and critical components. These theoretical and critical components become focal concerns in an academic context but their roots in professional practice should always be remembered. There may be other also defensible visions of law as an academic discipline. But that is the one which has shaped the curriculum at Bond.<sup>46</sup>

**James Cook Law School** was established in 1989. Its first students were admitted in 1990 to an LLB program being offered on both the Townsville and Cairns campuses of James Cook University. Justice John Dowsett of the Supreme Court of Queensland, and later a Judge of the Federal Court of Australia, has provided a fascinating insight as to the reason why James Cook University was permitted to host a law degree program.<sup>47</sup> Justice Dowsett explains that although the University had been teaching law subjects for many years there had been no suggestion that it would have an accredited law degree in the foreseeable future. But then:

Suddenly, at a monthly Judges’ meeting in Brisbane, we were asked to accredit a law degree course at James Cook. The folklore of the Supreme Court is that the Northern Judge, Sir George Kneipp, who was also the Chancellor of James Cook, had decided that it was time for a law degree to be taught in the north. He allegedly had gone ahead without reference to his colleagues on the Court, more importantly and audaciously, without the Commonwealth’s approval. Whether the story is true or not, I am sure it is substantially true, I have no doubt that George Kneipp had the courage, standing and foresight to have done just that.’<sup>48</sup>

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<sup>44</sup> Ibid 164.

<sup>45</sup> Ibid 163.

<sup>46</sup> Ibid.

<sup>47</sup> John Dowsett, 'The Law and the Legal Profession: Expectations and Reality' (2004) 11 *James Cook University Law Review* 4.

<sup>48</sup> Ibid 5.

As at 2014 James Cook Law School had approximately 450 students, mostly undergraduates, with an annual intake of 180 students each year. For a considerable period Professor Stephen Graw has been the Head of School. An extremely experienced law academic, Professor Graw served as the Chair of CALD from 2012 to 2014. Because James Cook Law School recruits from a broad cross-section of students including many mature students, and in recognition of the changing needs of the legal profession, it completely redesigned its first year program which was introduced for students who commenced their legal studies in 2005.

**Griffith Law School** was founded in 1992. It was appropriate that Griffith University, named after the first Chief Justice of the High Court of Australia, should eventually incorporate a law school into its establishment. It is one of the larger Australian law schools with an annual intake of at least 400 undergraduate law students. It also has a strong postgraduate department with an enviable culture of social justice.

The undergraduate law degrees are taught on Griffith University's campuses at Nathan and the Gold Coast. The postgraduate and professional programs are located at the Legal Practice Centre on the University's South Bank campus in the centre of Brisbane. Recognised strengths of its postgraduate program are migration law and practice, cultural legal studies, international law and institutions, domestic governance and intellectual property. One of the long-term features of Griffith Law School has been its Innocence Project which involves law students working with qualified practising lawyers to investigate and, where possible, assist in claims of wrongful conviction.

The **University of Southern Queensland (USQ) Law School** owes its establishment in 2005, and the development of its law programs, to the enthusiasm and energy of Professor Rosalind Mason who commenced teaching in the Department of Law in Toowoomba as a lecturer in 1988. In an interview she has recounted how, as Head of the Law Group within the Business School, she developed the law degree mainly out of the current law subjects which were then available as part of the Bachelor of Business degree.<sup>49</sup> Since the accreditation of its law programs by the Legal Practitioners Board of

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<sup>49</sup> Interview With Rosalind Mason, Professor and Head, Law School, QUT (Sydney, 23 August 2013).



Queensland in 2005, the USQ Law School has offered both the LLB and the JD qualification under the current Head of School, Professor Mike Robertson.

The penultimate law school to be located in Queensland is the **Central Queensland University (CQU) Law School** which was launched in 2011 by the Honourable Michael Kirby, a former Justice of the High Court of Australia. The LLB and JD programs of this law school are unique in Australia in that, from the very beginning of the law school, they have been taught wholly online. It is claimed that this form of online instruction selected for delivering the CQU law course is a response to 'several particular demands which arise in regional and rural Australia ... especially the State of Queensland.'<sup>50</sup> The online law program now has the added advantage that the Head of the Law School is Professor Stephen Colbran, who is regarded as one of the outstanding online legal educators in Australia. This expertise was recognised in 2014 when he received a Teaching Excellence Award during the Australian Awards for University Teaching in Canberra, being only one of 16 award winners across the whole tertiary sector.<sup>51</sup>

Because the University has a large number of campuses in Queensland stretching from Brisbane in the South to Cairns in the North, it is also able to provide mentors within these campuses to supply practical support to students studying online.

The latest law school established in Queensland was the **Sunshine Coast Law School** which was initially integrated into the University of the Sunshine Coast's Faculty of Arts and Business. In November 2012, the University advertised for applications for the position of the Inaugural Professor of Law<sup>52</sup> and, breaking with convention, made a joint professorial appointment to a husband and wife team, Professors Neil and Anne

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<sup>50</sup> The Hon. Michael Kirby, 'Online Legal Education: The New CQU Law Degree' (Speech Delivered at the Launch of the CQU Law Course, The Central Queensland University, 9 May 2011).

<sup>51</sup> Central Queensland University, *CQUNI Law Lecturer Wins National Teaching Award* <<http://www.cqu.edu.au/cquninews/stories/general-category/2014/cquni-law-Lecturer-wins-national-teacher-award>>.

<sup>52</sup> *Advertisement - Inaugural Professor of Law - University of the Sunshine Coast* <<http://www.usc.edu.au/university/jobs-at-usc/inaug-prof-law.htm>>.

Rees who also share responsibility as Co-Heads of the Law School. Both professors have served at some time as Dean of the University of Newcastle Law School.<sup>53</sup>

#### 4.4 Western Australia

Western Australia was one of the last states to have a law school, the University of Western Australia being established in 1927. This remained the only law school in the State until the founding of the **Murdoch Law School** at Murdoch University in 1990. As in other Australian States, the impetus for the creation of an additional Western Australian law school was an undersupply of graduate lawyers in the State. Again, the development of this law school was influenced by the appointment of an outstanding candidate as Dean. Ralph Simmonds was appointed Foundation Professor in 1990 and Dean in 1991. Professor Simmonds had previously been an Associate Professor and Associate Dean of McGill University in Montreal, Canada.

Originally the law program was located in the School of Economics and Commerce but in 1992 Murdoch Law School separated. Professor Simmonds had stated that one of the major aims of the new Murdoch Law School was:

To formulate a program of study that meets the requirements of the governing bodies of the West Australian legal profession for recognition for admission to articles of clerkship. But we will also offer the scope of earning two degrees through a carefully structured program of joint study of law and another major discipline.<sup>54</sup>

In his recollections of his time at Murdoch Law School, Professor Simmonds commented on the advantage that Murdoch had in its early days in that its small initial number of 50 students afforded him the opportunity to get to know all the members of the first law school student cohort. This advantage was gradually eroded as subsequent intakes grew in number. However, early ambience of friendly relationships between staff and students has remained a feature of the Murdoch Law School. As another Foundation Professor Michael Pendelton has remarked:

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<sup>53</sup> University of the Sunshine Coast, *University Appoints Two Professors of Law* (Edition 1, 2013) <[www.usc.edu.au/university/news-and-events/community-magazine/previous-issues/edition-1-2013](http://www.usc.edu.au/university/news-and-events/community-magazine/previous-issues/edition-1-2013)>.

<sup>54</sup> Philip Evans and Gabriel Moens (eds), *Murdoch Law School: The Search for Excellence* (Murdoch University, 2010) 8.

The first intake of Murdoch law students was an eclectic mix—far from typical law students but all enthusiastic for the new law school ... A significant cohort of mature age students marked these students aside from law students at UWA which at that time required a year of study in another course before transfer to law.<sup>55</sup>

Murdoch was given its early stability because Professor Ralph Simmonds remained as Dean until 2003 except for a break from July 1995 to November 1996. This period marked the significant development of two lasting features of the Murdoch Law School. These were the establishment in April 1992 of an electronic law journal, and the formal opening of Murdoch's Student Legal Advice Office in May 1993 by Sir Ronald Wilson, a Justice of the High Court. This became the foundation for Western Australia's first legal clinic, the Southern Communities Advocacy, Legal and Education Service Inc (SCALES), which was opened in 1997 by the Hon Daryl Williams, the federal Attorney-General.

In Professor Simmonds' view the most important initiative of Murdoch Law School was the fundraising campaign for a new university law library. This campaign resulted in non-government sources committing \$1.8 million by the middle of the first year of teaching of the law program in 1990. The total cost of the library was \$6.5 million, which was raised from a variety of government and non-government sources. However, Professor Simmonds believed that other advantages eventuated from the library fundraising campaign, particularly in establishing links with the legal profession:

In this enterprise of forging strong links with the legal profession, the law library campaign was enormously helpful. Not only did it bring us to the attention of those who might otherwise only have been able to take a passing interest in our operation, it also helped our relations with firms and individuals with particular talents and interest to contribute to our teaching. Our first year tutorial staff and some of our more innovative teaching in our first years were in large part products of the campaign.<sup>56</sup>

While he continued as Dean of Murdoch Law School, Professor Simmonds was appointed as a Commissioner of the Western Australian Law Reform Commission from

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<sup>55</sup> Ibid 120.

<sup>56</sup> Ralph Simmonds, 'From Foundation to Ordinary Politics: Staffing, Financing and Promoting the School of Law at Murdoch University' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 161.

1996 to 2004, becoming its Chair in 2001. In 2004 he was appointed as a Justice of the Supreme Court of Western Australia, one of the select group of law academics in Australia to achieve promotion to the judiciary.

Following a comparatively small break, between November 2003 and September 2005, when it was served by two interim deans, Murdoch was fortunate to appoint another long-term Dean, Professor Gabriel Moens, who served from 2005 until 2012. Professor Moens was also a law academic with a formidable reputation as a law teacher having been awarded (jointly), the 1999 Australian Award for University Teaching in law and legal studies. He had previously been the Garrick Professor of Law at the University of Queensland, apart from also occupying appointments at both Australian and numerous overseas tertiary institutions. He was responsible for Murdoch Law School developing many prestigious international programs and also for developing its moot culture.

There was a break of seven years before the foundation of another law school in Western Australia, the **University of Notre Dame Australia Law School** in Fremantle in 1997. The Foundation Dean was Professor Greg Craven, an outstanding law academic who subsequently became Vice-Chancellor of the Australian Catholic University. His term as Dean was commemorated by the re-naming of the Law School's library in 2003 as the 'Greg Craven Law Library'. As mentioned earlier in this chapter, another Notre Dame Law School was established in Sydney in 2006.

There was a further break of eight years before the foundation of the next law school, with the establishment of the **Edith Cowan University Law School** in 2005. The Foundation Head of School was Professor Paul Moyle who was previously an academic at the University of Western Australia Law Faculty. Professor Moyle had a particular interest in the sociology of law, having published two texts relating to the conduct and management of prisons.<sup>57</sup> He was therefore an ideal choice for a law school that was going to have a focus on law and justice studies. Professor Moyle took an interest in legal education, being for some time the convenor of the Legal Interest Group of ALTA

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<sup>57</sup> Graeme Coss and Anne Duffield (eds), *Australasian Law Teachers Association, Directory of Members* (LBC Information Services and the Australasian Law Teachers Association, 2003).

and, also for the period 2005–2007, its Chair.<sup>58</sup> This tradition of Law and Social Legal Studies is still carried on at Edith Cowan University, with the most recent appointment of Head of School in August 2012 being Professor Anne Wallace, who was described by the Edith Cowan University Vice-Chancellor, Professor Kerry Cox as '[h]aving strong connections in courts and justice agencies in Australia as a result of her considerable professional legal experience as Deputy Director of the Australasian Institute of Judicial Administration (AIJA) and as a Principal Solicitor for the Australian Government Solicitor, Tasmanian Office.'<sup>59</sup>

Western Australia's latest law school, established in 2012, is **Curtin Law School**. Curtin University (Curtin) was able to appoint Professor Paul Fairall as its Foundation Dean of Law. Professor Fairall is regarded as one of Australia's most experienced and longest serving law deans. Previously he had completed a five-year term as Foundation Dean of Law at the University of South Australia, prior to which he had been the Dean of Law at the University of Adelaide and James Cook University. He had also served as Chair of CALD from 2001 to 2002.

His previous experience, and the fact that Curtin had had a large contingent of law academics already teaching business and tax law, enabled Curtin Law School to make an early start on developing a law degree, which was quickly approved by the Legal Practice Board of Western Australia. At this stage, the accreditation was assisted by the fact that Curtin opted for a conventional four-year law degree program with a variety of options of double-degree programs. Prior to this accreditation, Curtin had made two failed attempts to establish a law school but, as Paul Fairall commented in an interview, the fact that the proposal was for an orthodox law degree program probably made it more acceptable to the Legal Practice Board.<sup>60</sup> This early accreditation of the law degree enabled Curtin Law School to enrol 120 students in the first semester in 2013. Apart from this, Professor Fairall was able to gain some added prestige for the newly

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<sup>58</sup> Australasian Law Teachers Association, *List of Former Chairpersons* <[http://alta.edu.au/resources/PDFs/ALTA%20Officers/Former%20Chairpersons%20of%20ALTA%20\(Updated%20April%202012\).pdf](http://alta.edu.au/resources/PDFs/ALTA%20Officers/Former%20Chairpersons%20of%20ALTA%20(Updated%20April%202012).pdf)>.

<sup>59</sup> Edith Cowan University, *Vice-Chancellor's News: New Head of School of Law and Justice* (3 August 2012) <[www.ecu.edu.au/about-ecu/vice-chancellor/vice-chancellors-news/2012/new-head-of-school-of-law-and-justice](http://www.ecu.edu.au/about-ecu/vice-chancellor/vice-chancellors-news/2012/new-head-of-school-of-law-and-justice)>.

<sup>60</sup> Interview With Paul Fairall, Professor and Dean, School of Law, Curtin University (Canberra, 30 September 2013).

established law school by being involved in the appointment of the Chief Justice of Western Australia, the Hon Wayne Martin as the inaugural Chair of the Advisory Board of Curtin Law School. The fact that Western Australia's newest law school was able to have a major member of the State's judiciary was a major coup for the law school over the longer serving law schools in the State. As Professor Fairall acknowledged: 'Advisory boards provide partnership platforms between CBS [Curtin Business School] and industry leaders to shape our education, our research and our future direction. The Chief Justice's chairing of the Law School Advisory Board will enhance this collaboration as we start offering the LLB from first semester next year.'<sup>61</sup>

#### 4.5 South Australia

Adelaide Law School remained the pre-eminent and only University law school in South Australia until the establishment of **Flinders Law School** in 1992. The Foundation Dean was Professor Rebecca Bailey-Harris. She had been a senior lecturer and Dean of the Faculty of Law at the University of Adelaide prior to her taking up the appointment at Flinders University in 1991. In a tribute to her in the first edition of the *Flinders Journal of Law Reform* in 1995, Tony Moore emphasises that, on her appointment in 1991, Professor Bailey-Harris was the only staff member of Flinders Law School and, until the end of her term as Dean in 1994, the only Professor. Her dedication to Flinders Law School was also marked by the fact that during her term she chaired every meeting of the Board of the Law School and, prior to its establishment, the interim body to establish the law school.<sup>62</sup> She also served as a part-time Commissioner of the ALRC for the period 1991–1995. She had to return to her home city of Bristol in the United Kingdom in 1994 due to family illness. However, this did not prevent Bailey-Harris from continuing to have a distinguished academic career as a Professor at the University of Bristol until she retired as an Emeritus Professor in 2005, whilst continuing with a successful practice as a barrister at 1 Hare Court, Temple, London.

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<sup>61</sup> Curtin University, *Curtin News: WA Chief Justice Appointed New Curtin Law School Advisory Board Chief* (29 October 2012) <<http://news.curtin.edu.au/media-releases/wa-chief-justice-appointed-new-curtin-law-school-advisory-board-chief/>>.

<sup>62</sup> Anthony Moore, 'Tribute to Rebecca Bailey-Harris' (1995-1997) 1 *Flinders Journal of Law Reform* 1.

Bailey-Harris was followed as Dean by Professor Andrew Stewart, formerly of Sydney Law School, who served in this position from 1994–1997. It was during his term as Dean that Flinders Law School hosted the ALTA Conference in 1996. This was an important gesture by a young law school to take on the task of organising a major law conference so early in its existence. This meant that Andrew Stewart was required to serve as President of ALTA for the period 1995–1996. At the same time, he was also Chair of what was then known as the Committee of Australian Law Deans during the period 1996–1997. In 1997 he was replaced by Associate Professor Tony Moore who was first Dean until 2000 and then remained at Flinders Law School until his retirement as a full-time academic in September 2004. As in other states, Flinders Law School was established to help meet an overwhelming demand for university places in law which could not continue to be satisfied by the University of Adelaide, the sole law school in South Australia until the founding of Flinders Law School. It has been an innovative law school in that, apart from its Bachelor of Laws degree in 1999, it introduced a Bachelor of Laws and Legal Practice degree whereby students were able to meet all the requirements for admission to practice as part of their undergraduate law degree. This came about because of an agreement between Flinders Law School and the Law Society of South Australia whereby Flinders law students undertook a subject taught by the Law Society. The justification for this arrangement has been described by Flinders Law School as follows:

The incorporation of practical legal training into the degree flows from a philosophy articulated from the establishment of the Flinders law degree whereby skills training is integrated with the study of substantive law topics. These skills enhance the appreciation of the ways in which legal rights and obligations are given effect in practice but are relevant to almost all applications of legal knowledge not restricted to legal practice.<sup>63</sup>

South Australia remained a two law school state until the establishment of the **South Australia (SA) School of Law** in 2007. There was an unusually long delay in establishing the SA School of Law. The University of South Australia had been established in 1991 and since that time there had been a strong critical mass of law academics in the Department of Business. The moving force in the development of the

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<sup>63</sup> Flinders University Law School, *Information Sheet*  
<[www.flindeds.edu.au/jehl/law/fls/fls\\_home.cfm/](http://www.flindeds.edu.au/jehl/law/fls/fls_home.cfm/)>.

SA School of Law was Professor Paul Fairall who later occupied the same role in the establishment of the Curtin Law School. He had been the Dean of the Adelaide Law School prior to taking up his appointment with the University of South Australia.

Although the LLB program is taught over four years the University of South Australia made it possible for students to complete it within three years. Students were also given the opportunity to commence their studies in any of the three university terms, starting in February, June or September. On a similar basis to that at Flinders Law School there was provision for students to gain admission to the Law Society of South Australia's Graduate Diploma of Legal Practice in the last year of their undergraduate studies, thus enabling them to be admitted to practice as soon as they had graduated with their law degree.<sup>64</sup>

One of the advantages that the new SA School of Law had was that, despite that the University of South Australia is spread across many campuses within the State, it was located in Adelaide.<sup>65</sup> On his departure to Curtin at the end of 2011, Professor Fairall was replaced in March 2012 as Dean by Professor Roman Tomasic, another experienced law academic who had been involved in the foundation of both Victoria Law School, Melbourne and Canberra School of Law and Justice. Prior to moving to South Australia Professor Tomasic had been Professor of Company Law at the University of Durham Law School, one of the United Kingdom's oldest and prestigious law schools.<sup>66</sup> However, Professor Tomasic only served as Dean until November 2012 although he has remained at SA School of Law as a Professor.

#### 4.6 Northern Territory

Because of the size of its population (245,100 in 2014),<sup>67</sup> it is not surprising that the Northern Territory only has one university; Charles Darwin University. Previously known as the Northern Territory (NT) University, it was founded in 1989 by the merger of the Darwin Institute of Technology and the University College of the Northern

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<sup>64</sup> Council of Australian Law Deans, above n 37.

<sup>65</sup> Interview With Paul Fairall, Professor and Dean, School of Law, Curtin University (Canberra, 30 September 2013).

<sup>66</sup> Roman Tomasic, 'Staff-Profile Roman Tomasic' (Edition Two, ALTA Newsletter, Australasian Law Teachers Association, 2012) 18.

<sup>67</sup> Australian Bureau of Statistics, *Australian Demographic Statistics Jun 2014, Cat No 3101.0* (ABS, 2014).



Territory—yet another merger instigated by the federal Minister of Education, John Dawkins. The University College of the Northern Territory had been formed in 1987 following an agreement between the Commonwealth government and the University of Queensland that, for a five-year period from 1987 to 1991, the College would award degrees from the NT University. This agreement continued for some time after the 1989 merger had taken place. A further merger took place in August 2003 when, as a result of an initiative of the interim Vice-Chancellor of the University, Professor Ken McKinnon, the Northern Territory Legislative Assembly enacted the Charles Darwin University Bill. This merged the NT University with the Alice Springs' Centralian College to form the Charles Darwin University, which came into operation from 1 January 2004.

The **NT/Charles Darwin Law School** has had a varied and chequered career. Law teaching first commenced in 1987 when the first and second years of the University of Queensland undergraduate law degree was offered through the University College of the Northern Territory arts degree program.<sup>68</sup> On the establishment of the NT University in 1989, the NT Law School was administered as a school of law within the NT University's Faculty of Arts. The University of Queensland agreement was varied to enable a full law degree to be awarded at the new NT University.

In 1990 Ned Aughterson was appointed as the Foundation Professor of Law. In 1991 a separate NT University law degree replaced the University of Queensland law programs, which were finally phased out in 1993. Professor Aughterson was appointed as Foundation Dean in 1992 on the establishment of a separate Faculty of Law and continued in this role until 1996. During his term a Centre for Southeast Asian Law was established. The NT Law School also introduced an external master's degree program in comparative law. When Professor Aughterson relinquished his position as Dean he was replaced by Professor Jenny Blockland who had taken up a position as a lecturer in law at the faculty in 1990. Professor Blockland left the faculty in 1998 to follow a distinguished career within the Northern Territory as Magistrate in 2002, Chief Magistrate in 2006 and as a Justice of the Supreme Court in 2010.

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<sup>68</sup> Austin Asche, 'Law's Illustrious Past, Bright Future: School of Law 20th Anniversary' (Charles Darwin University, 2006) 26.

In 1998 law was taught within a newly formed School of Law, Business and Arts. In 2003 NT University began referring to 'law' as a 'discipline' within the School of Law and Business. Ned Aughterson retained his position as Professor at Charles Darwin Law School either on a full-time or part-time basis. It was in the role of Head of the Law Discipline that he presided over the ALTA Conference, which was held at Charles Darwin University in 2004.

#### **4.7 Australian Capital Territory**

The **Canberra School of Law and Justice at the University of Canberra** had its origins in the Canberra College of Advanced Education, first established in 1965. It became the University of Canberra under the sponsorship of Monash University in 1990. Roman Tomasic, who had worked for the Law Foundation of NSW and at the University of Wisconsin-Madison in the United States of America and completed a PhD at the University of NSW and an SJD at Wisconsin-Madison, became Head of the Law Discipline at the Canberra College of Advanced Education in 1985. He was appointed the Foundation Professor of Law in 1989 and was instrumental in the development of the new school of law by serving as its inaugural Head of School. He was also elected as the Chair of the University Academic Board. There is no doubt that Professor Tomasic played a major role in the development of both the University of Canberra and Canberra School of Law during his 15 years there.

The Canberra School of Law does not appear to have been overshadowed by the only other law school in the Australian Capital Territory, the prestigious ANU. This might be because it has focused on a limited number of research strengths in commercial and corporate law, revenue law and justice studies. With regard to the latter the Canberra School of Law introduced a Justice Studies program in 2008 which focused on preparing students for careers in the justice sector including court and tribunal management, law enforcement, and justice policy and administration. This is not meant to detract from the fact that it offers a full range of undergraduate and postgraduate programs, apart from its high reputation for its advocacy training which is based on a state-of-the-art electronic moot court.

## 5. The Effect of 'Third Wave' Law Schools on Legal Education

The ever increasing number of law schools in Australia has nearly come to an end. Of the public universities there is now only one; the Federation University Australia (the former University of Ballarat) which does not now support a law school. However, there is no reason to believe that, at some time in the future, this one remaining tertiary institution will not also adopt a law degree program within its undergraduate or postgraduate course offerings.

One of the major arguments advanced for tertiary institutions wishing to introduce law programs is that they are relatively cheap to teach and, therefore in federally funded universities, there is the opportunity for law programs to cross-subsidise other programs. Although this argument would have been true in the past, particularly with regard to the more traditional law universities, there has been a change of attitude towards such a policy, much of it brought about by law students. An increasing proportion of students studying law already have a prior degree, which is a prerequisite for anyone enrolling in a JD program. These mostly mature students will already have been funded on a Higher Education Contribution Scheme (HECS) basis and therefore will need to be self-funded, usually by obtaining a government (fee-help) loan. This means that they will have a greater interest in obtaining value for money and ensuring that their law programs are appropriately resourced and that their teaching is effectively assessed and monitored.

One attempt to discover themes or trends which distinguished the 'Third Wave' law schools was made in a text published in 1998 and edited by John Goldring, Charles Sampford and Ralph Simmonds.<sup>69</sup> Allowing for the passage of 17 years, guidance can be gained from some of the articles contained in this book. The most helpful article is that by Ralph Simmonds<sup>70</sup> whereby he places the newer, 'Third Wave' law schools within the context of Australian law schools generally. He explains that up until 1997 most of the 'Third Wave' law schools could be numbered among a grouping of small

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<sup>69</sup> John Goldring, Charles Sampford and Ralph Simmonds, *New Foundations in Legal Education* (Cavendish Publishing, 1998).

<sup>70</sup> Ralph Simmonds, 'Growth, Diversity and Accountability' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing Australia, 1998) 55, 55.

(100 to 299 students) or medium (300 to 599) as compared to the three larger groups, larger (600 to 999), large (1000 to 1499) and very large (1500 to 2000).<sup>71</sup> It could be accepted that this trend in size has been followed by the subsequent law schools formed since Ralph Simmonds reached this conclusion. Examination of the profiles of these newer law schools would indicate that most of them built on their existing infrastructure of law academics already employed by the host university—usually in departments of business or, to a lesser extent, social science or arts departments—who have more easily converted to teaching law degree programs. The existence of these law academics in situ has encouraged the development of joint degree or combined degree programs often, but not always, involving combined or joint LLB and Bachelor of Business degrees. It appears that because of the background of a more generalist approach already existing among current law academics transferred to the new law schools, there has been a greater tendency to adopt law related programs such as 'Justice' or 'Law and Society Studies' in addition to the more traditional law degrees.

Ralph Simmonds was also of the view that there was a greater emphasis on innovation in teaching and assessment strategies in the 'Third Wave' law schools than had occurred in the earlier law schools. In his view:

Within fairly significant resource constraints, there have been considerable efforts made to proceed in ways which are consistent with the lessons of good tertiary teaching. These have yielded formats such as mixed model lecturing (classes breaking up into small groups for group tasks); resource-based strategies, using work students complete on their own (inspired by distance or external learning experiences; computer-mediated group work particularly through local networks); and continuous assessment strategies, such as mixtures of legal essays, multiple choice and oral presentation forms, and peer assessment.<sup>72</sup>

This would certainly be true at the time that Ralph Simmonds made this statement and as reflected in the approaches adopted by law schools founded subsequent to 1998. However, it would be fair to support the view that such innovations and those which have followed, particularly as a result of technical advancements in teaching techniques,

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<sup>71</sup> Ibid 56–7.

<sup>72</sup> Ibid 63.

would now have been adopted by most, if not all, Australian law schools. Certainly the evidence can be accepted on the basis of the papers given at the Annual Conferences of the Australasian Law Schools or contained in such journals as the *Australian Law Education Review* or the *Legal Education Digest*.

Michael Chesterman, another leading commentator on Australian legal education and a former Dean of the University of NSW, also had some informative comments to make in the same text.<sup>73</sup> Again, making allowances for the fact that the article was published in 1998, it is still pertinent with regard to both law schools established during the period 1989–1997 and following it until the present time. He stated that:

During the 1990s, each of the new law schools, on or after their conception or birth, has had to determine its individual niche ... this has been done in a climate which has been hostile in one respect but in at least one other way has been relatively favourable. The climate has been hostile in so far as the new law schools have been told regularly and forcefully by practitioners, politicians and sundry other pundits—relying mostly on crude comparisons between current numbers of law students (most of them part-time) and practising lawyers (most of them full-time) in Australia—that the last thing that this country needs right now is more law schools. The favourable factor is that the existing law schools, through channelling much of their educational growth during the 1980s and the early 1990s in the directions which I have mentioned, left many gaps in legal education which could be filled by the new players in the field. A brief survey of the new schools paying attention to their public aspirations rather than their specific achievements ... shows that they did indeed try and fill these gaps.<sup>74</sup>

In agreeing with the views of Simmonds and Chesterman, there seems little doubt that the 'Third Wave' law schools have made a considerable impact on the manner in which legal education in Australia has developed over the last two decades. In this author's view, one of the major influences has been the substantial increase in both the number of law staff and students forming a critical mass among their respective universities. Their influence is not to be underestimated when the provision of teaching and

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<sup>73</sup> Michael Chesterman, 'The New Law Schools: What's New in Them?' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, Australia, 1998) 204, 204.

<sup>74</sup> Ibid 205.

administrative resources relies, to a major extent, on the pressure exerted within relevant academic boards and committees.

Another important effect has been the reconceptualising of teaching across the whole of the legal education spectrum. As mentioned above, the majority of new law schools were at first mostly staffed by law academics who had been employed in other subject areas within the same university. They would have been recruited principally from the university's business faculty or department which, because they would have normally been involved in teaching far larger numbers of students than the traditional law school, would have had to develop innovative forms of teaching. It was entirely coincidental that, at the time this occurred, there was also a major expansion in the use of information technology both for learning and teaching. Not only did this new digital technology provide a form of integrated learning; it also prepared students for the development of online communication skills, which they would be required to use when they entered the legal office environment. Additionally, as has been evidenced in the individual accounts of the 'Third Wave' law schools in this chapter, many of them—such as Deakin Law School, UNE School of Law, CQU Law School, USQ Law School, and Charles Sturt Law School—have expanded their distance learning programs through the use of digital technology.

Although the original emphasis within the CAEs and the resulting enlarged university systems had been on teaching, one of the further outcomes of the Dawkins reforms was the redistribution of research funding across the whole of the tertiary sector. This had implications for the more traditional university law schools as it meant a reduction in their research funding allocation. Forsyth has described the outcome of this action as follows:

For research funding to be spread across the enlarged university system, government decided to claw back \$65 million from the older universities; this would be redistributed to all institutions, on a competitive basis, for research that aligned to the national interest. The Australian Research Council was established in place of the Australian Research grants committee to facilitate the change.<sup>75</sup>

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<sup>75</sup> Forsyth, above n 7.

In normal circumstances, the newer law schools would have been handicapped by a lack of library resources as compared to those possessed by the traditional law schools. However, the provision of online resource materials such as e-journals, law reports and databases (particularly those provided by AustLII) led to a more level playing field for all law schools. This has meant within the modern research paradigm with its influence on acquiring research quantum that 'Third Wave' law schools have proved, in some circumstances, more than capable of competing for external competitive grants, Australian Postgraduate Award grants for higher degree research, refereed publications and research consultancies. In the most recently published Australian Research Council (ARC) ratings in 2011, the "Third Wave" law schools at the following universities were rated at Level 3 (World Level): Australian Catholic University (this, prior to the establishment of the law school), Flinders University, La Trobe University, University of South Australia and the University of Wollongong.<sup>76</sup>

While the growth of 'Third Wave' law schools has led to many improvements in legal education since 1989, another feature of this expansion has given rise to some controversy, in particular the increase in number of law schools has been criticised. This has raised the question whether the growth in law schools has led to an oversupply of law graduates resulting in the subsequent failure for them all to be absorbed within the legal profession. Major consideration to the question of 'Are there too many law graduates?' will be addressed in the final chapter of this thesis. At this stage it can be observed that while the newer law schools have obviously increased the size of the legal population, their focus on the diversity of the law programs provided for their students, such as the provision of joint and combined degrees, has offered these law graduates a wider choice of career options in law-related employment.

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<sup>76</sup> Australian Government, *Australian Research Council, Field of Research Results, ERA Ratings for 1801 (HCA) - Law* <[http://www.arc.gov.au/era/outcomes\\_2010/FoR/HCA1801](http://www.arc.gov.au/era/outcomes_2010/FoR/HCA1801)>.





## Chapter 8

### External Factors Affecting Australian Legal Education

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#### 1. Stakeholders in Legal Education

Whilst legal education in Australia is primarily concerned with the development of individual Australian law schools, they are subject to various power relations brought to bear on them by a diversity of external influences. Fiona Cownie, a leading English legal academic and commentator, has described this exercise of influence as:

power relations which are played out in university law schools as a result of the different pressures exerted upon them by a range of different 'stakeholders.' From students to governments, from lawyers to universities, a host of institutions and actors believe that law schools should take account of a vast number of (often conflicting) considerations when teaching their students, designing curricula, carrying out research and so on.<sup>1</sup>

This chapter examines who these stakeholders are in Australian legal education and how much influence, if any, they exercise over law schools in Australia. To a certain extent the degree of external influence exercised is dependent on the size and influence of individual law schools, and their standing and prestige. In discussing the future of English law schools, Fiona Cowie and Anthony Bradney express the following concern, which could just as easily be applied to Australian law schools: 'over the two next decades law schools will increasingly be driven to do things that they do not want to in response to outside pressures but they can retain a substantial degree of control over their own destinies if they are willing to invest the time and effort.'<sup>2</sup>

It is also relevant to consider how this influence has been beneficial to legal education and to what extent it has also served the interests of stakeholders. It is evident that as federal and state governments provide funding for the academic and professional stages of legal education they have been able to exercise undue, if not absolute, influence over the resourcing of law programs. The first part of this chapter demonstrates that governmental policy has facilitated a lower level of resources for law programs, aiding university administrations to use part of law school students' contributions towards the cost of their tertiary education to cross-subsidise the programs of other subject disciplines within the sector.

Whilst more subtle, the influence of the admission boards has been equally absolute in exercising on behalf of the Chief Justices complete control over those who may gain entry as legal practitioners, whether as barristers or solicitors. This has meant that they can require the insertion of selective core areas of substantive law within the curriculums for the academic and the practical legal training stages for admission as a legal practitioner, whilst also stipulating the appropriate length of such programs.

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<sup>1</sup> Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010) inside cover page.

<sup>2</sup> Anthony Bradney and Fiona Cownie, 'British University Law Schools in the Twenty-First Century' in David Hayton (ed), *Law's Future(s)* (Hart Publishing, 2000) 1, 12.

The latter part of this chapter examines the influence of ‘ad hoc law associations’, which represent specialised groups of equally important stakeholders, whether lawyers, law academics or law students who all have a vested interest in the successful promotion of legal education. The question is how successful these associations have been in defining the role of legal education, considering their influence is predominantly exercised by lobbying the authorities responsible for exercising control over the funding and accreditation of law programs for entry into the legal profession.

## 2. Government Funding

How government funding has influenced the quality of law degree programs is a theme that Margaret Thornton has highlighted in a book, *Privatising the Public University*, in which she states that:

Because of the upheavals in governance, there is considerable tension, if not an overt power struggle between management and academics everywhere which is inevitably exacerbated by declining resources. It is paradoxical that the extent of government control has been ratcheted up as government funding has declined.<sup>3</sup>

This contrasts with the earlier Australian Law Reform Commission (ALRC) Discussion Paper 62 of August 1999, which commented that the number of law schools had more than doubled to 28 since the 1987 Pearce Report on Legal Education. The ALRC argued that this had been brought about by:

the relinquishing of control over new award programs (except for some in medicine) by the federal bureaucracy. Law faculties are attractive propositions for universities, bringing prestige, professionals and excellent students, at a modest cost compared with comparable professional programs such as medicine, dentistry, veterinary science, architecture or engineering.<sup>4</sup>

The ALRC proceeded to quote David Weisbrot who had stated:

The central message of the Pearce Report on Australian Law Schools was that legal education in Australia is being run on the cheap, and this is a Bad Thing. The moral for

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<sup>3</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 18.

<sup>4</sup> Australian Law Reform Commission, 'Review of the Federal Civil Justice System, Discussion Paper No. 62' (1999) 43.

Vice Chancellors, University Councils, and Governments, however, is that legal education in Australia can be run on the cheap, and this is an Absolutely Splendid Thing.<sup>5</sup>

This illustrates that whilst the Australian Government has not controlled either the number of law schools or law students in Australia, it has influenced the manner by which tertiary legal education programs have been funded, greatly to the detriment of the law programs themselves.

In the modern age concerns about the underfunding of law programs were accentuated by the Committee of Australian Law Deans in a report published by the Centre for Legal Education in 1994 (the Deans' Report).<sup>6</sup> This was unusual as, until this time, the law deans had been cautious in their dealing with a topic which could be seen to be critical not only of the government but also of their employers, the universities.

There was also the perception, not supported by any substantial evidence, that some law schools were better funded by their own universities than others, and that these would not want any publicity given to the fact that other law schools were able to teach their law programs at a far lower cost. Nevertheless, underfunding of law schools had obviously become so serious that the view of the majority of the Australian law deans was that it had become a topic which could no longer be avoided and had to be given maximum publicity. The opening paragraph of the Deans' Report emphasised their concerns. Under the heading of *Law as an underfunded discipline*, it stated that:

There is widespread and deep concern that law has been, and remains, an underfunded discipline in Australian universities. This is not a recent development. As long ago as 1964 the Martin Report was noting law's inferior funding position as against most other disciplines. More recently it has been highlighted and reinforced by the major review of the principles and mechanisms or allocation of resources in the Australian higher education system undertaken in the late eighties. Whilst, as the July 1988 policy statement of the then Minister said, the government's concern was to provide an equitable basis on which institutions could compete for funds, the net result has been that law's poor funding

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<sup>5</sup> David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1990-91) 2(2) *Legal Education Review* 219.

<sup>6</sup> Centre for Legal Education and Committee of Australian Law Deans, 'The Cost of Legal Education in Australia' (Centre for Legal Education, 1994).

position, relative to other disciplines, has not improved and, indeed, has generally been more securely entrenched.<sup>7</sup>

The Deans' Report clearly emphasised the decision which had given rise to this form of funding and which continued to disadvantage the provision of legal education programs until well into the 21<sup>st</sup> century. As the Deans' Report explained this came about when 'in 1991, the government introduced, what it called, a Relative Funding Model (RFM) for higher education. Under this model each discipline was grouped into one of five clusters for the purposes of a one-off system-wide operating grant to institutions from the government.'<sup>8</sup>

The problem with the RFM was that law was placed in the lowest cluster—one—with a relative weighting of 1.0, whilst the highest cluster—five—had a relative weighting of 2.7. A submission by the Law Council of Australia quoted in the Deans' Report stated that the modern tertiary legal education training program at that time cost \$12 000, the full-fee amount charged by Bond University Law School, a private law school. In comparison, cluster one funding for the equivalent full time student unit was around \$4000. Although law students would be paying the same amount under the Higher Education Contribution Scheme (HECS) as all other students, they would be receiving only approximately one quarter funding for their courses compared with students in cluster five, who were studying agriculture, dentistry, medicine and veterinary science. This meant that law students were effectively cross-subsidising students in the other clusters. The other major concern of the deans was that inadequate government funding appeared to give some substance to the perception that, in the words of the 1964 Martin Report: 'Law ... can be taught under a gum tree, and for much of Australia's history it might as well have been so taught.'<sup>9</sup>

However, the remainder of the Deans' Report is concerned with disabusing readers of this point of view. It also assessed the true cost of a quality legal education incorporating: small group teaching and class sizes; the requirements of continuous assessment of student work; non-formal teaching activities such as mooting, advocacy

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<sup>7</sup> Ibid 1.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 11.

and interviewing programs; and clinical education and/or practical training. As the Deans' Report emphasised, the non-formal teaching activities:

were generally incorporated into the program not as a means of training in these skills, but in order to teach intellectual skills of analysis and synthesis, the development of logical arguments, and communication skills. All of them require teacher supervision, coordination and assessment.<sup>10</sup>

While the Deans' Report effectively explained the need for more appropriate funding of legal education, it did not succeed in changing the allocation of law in the RFM from cluster one to a higher cluster. Therefore, the underfunding of law programs remained the same until the end of the 20<sup>th</sup> century. This did not prevent attempts by law teachers to influence government to change the RFM in favour of legal programs.

In the 26 July 2000 edition of the *Campus Review* Jacqui Elson-Green interviewed the author, Chair of the Australasian Law Teachers' Association (ALTA), who stated that:

Law is one of the lowest funded programs in universities across Australia even though graduates are levied the highest HECS with just 52 per cent of that money reinvested in law faculties.<sup>11</sup>

The Chair of ALTA noted that: 'The way that law is taught has changed dramatically over the last nine years ... and the relative funding model of 1991 which presumed law was a low cost course, and which continues to be used by universities in allocating funding, no longer applies.'<sup>12</sup> The article containing the interview reported that tertiary legal education had become more sophisticated:

Law is now a legal information technology-based profession, said Barker, highlighting the fact that use of computer laboratories for teaching closely mirrored engineering and information technology in terms of student use and need to access data electronically. In

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<sup>10</sup> Ibid 46.

<sup>11</sup> Jacqui Elson-Green, 'Uni Law Teaching Under-Funded, Says ALTA Head', *Campus Review* 26 July 2000, 5.

<sup>12</sup> Ibid.

addition, faculties had to meet other costs including establishing simulated magistrates courts as well as creating moot courts.<sup>13</sup>

In view of the lack of any government response to these submissions for an increase in funding support for law programs, the Council of Australian Law Deans (CALD) made a further submission to a 2001 Senate Inquiry into the Capacity of Public Universities to meet Australia's Higher Education Needs. CALD's submission, submitted by Professor Paul Fairall its Chair, reiterated that: 'The major issue for Australian law schools is a chronic deficiency of funding, in a context of growing demand for legally qualified graduates'.<sup>14</sup> The submission repeated the usual arguments which had been made in previous submissions, although there were some disagreements which had not been canvassed before, with CALD recommending to the Senate Committee that it:

**Recognise** that to continue the under-funding of law schools courts the danger of undermining the ideal of an ethical and altruistic profession that plays a key role in the good governance (and therefore the efficiency and prosperity) of Australian society ...

**Support** substantial additional funding to underpin equitable student access, especially in relation to recognised equity groups.'<sup>15</sup>

Despite CALD's 41-page submission the Senate Committee Report did not acknowledge the underfunding of law programs in its one line reference to legal education.<sup>16</sup> The last government report into tertiary education which might have improved the funding of law programs was that published in May 2003 by the Hon Brendan Nelson in his capacity as federal Minister for Education, Science and Training.

David Barker, the Chair of CALD at the time, expected that Dr Nelson would improve the funding of law programs, but the outcome was even more disappointing. This led to an article in the legal affairs pages of *The Australian Financial Review* published on 25 July 2003 in which the Chair expressed his disquiet in the following strong terms:

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<sup>13</sup> Ibid.

<sup>14</sup> Council of Australian Law Deans, 'The Capacity of Public Universities to Meet Australia's Higher Education Needs' (Submission to Senate Committee Inquiry, Senate Employment, Workplace Relations, Small Business and Education References Committee, Parliament of Australia, 2001).

<sup>15</sup> Ibid 3 (emphasis in original).

<sup>16</sup> Senate Employment Workplace Relations Small Business and Education References Committee, 'Universities in Crisis' (Australian Parliament, 2001).

It is a sad state of affairs to realise that frustration relating to underfunding of legal education was manifest many years before the current government announced its proposal to place law in the lowest discipline cluster, with an estimated Commonwealth course contribution in 2005 of \$1509. This lowest government contribution to any subject discipline is in complete contradiction to law being placed in the highest band (\$6427) with regard to the students' contribution towards the cost of their education.

This places law within the same band as dentistry, medicine and veterinary science—the only difference being that all these disciplines will in 2005 attract an estimated Commonwealth contribution of \$15 422, in stark contrast to law's \$1509. The government has also provided a discretion for universities to levy an additional maximum student contribution set at 30 per cent higher than the estimated higher education contribution scheme contribution rate for 2005, resulting in a law student being expected in 2005 to pay a total of \$8355. If past experience is any guide, about 30 per cent only of the total student contribution/government grant will be directly allocated to the law schools, the remainder being used to cross-subsidise courses in other disciplines such as humanities or social sciences, the balance being retained for general university expenses.<sup>17</sup>

The article also explained why law deans and law academics had not been more vehement in their criticism of a government system of distributing money in support of tertiary education which so unfairly discriminated against law programs. In this respect he stated that:

The question may quite legitimately be asked as to why law academics, and law deans in particular, do not engage in great protest against these obvious anomalies and the consequent unfairness in respect of the underfunding of law programmes despite the high fees paid by their students.<sup>18</sup>

Barker added that: 'The response must be that law deans are involved in the general management structure of their universities and are imbued by a sense of collegiality which prevents them protesting externally.'<sup>19</sup> In this regard it would appear that the majority of law academics followed the lead of their law deans by also failing to take any action.

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<sup>17</sup> David Barker, 'Law Students Pay Top Dollar for Small Piece of Pie', *Australian Financial Review* (Sydney), 25 July 2003.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.



Significantly, it was the reforms of 2005–6 which improved the funding of law programs. This was partly because the Commonwealth Government deregulated university fees, permitting the universities to increase their fees by a maximum of 25 per cent. At the same time it also permitted universities to introduce full-fee undergraduate courses and a student loan scheme (FEE-HELP) for fee-paying students undertaking postgraduate programs. This coincided with Australian law schools introducing postgraduate programs whereby students who had already been awarded a non-law undergraduate degree could study for a postgraduate degree in law (a Juris Doctor (JD) which would satisfy the academic requirements for entry into the legal profession. Therefore, students undertaking full-fee programs, particularly postgraduate students, had an expectation that their programs would be of an acceptable quality which could only be provided if substantially funded.

The fact that postgraduate fees were considerably higher than undergraduate fees was also reflected in the higher funding of these programs by respective universities. The cost of a JD program in 2015 at the University of Melbourne was \$114 816.<sup>20</sup> The cost of a Bachelor of Laws (LLB) undergraduate program in 2015 at Bond University, a private university, was \$123 712 (for a full program of 33 subjects over two years eight months).<sup>21</sup> In contrast, a Commonwealth Supported Place which replaced HECS, at Monash University on the LLB (Honours) undergraduate program for 2015 cost \$10 266.<sup>22</sup>

The Labor Government elected in 2007 abolished full-fee paying undergraduate courses but retained full-fee paying postgraduate programs. This demonstrates the willingness of university authorities to allocate a larger proportion of a fee towards the cost of a particular law course if a program is full-fee paying.

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<sup>20</sup> The University of Melbourne, *Melbourne Law School - the Melbourne JD-Fees* <<http://law.unimelb.edu.au/jd/future-students/fees-scholarships-and-bursaries/fee>>.

<sup>21</sup> Bond University, *2015 Schedule of Fees, Undergraduate* <<https://bond.edu.au/files/29/Undergraduate%20Program%20Fee%20Schedule%202015>>.

<sup>22</sup> Monash University, *Bachelor of Laws (Honours) for 2015* <<http://monash.edu/study/coursefinder/course/3001/courseview=domestic>>.

### 3. Influence of State and Territory Committees and Boards

#### 3.1 Admission Boards

##### *(a) New South Wales*

Historically the Supreme Courts of the various states and territories have exercised significant control over legal education in Australia. As indicated in Chapter 4, in New South Wales (NSW) the Supreme Court was the first to be given such control when, in accordance with the Third Charter of Justice, made pursuant to the *New South Wales Act* 1823, it was granted the power to ‘approve and admit qualified practitioners from Great Britain and Ireland and to make rules for the admission of “so many fit and proper persons ... as may be necessary”.’<sup>23</sup>

However, this excluded those persons within the colony who wished to enjoy the same privilege. As a result a Bill was introduced into the Legislative Assembly which passed and became the *Barristers Admission Act 1848* (NSW), and established a Barristers Admission Board. This consisted of three judges of the Supreme Court of NSW, together with two practising barristers. They had the power to make rules for the examination and admission of barristers.<sup>24</sup> This Act also retained the right of the Board to continue to admit barristers from the United Kingdom without any other formal qualification. Subsequently, another Board was established in 1877 for the purpose of admitting solicitors, and although it was commonly known as the Solicitors Admission Board it was not officially granted this title until 1953.<sup>25</sup>

In NSW there continued to be a Barristers Admission Board until 1993 comprising all the judges of the Supreme Court, the Attorney General and two barristers, as well as a Solicitors Admission Board, which also had as its members all the judges of the Supreme Court, the Attorney General and two solicitors.

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<sup>23</sup> Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111, 114.

<sup>24</sup> *Barristers Admission Act 1848* (11 Vic. No.57).

<sup>25</sup> *Legal Practitioners (Amendment Act) 1954* (NSW) .

In accordance with the *Legal Profession Act 1987* (NSW) both admission boards were replaced in 1993 by a single Legal Practitioners Admission Board whose membership consisted of the Chief Justice, three judges of the Supreme Court, the Attorney General (or nominee), two NSW law deans, two barristers and two solicitors.<sup>26</sup> The appointment of two NSW law deans was the first time that law academics had been appointed to any NSW Admission Board and had been the outcome of extensive lobbying by the NSW law deans.<sup>27</sup>

In 2008 the Legal Practitioners Admission Board was redesignated as the Legal Profession Admission Board (LPAB).<sup>28</sup>

The general supervisory power of the NSW judiciary over admission of legal practitioners inadvertently means that it is also in a position to influence legal education in the State. As a former President of the LPAB has commented in an interview conducted for this thesis:

The LPAB is a remarkable combination; it's the strangest body in law in Australia. The Board sits as a university sort of vice-chancellor's office as well as an admission authority, and it's just a fascinating combination actually for that reason. And it works.<sup>29</sup>

Historically, a similar process has evolved in most other jurisdictions in Australia with Supreme Court judges in Queensland, South Australia and Tasmania exercising direct responsibility for the introduction of rules laying down the educational requirements governing entry into the legal profession.

### **(b) Victoria**

On being established as a separate colony with the consequent establishment of a separate legal jurisdiction, Victoria maintained a separate board of examiners for each of the two branches of the legal profession with the introduction of the appropriate rules in 1852. Both these boards had judges as members, with the Barristers Admission Board

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<sup>26</sup> *Legal Profession Act 1987* (NSW).

<sup>27</sup> Unpublished Email to NSW Law Deans from David Barker (February 2002).

<sup>28</sup> *Legal Profession Act 2004* (NSW).

<sup>29</sup> Interview with Hon. Justice Michael Slattery, NSW Supreme Court (Sydney, 10 December 2013).

including two elected barrister representatives while the Solicitors Admission Board had its solicitor representatives selected by the judges.<sup>30</sup>

Further legislation introduced in 1895, 1903 and 1905 finally led to the establishment of a Victoria Council of Legal Education comprising judges, the Attorney-General, the Solicitor-General, the Dean of the University of Melbourne Law Faculty, and representatives of the University of Melbourne University Council, the Victorian Bar and the Law Institute of Victoria (the latter on behalf of solicitors in Victoria). These requirements remained in place until the enactment of further legislation in 2004 which established a Council of Legal Education and a Board of Examiners which were vested with the authority to regulate jointly entry into the legal profession in Victoria. In this respect the Council's role is to determine requirements for admission, and approve law courses and the providers of practical legal training. The Board of Examiners is responsible for determining the eligibility of applicants for admission to the legal profession and providing the certificate for admission, which is relied upon by the Supreme Court of Victoria when admitting an applicant to practise as a lawyer in Victoria.<sup>31</sup>

### *(c) Queensland*

The regulation of the legal profession and the provision of mandatory forms of legal education to satisfy entry into the legal profession came comparatively late to Queensland. As mentioned in Chapter 5, formal university legal education commenced in Queensland with the foundation of a functioning law school at the University of Queensland in 1936. Prior to that time those wishing to be admitted as legal practitioners could either hold law degrees awarded by law schools in other states of Australia or overseas or have sat the examinations conducted by Barristers or Solicitors Boards which were the ultimate responsibility of the Supreme Court of Queensland's Admission Board. It was not until 2007 that the Queensland Legal Practitioners Board was established by the *Legal Profession Act 2007* (Qld). While the Supreme Court is responsible for the admission of lawyers in Queensland, it is the Legal Practitioners

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<sup>30</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 17.

<sup>31</sup> Law Institute Victoria, *Admission to Legal Practice* <<http://www.liv.asn.au/For-Lawyers/regulation/Steps-to-Qualified-Practice/Admission->>.

Board that issues the recommendations in the form of a certificate of compliance certifying the eligibility and suitability of a candidate for admission.

#### *(d) South Australia*

In South Australia, at the establishment of the University of Adelaide Law School in 1882 there were 60 articled clerks undertaking training which would lead to their completing examinations controlled by the Board of Examiners of the Supreme Court of South Australia.<sup>32</sup> The Supreme Court exercised its right to recognise Adelaide Law School for the purposes of its graduates being admitted to practise as lawyers in South Australia and the same process was followed for the subsequent law schools established at Flinders University and the University of South Australia.<sup>33</sup> While an applicant in all jurisdictions is required to satisfy the admitting authority that he or she is ‘currently of good fame and character’, it is only in South Australia that the admitting Act does not require the admitting authority to consider whether the applicant is a ‘a fit and proper person’ for admission as legal practitioner.

While the Supreme Court is the admitting authority in South Australia, the Legal Practitioners Registry operates under a delegation from the Court with regard to such administrative matters as maintaining the register of legal practitioners in South Australia holding a practising certificate, and acting as Secretariat to the Board of Examiners. It is the Board of Examiners which considers applications for admission as a legal practitioner in South Australia.

#### *(e) Tasmania*

As in other jurisdictions, the Supreme Court of Tasmania has a similar form of control over legal education in Tasmania and exercises its right to admit law graduates to practise law within its jurisdiction. The singular nature of the University of Tasmania has afforded greater opportunity to the Northern and Southern Tasmanian Law Societies to influence the operation of teaching of the LLB at the University than would be

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<sup>32</sup> Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School 1883–1983* (Faculty of Law, University of Adelaide, 1983) 11.

<sup>33</sup> *Legal Practice Act 1981* (SA) s 15(1)(a).

acceptable in most other jurisdictions. The relevant legislation regarding the admission of Tasmanian law graduates is the *Legal Profession Act 2007* (Tas).

#### *(f) Northern Territory*

The Northern Territory, because of its remote location and the later development of a recognised university within its boundaries, has been subject to a variety of processes for the accreditation of practising lawyers. In 1987 arrangements were made with the University of Queensland for the accreditation of the law degree originally taught at the University College of Northern Territory. This gave law graduates of the University College—subsequently re-named Northern Territory University and finally re-titled Charles Darwin University—the opportunity to be admitted as legal practitioners of either or both the Supreme Courts of Queensland and the Northern Territory. This option came to an end when this degree-awarding agreement terminated after the establishment of the University of Northern Territory in 1989.<sup>34</sup>

#### *(g) Australian Capital Territory and Western Australia*

David Weisbrot has drawn attention to the fact that both the Australian Capital Territory (ACT) and Western Australia previously operated different processes for legal education than those established within most state and territory jurisdictions, which relied on Supreme Court judges exercising supervision over educational requirements for admission as a legal practitioner.<sup>35</sup>

In the ACT the Admission Board originally comprised the Chief Judge who appointed the four lawyers who comprised the remaining members of the Board. The admission procedures were reformed in accordance with legislation enacted in 2006.<sup>36</sup> In Western Australia (where the profession was fused), the previous admitting authority, the Barristers Board comprised the Attorney General, the Solicitor General, all Queen's Counsel practising in the jurisdiction, seven practitioners who were elected annually

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<sup>34</sup> *Legal Profession Act 2007* (NT).

<sup>35</sup> David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 144.

<sup>36</sup> *Legal Profession Act 2006* (ACT).

and all retired Supreme Court judges. Again, these provisions were reformed in accordance with legislation enacted in 2008.<sup>37</sup>

### 3.2 Academic Requirements for Admission as a Legal Practitioner

While the Admitting Authorities have control over the composition of legal education programs offered by university law schools and practical legal training providers, their authority is limited to the content of such programs and obviously only extends to their own particular jurisdiction. There is, for example, no supervisory national control similar to that exercised by the American Bar Association in conjunction with the American Law Schools Association over the accreditation of law schools within the United States. The only limitation upon legal education programs is that exercised by the Law Admissions Consultative Committee (LACC) which has a Charter approved by the Council of Chief Justices which also appoints its Chairman.<sup>38</sup>

Its predecessor organisation was the Consultative Committee of State and Territorial Authorities, which was originally headed by Justice Priestley of the NSW Court of Appeal. As stated in *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89): ‘The Committee, compiled a list of compulsory subject areas for academic legal study, colloquially known as the *Priestley Eleven*, which individuals must complete in order to fulfil admission requirements.’<sup>39</sup>

As ALRC 89 pointed out this list also incorporates ‘Professional Conduct’. The subjects listed are: Criminal Law and Procedure, Torts, Contracts, Property, Equity (including Trusts), Company Law, Administrative law, Federal and State Constitutional Civil Procedure, Evidence, Ethics and Professional Responsibility.

Before the Consultative Committee for State and Territorial Authorities, the origins of modern legal education could be regarded as arising in 1976 when, at a National Conference on Legal Education, a recommendation was made by Justice Charles Bright that an Australian Legal Education Council (ALEC) be established. It was expected

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<sup>37</sup> *Legal Profession Act 2008* (WA).

<sup>38</sup> Law Admissions Consultative Committee, *Law Admissions Consultative Committee* <<http://www.lawcouncil.asn.au/LACC/>>.

<sup>39</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89' (2000) [2.21].

that, with Justice Gordon Samuels as its Chair, ALEC would be able to emulate the United Kingdom Ormerod Committee and designate a core group of compulsory subjects which would form both the basis of a common law degree acceptable to all Australian law schools and serve as a formula for those seeking admission as legal practitioners.<sup>40</sup>

Similarly, the Victorian Council of Legal Education established an Academic Course Appraisal Committee in June 1978 chaired by Justice Richard McGarvie. This Committee was charged with recommending those subjects, the completion of which would serve as the academic requirements for qualifying for admission as a legal practitioner.

A year later in 1979 the Chief Justice of the Supreme Court of NSW, Sir Laurence Street, convened a meeting of the Consultative Committee to seek consensus between all Admitting Authorities about a group of legal subjects acceptable to law schools to form a basis for qualification for admission as a legal practitioner.

To allay the concerns of many law schools as to the impact of the requirements imposed by the proposal from the Victorian Council of Legal Education, the Academic Course Appraisal Committee of the Council conducted an inquiry, the outcome of which led to the publication in September 1980 of a *Report on Legal Knowledge Required for Admission to Practise* (The McGarvie Report). This Report also examined a report by another committee of ALEC, chaired by Professor Horst Lücke, entitled a *Report on Core Subjects*.<sup>41</sup>

Although there followed further deliberations by both Committees, the final consensus was that the eleven subjects which finally formed the *Priestley Eleven* were acceptable to constitute a basis for the academic requirements for an undergraduate law degree qualifying for admission as a legal practitioner. The only additional recommendation of the McGarvie Report was there should be ‘an inevitable introductory course’.

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<sup>40</sup> Law Admissions Consultative Committee, *Background Paper on Admissions Requirements, Practical Legal Training Requirements for Admission*  
<[http://www.lpub.nsw.gov.au/Documents/background\\_paper\\_on\\_admissions](http://www.lpub.nsw.gov.au/Documents/background_paper_on_admissions)>.

<sup>41</sup> Ibid.



On 1 December 2014 LACC at the request of the Council of Chief Justices invited interested bodies to make submissions by 31 March 2015 on a limited review of the Academic Requirements for admission to the legal profession of Australia. The main issues of this review were whether Civil Procedure, Company Law, Evidence, and Ethics and Professional Responsibility should be omitted from the Academic Requirements and whether Statutory Interpretation should be included as an Academic Requirement.<sup>42</sup> CALD submitted that ‘the consultation period has been too short to allow for serious consideration of the proposals’.<sup>43</sup> It therefore remains to be seen whether LACC will take any further action on its current proposals or extend the time period for a more in-depth review to take place in the future.

### 3.3 Practical Legal Training Requirements

Prior to 1970 the accepted form of training for entry into the legal profession for law graduates (or students undertaking similar courses to satisfy the academic requirements for qualification as a legal practitioner) was to undertake legal articles. The length of these articles varied from one to five years depending on the jurisdiction.

As the number of law students increased, their ability to obtain legal articles decreased which meant that alternative means of satisfying the practical training requirements needed to be developed. Therefore NSW and South Australia introduced Practical Legal Training (PLT) courses to replace articles, and Queensland and Victoria introduced them as an alternative to articles. This inevitably led to the need to standardise such PLT courses across Australia. Consequently, in February 1993 the (then) Standing Committee of Attorneys-General requested the Law Council of Australia to try to obtain the agreement of the various jurisdictions on a common curriculum for a PLT program. No agreement could be reached so LACC was again asked to be involved. A further issue was whether the PLT program should be undertaken before or after a student had been admitted as a legal practitioner. LACC’s deliberations were published in a report

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<sup>42</sup> Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession* <<http://www1.lawcouncil.asn.au?LACC/index.php/review-of-academic-requirements>>.

<sup>43</sup> Council of Australian Law Deans, ‘Academic Requirements for Admission to the Legal Profession’ (Submission to the Law Admission Consultative Committee, 3 March 2015) 1.

in 1994 which set out the various general areas of training under the following sub-headings:

*Legal Profession*

- Ethics and Professional Responsibility
- Trust and Office Accounting

*Skills*

- Work Management
- Legal Writing and Drafting
- Interviewing
- Negotiation and Dispute Resolution
- Legal Analysis and Research
- Advocacy Practice and Procedure
- Litigation

*Areas*

- Property Practice
- Wills and Estate Management
- Commercial and Corporate Practice

In contrast to the *Priestley Eleven* these PLT subjects attracted the complementary nomenclature of the *Priestley Twelve*.<sup>44</sup>

They subsequently became adopted in the Law Council's document published in 1994 entitled 'Blueprint for the Structure of the Legal Profession: National Market for Legal Services'.<sup>45</sup> This was followed in 1997 by a Report produced by the Australian

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<sup>44</sup> Law Admissions Consultative Committee, above n 42, 40.

<sup>45</sup> Law Council, 'Blueprint for the Structure of the Legal Profession: A National Market for Legal Services' (July 1994).

Professional Legal Education Council (APLEC) entitled ‘Standards for the Vocational Preparation of Australian Legal Practitioners’.<sup>46</sup>

A joint project between LACC and APLEC ensued on Competency Standards for Entry Level Lawyers which was recommended to all Admitting Authorities early in 2001.

#### 4. The Evolution of Ad Hoc Law Associations

Whenever there is a publication or report relating to the development of legal education which might give rise to a focus on the influence of government, state admitting authorities or the university law school themselves, there is typically little or no attention given to the influence of the various academic law associations. Is this because they are regarded as ineffectual and of no consequence, or is it because no account has ever been taken of their existence or influence?

ALRC 89 contained a statement questioning the effectiveness of any institution in existence at that time (2000) to influence legal education:

In the Commission’s view, there is need for an institution which can draw together the various strands of the legal community to facilitate effective intellectual interchange of discussion and research of issues of concern and nurture coalitions of interest. Such an institution should have a special focus on issues of professionalism (including ethics) and professional identity, and on education and training.<sup>47</sup>

ALRC 89 went on to state that: ‘No institutions currently exist to fill this need—or which readily could be adapted to do so.’<sup>48</sup> This statement led to the ALRC recommending that:

The Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australian Professional Legal Education Council and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession—

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<sup>46</sup> Australian Professional Legal Education Council, *Standards for the Vocational Preparation of Legal Practitioner* (APLEC, 1990).

<sup>47</sup> Australian Law Reform Commission, above n 39, 154.

<sup>48</sup> Ibid.

students, practitioners, academics and judges in promoting high standards of learning and conduct and appropriate collegiality across the profession.<sup>49</sup>

#### 4.1 Australasian Law Teachers Association

The oldest of ad hoc law associations—ultimately named the Australasian Law Teachers Association (ALTA)—was established at Sydney Law School on 5 June 1946 when a meeting took place of all Deans and full-time teachers of law in Australian universities together with some part-time teachers. As was stated at the meeting:

In Australia, there has not been in the past, at least to the knowledge of present Faculty members, any federal organisation of the law schools as such. Individualism has its advantages, but in the post-war world, with its problems of teaching personnel, content of the curriculum, and increasing student numbers, there is a need for the Universities to pull together and assist each other as far as possible. The traditions of this country are such that there is no possibility of rigid uniformity in the solution of the problem of legal education—but sharing of experience might remove some of those differences which impose such hardship on the student who, for personal reasons, must move from one State to another before this course is completed.<sup>50</sup>

The meeting also declared that the objects of the Association as expressed in the Constitution, would be as follows:

- (a) the furtherance of legal education in Australia and of the work and interests of University law teachers;
- (b) the encouragement and organization of legal research and the publication of contributions to legal knowledge;
- (c) the promotion of active co-operation of the University law schools of Australia with one another, with law schools elsewhere and with University, professional, and other learned bodies in Australia and elsewhere;
- (d) the maintenance of close relations between the Universities and the legal profession;

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<sup>49</sup> Ibid.

<sup>50</sup> George Paton, 'Australian Universities Law Schools Association' (1946) 20 *Australian Law Journal* 99.

- (e) co-operation with professional legal associations and other bodies in the work of law reform.<sup>51</sup>

The first President of the Association was Professor G W Paton who held this position from 1946 to 1948. At the time of its foundation the original name of the Association was the Australian Universities Law Schools Association (AULSA), with 'Australian' being replaced 1962 by 'Australasian' to encourage the greater involvement of New Zealand law schools and law academics. This remained as its title until a name change to the Australasian Law Teachers Association (ALTA) was approved at the Association's Conference Annual General Meeting at the University of Sydney in July 1988.

The account of the initial meeting in 1946 is helpful in capturing the views of legal academics at that time. There is a sense of irony in Professor Paton's report of the proceedings: 'At a preliminary meeting, the world could not be re-moulded, but some energetic preparatory work in the circulation of documents enabled the broad issues to be discussed.'<sup>52</sup>

These broad issues revealed the view that: 'Whatever the demand for more technical subjects, the *cultural* subjects should find a place in the law course.'<sup>53</sup> It was also recognised that 'to overload the full-time teachers with lecturing leads to inefficiency and inhibits original research.'<sup>54</sup>

There was also a statement relating to what the relationship would be between the State universities and the new university proposed for Canberra (the Australian National University (ANU).) In their statement the members of AULSA stressed their concerns about excessive teaching and administrative loads on full-time members of staff, which inhibited them from undertaking research:

This conference welcomes the proposed establishment of one or more research chairs in Law in the Australian National University as a recognition of the importance of expanding legal research activities at all the Australian Universities as a matter of national importance.

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid 100.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

In making this statement the conference emphasises the restriction on research by University law teachers which arises out of their being over-burdened with teaching and administrative work. The conference, while appreciating the valuable contribution to legal education made by practising members of the profession in their capacity as part-time lecturers, therefore stresses the importance of creating more Chairs and full-time lectureships in Law.<sup>55</sup>

In assessing the influence of AULSA and its successor ALTA on the development of legal education it is helpful to consider their activities from 1946 to the present.

### ***(a) Principal Activities***

#### ***(i) Establishment of a Committee of Law Deans***

In the Minutes of AULSA's Annual General Meeting held at the University of Western Australia on 25 August 1978, the President's Report contained the following Item under the title 'Committee of Deans':

As a result of a request from the Australian Legal Education Council, the Executive [of AULSA] proposed the establishment of a Committee of Deans for Australian Law Schools. After correspondence between the Executive Vice-President and the Deans of various law schools it has been proposed that the proposed Committee of Deans should remain outside the AULSA organisation but should liaise with AULSA and report to the Annual General Meeting of the Association. The Committee of Deans had met during the Conference and a report would be made later.<sup>56</sup>

#### ***(ii) Introduction of the Australasian Law Teaching Clinic***

The first national law teaching clinic in Australia (the NSW Law Teaching Workshop) was conducted under the auspices of AULSA by Professor Neil Gold and Mary Gerace, both of the University of Windsor, Canada, in July 1987, at Mount Broughton, NSW. It was coordinated by Professor Jack Goldring of the Macquarie Law School.

Following the success of this inaugural venture, in 1988 the Annual General Meeting of AULSA requested that Professor Goldring organise another Teaching Workshop to be

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<sup>55</sup> Ibid.

<sup>56</sup> Australasian Universities Law Schools Association, 'Minutes, AGM' (1978) 3.

held later in the same year. A small committee was established and plans for this workshop were formulated. It was decided that the workshop should be named the Australasian Law Teaching Clinic and, in order to conform to the terms of the AULSA Charter, it included Australian, New Zealand and Papua New Guinea law teaching institutions. At about this time Professor Goldring took up a three-year appointment as a Commissioner of the ALRC and so Ben Boer and Graeme Cooper took over the role of coordinating the renamed Australian Law Teaching Clinic, assisted by Marlene Le Brun, Richard Johnstone and Richard Chisholm. The Clinic was again conducted at Mount Broughton, with the materials being provided by Ben Boer and Graeme Cooper.<sup>57</sup>

The Clinic was the forerunner of a number of Law Teaching Clinics, later renamed the ALTA Law Teaching Workshop. Michael Adams who attended the Clinic in 1992 has described how it ‘brought theory to the practice of teaching law, and ... was an amazing experience to hone skills and look at assessment and issues of presentations.’<sup>58</sup>

Another outcome of the Australian Law Teaching Clinic was the publication in 1994 of *The Quiet Revolution* by Marlene Le Brun and Richard Johnstone, which was concerned with the improvement of student learning in law and in which the authors acknowledge the influence of the Australasian Law Teaching Workshop:

The most successful development, however, has been the Australasian Law Teaching Workshop, which over the last several years has taken the work that began in Canada and extended it to particular applications for the region. Indeed, this book is the culmination of the efforts and commitment demonstrated by staff of the Workshop who were determined to ensure that appropriate text and materials were available to teachers in Australia.<sup>59</sup>

The activities of the ALTA Law Teaching Workshop were terminated at the ALTA Annual General Meeting in Fremantle 2003. At this meeting it was decided that because of the number of teaching courses being conducted by the Universities there was no

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<sup>57</sup> Ben Boer, 'The Australasian Law Teaching Clinic: Its Past, Present and Future' (1989) 1 *Legal Education Review* 145.

<sup>58</sup> Interview With Michael Adams, Dean of Law, University of Western Sydney (Sydney, 8 December 2013).

<sup>59</sup> Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Co, 1994) ix.

further need for a specialist teaching workshop of the kind operated by ALTA. However, when ALTA conducted a survey of its members in 2007 on future services that it might provide, the ALTA Executive was surprised when a majority of members requested a revival of the Law Teaching Workshop. The Executive responded by providing a major teaching workshop exercise on the day preceding the ALTA Annual Conference for 2009 at the University of Western Sydney.

### (iii) The Legal Education Review

The publication of the first edition of the *Legal Education Review* (LER) in 1989 was an outcome of the ALTA Conference held at the University of Sydney Law Faculty in August 1988. One could question why it took approximately 35 years for such a journal to evolve, but the 1988 Conference had been a major milestone in the development of ALTA, and the LER incorporated many of the articles and comments that had been delivered at the 1988 Conference.<sup>60</sup> The most controversial of these had been made by Gerald Frug of the Faculty of Law, Harvard University;<sup>61</sup> Robert W Gordon of the Faculty of Law, Stanford University;<sup>62</sup> Catharine MacKinnon of Osgood Hall and Yale Law Schools;<sup>63</sup> Margaret Thornton of Macquarie Law School;<sup>64</sup> and Lucinda Finley of the Law School, State University of New York at Buffalo.<sup>65</sup> Since its first edition the LER has become a highly regarded law journal having been published on a regular basis until the present time.

### (b) Transition

In 1988 not only did AULSA become ALTA but ALTA was transformed by a further amendment to the Constitution approved at the Annual General Meeting whereby full membership was granted to all teachers of law and PLT courses in tertiary institutions

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<sup>60</sup> 'Editorial' (1989) 1 *Legal Education Review* 1.

<sup>61</sup> Gerald Frug, 'A Critical Theory of Law' (1989) 1 *Legal Education Review* 43.

<sup>62</sup> Robert Gordon, 'Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59.

<sup>63</sup> Catherine MacKinnon, 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85.

<sup>64</sup> Margaret Thornton, 'Women and Legal Hierarchy' (1989) 1 *Legal Education Review* 97.

<sup>65</sup> Lucinda Finley, 'Women's Experience in Legal Education: Silencing and Alienation' (1989) 1 *Legal Education Review* 101.



in its constituent jurisdictions. Previously, full membership had been confined to law teachers in universities.

This constitutional amendment avoided the problems that had previously arisen in the United Kingdom Society of Legal Scholars when full membership had been refused to polytechnic law teachers and other tertiary law teachers outside the university sector. This had led to the excluded law academics forming their own law teachers association, the Association of Law Teachers, resulting in a continuous split between the two academic law associations which has persisted until the present.

In an interview, Rosalind Mason, one of the first beneficiaries of this constitutional change, coming from a College of Advanced Education at that time, has described how she was affected by the enthusiastic nature of the 1988 Conference and how it eventually led to her becoming Chairperson of ALTA in 2006.<sup>66</sup> Another outcome of the changes instituted at the 1988 Conference was that the practice of member law schools submitting their Annual Reports to the Annual General Meeting of the Conference gradually disappeared.

### *(c) Ongoing Outcomes and the Future*

Although Professor Paton recognised in 1946 that the world of legal education could not be immediately remoulded he would nevertheless have been surprised if he could have foretold the status of ALTA in 2015.

ALTA operated out of permanent headquarters on the Kuring-gai Campus (Lindfield) of the University of Technology, Sydney, with a paid administrator/coordinator, until 2015, when the association moved to the ANU College of Law. It has a General Executive which embraces representatives from most states and territories in Australia and also a New Zealand Executive. It publishes two major journals annually, the LER and the *Journal of Australian Law Teachers Association* (JALTA), and sponsors a third, the *Legal Education Digest* (LED), published on a tri-annual basis, all three being published in hard copy and distributed electronically to members. The LER is a refereed journal and Michelle Sanson, a former editor has expressed how being in this role was

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<sup>66</sup> Interview With Rosalind Mason, Professor and Head, Law School, QUT (Sydney, 23 August 2013).

‘a great experience in terms of knowing who all the movers are in legal education and [seeing] where the law is developing.’<sup>67</sup> JALTA was launched to assist members who publish papers in the ALTA Conference proceedings by providing a double-blind refereed journal. This satisfies the current institutional requirements for refereed journals with respect to higher education research data collection purposes.

The focal point for most members is the Annual Conference, normally hosted by a member law school, which takes place over three days and is attended by 150 to 200 members, approximately a quarter of the membership. As well as the featured speakers who deal with ongoing legal issues in the plenary sessions, a major part of the conference is the activities of the 30 interest groups which focus on contemporary matters of interest in legal education. There are also sponsored awards such as the LexisNexis–ALTA Award for Excellence and Innovation in the Teaching of Law and the CCH–ALTA Best Conference Paper Award.

With a membership base in excess of 850 members, as well as strong links with government bodies and other national and international key agencies, ALTA has gained an influential position with respect to the promotion of legal education, research and scholarship throughout Australia, New Zealand and the South Pacific Region.

## **4.2 Council of Australian Law Deans (CALD)**

The Committee of Deans, the forerunner of the Committee of Australian Law Deans and subsequently the Council of Australian Law Deans (CALD), was established at the Annual General Meeting of AULSA on 25 August 1978.

Its development progressed in 1979 when the Minutes of the Thirty-Fourth AULSA Annual General Meeting held at the University of Melbourne on 31 August 1979 stated that Professor G Nash submitted the Report of the Committee of Deans. The most illuminating part of the Report, concerning its future, stated:

- (1) Future Role of the Committee of Deans—the Deans discussed whether the Committee should remain in existence and were unanimously of the view that there was a significant

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<sup>67</sup> Interview with Michelle Sanson, Senior Lecturer, UWS School of Law (Sydney, 12 February 2014).

role for the Committee of Deans to play as representing the Law Schools as institutions. The Committee can speak on behalf of the Law Schools as a whole in relation to matters of educational policy and educational funding, can liaise with such bodies as the Law Council of Australia and the Australian Legal Education Council and provide a central clearing house for information emanating from these bodies and also for information generated by particular law schools.<sup>68</sup>

Other matters discussed at this meeting included ‘the portability of qualifications and rationalization of admission requirements; copyright; activities of the Australian Legal Education Council; and exchange programs.’<sup>69</sup>

During the early years of its existence the Committee of Deans retained close links with AULSA. It appears that the President of AULSA was also the Convenor of the Committee of Deans. However, a conflict arose in 1982 when the Committee of Deans reported to the Annual General Meeting of AULSA—held on 14 August 1982 at the University of Tasmania—that as the incoming President of AULSA would be a New Zealand Dean it had recommended that Tony Blackwood, the current Convenor, hold that position for a further year.<sup>70</sup>

Arguably, this decision marked the growing separation of the law deans as a group from AULSA, and subsequently ALTA. While some traditions have been maintained, such as the law deans holding one of their tri-annual meetings either before or after the annual ALTA Conference, and the Chairperson of CALD reporting to the ALTA Annual General Meeting, these are now just matters of convention and not derived from any formal agreement.

#### *(a) Increasing Influence of CALD*

Until quite recently the law deans as a group have faced problems relating to the nature of their organisation. The minutes of CALD meetings could be interpreted as indicating that on many occasions the deans have been prevented from making collective decisions because of the overriding sectional interests of the law schools they represent. This is not to underestimate their influence as a representational body of law academics on the

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<sup>68</sup> Australasian Universities Law Schools Association, 'Minutes AGM' (1979) 9.

<sup>69</sup> Ibid.

<sup>70</sup> Australasian Universities Law Schools Association, 'Minutes AGM' (1982) 5.

ongoing development of legal education. Instead, this interpretation emphasises the degree of pragmatism which has been needed to obtain a consensus among them.

However, an example where they were able to cooperate was in the submission of Australian Law School Deans to the Commonwealth Tertiary Education Commission Assessment Committee for the Discipline of Law in April 1986.<sup>71</sup> It was helped by the fact that at that time there were only 12 Australian law schools offering an LLB course; now there are 37.

The conclusion to the submission encapsulates what has been an ongoing problem for Australian law schools in the modern era—the lack of resources and ‘the absurdly low level of law’s relative share of tertiary education funding.’<sup>72</sup>

In their submission the Deans stated:

The contemporary state of tertiary legal education is marked by confusion, irony, paradox and inequity. There is confusion as to the nature and aims of legal education. The common perception is that law schools are vocational or trade schools. The reality is otherwise. The modern law school is an academic rather than a professional institution. Its academic aims are consistent not only with the training of legal practitioners; achievement of the aims is essential if socially-aware graduates with advanced intellectual skills are to be produced. Law schools believe that such graduates serve the profession and community well. But the confusion as to what law schools are about has doubtless been partly responsible for their parlous resource position.<sup>73</sup>

### *(b) Standards for Australian Law Schools*

In Chapter 9, under the section relating to Legal Education Reforms, ALTA/CALD Reports, a full account has been given of the Standards for Australian Law Schools Report. However, it is referred to briefly here to ensure its relevance is identified in relation to CALD’s influence during this first decade of the 21<sup>st</sup> century. It was the first

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<sup>71</sup> Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (The Pearce Report) (Australian Government Publishing Service, 1987).

<sup>72</sup> Ibid, Statement of Australian Law Deans, attached as appendix 3 to the Pearce Report, 32.

<sup>73</sup> Ibid.

successful attempt towards establishing minimum standards for legal education in Australia.

However, there had been an earlier unsuccessful undertaking. Chapter 2 of ALRC 89 contains an interesting account of the previous attempt by the Law Council of Australia in 1994 to establish a National Appraisal and Standards Committee to accredit law schools with an explanation of its failure.<sup>74</sup> Some 13 years later in 2007, following a meeting with all the relevant parties at the Law Convention in Sydney, the Law Council of Australia established a Legal Education Committee which included representatives from CALD, ALTA, APLEC and the Australian Law Students Association (ALSA) to discuss mutual problems and developments relating to legal education. At the same time greater cooperation within CALD led to the establishment of a CALD Standing Committee on Standards and Accreditation. The Standing Committee sought the assistance of Christopher Roper, a former Head of both the Leo Cussen Institute in Melbourne and the College of Law in Sydney, with the drafting of a document 'Standards for Australian Law Schools.'<sup>75</sup>

A brief history of the standards project had been drafted by Professor Michael Coper, the then Chair of the Standards Committee, and was published on 9 March 2008.<sup>76</sup> This brief history is a useful explanation of the main standards project document. The most significant statement within this account is the paragraph declaring:

It should be said immediately that the overwhelming purpose of the CALD standards project is to enhance the quality of Australian law schools in all of their diverse endeavours, and to do so by assisting all Australian law schools to strive for and to reach a clearly articulated set of standards.<sup>77</sup>

The paragraph concludes:

The point is that the standards are intended to be beneficial, not punitive, they are written largely in general rather than tightly prescriptive terms, and allow for diversity in the different ways in which law schools might seek to fulfil their particular missions. The

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<sup>74</sup> Australian Law Reform Commission, above n 39, 129–30.

<sup>75</sup> Council of Australian Law Deans, 'Standards for Australian Law Schools Final Report' (CALD, 2008).

<sup>76</sup> Michael Coper, 'A Brief History of the CALD Standards Project' (2008).

<sup>77</sup> Ibid.

object is to lift the quality of our various contributions to the discipline of law as a whole, and work together to do so.<sup>78</sup>

As to the standards themselves, their relevance is incorporated in a unanimous resolution adopted by CALD at its first meeting on 4 March 2008 at the Faculty of Law, University of New South Wales, Sydney, at the UNSW Conference Centre at Coogee Sands. Because of the location of the meeting the resolution has been entitled the ‘Coogee Sands’ Resolution.<sup>79</sup>

This was a notable triumph for CALD. It ensured that not only was the agreement inclusive of all Australian law schools, but it confirmed that by taking the initiative in this way it forestalled any outside official body or institution from imposing any unacceptable or draconian forms of standards on the law schools.

Since the turn of the 21<sup>st</sup> century CALD has suffered from the ever changing nature of its membership. It is now an unusual event for the dean of a law school to serve for more than one appointed term, which is usually either four or five years. Rare exceptions to this practice have been Michael Crommelin (Dean at Melbourne Law School for 18 years)<sup>80</sup> and Michael Coper (ANU Dean for 15 years).<sup>81</sup> This also means that anyone holding an appointment within CALD will rarely serve the full term of office which for the Chair is a maximum of two years. However, recently there has been a consolidation of its leadership and the establishment of a permanent administrative office at the University of Sydney.

### 4.3 Australian Academy of Law

*Towards an Australian Academy of Law* was a heading in ALRC 89;<sup>82</sup> the Report incorporated a chapter on *Education, training and accountability*. In fact, ALRC 89 was pivotal in the establishment of the Academy whose origins spanned more than a decade of discussion, negotiation and planning before its final launch at Government House, Brisbane, Queensland on 26 July 2007. Prior to the publication of ALRC 89 in 2000

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<sup>78</sup> Ibid 2.

<sup>79</sup> Australian Law Reform Commission, above n 38.

<sup>80</sup> Waugh, above n 30, 287.

<sup>81</sup> Australian National University, *Our People: ANU College of Law, Michael Coper* (19 February 2015) <<http://law.anu.edu.au/staff/Michael-coper>>.

<sup>82</sup> Australian Law Reform Commission, above n 39, 150.

there had been two papers considered by CALD recommending the establishment of an Australian Academy of Law.<sup>83</sup>

Leading up to the publication of ALRC 89, the topic of an Australian Academy of Law appeared at frequent intervals on the agenda of CALD meetings but because it was not seen as urgent compared with many other pressing topics—such as those concerning funding of law programs, staff ratios and research surveys—further discussion was frequently held over until the next CALD meeting. The appointment of Professor David Weisbrot, a former Dean of the University of Sydney Law Faculty, as President of the ALRC in 1999 and his subsequent support for the concept of the Academy expressed in ALRC 89, put its establishment firmly back on the wider Australian legal education agenda. Its recommendation by ALRC 89 and Weisbrot's energy in promoting its ideals provided the impetus for it to become a reality. However, the next steps with regard to the development of the Academy of Law proceeded with the same lack of urgency that had marked previous moves for its establishment. These steps concerned the publication of two reports which were to have a profound effect on the progress of the Academy towards reality. The first was that of a sub-committee which reported to CALD at its June 2000 meeting. It contained an informative opening paragraph which after the statement: 'The idea of the formation of an Australian Academy of Law has been under discussion in the Council of Australian Law Deans (CALD) for some years' went on to say:

The idea stems from diverse sources. On the one hand, part of the inspiration comes from dissatisfaction with the Australian Academy of the Social Sciences as a body that can effectively recognise and represent scholarly achievement in the law (and from the hope that a similar but separate body for law might win a separate subvention of government funds). On the other hand, part of the inspiration comes from consciousness of the lack of a forum that brings together all branches of the legal community to consider and progress solutions to issues and problems of common interest, particularly in the area of legal education and training. The model of the American Law Institute (ALI) has provided a

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<sup>83</sup> Ibid 152.

powerful beacon for the latter conception, though the main objective of that body is law reform.<sup>84</sup>

Two years later Professor Ralph Simmonds, who at that time was the Dean of the Faculty of Law at Murdoch University, reactivated the concept of the Academy. As Chair of the Law Reform Commission of Western Australia he presented a paper to the Australasian Law Reform Agencies Conference in Darwin in June 2002 entitled: 'Modernising and Reforming National Law: Back to the Future?', arguing for 'an Australian Academy of Law with a substantial role in relation to law reform.'<sup>85</sup>

The presentation of these papers was followed by further delays in establishing the Academy until Professor David Weisbrot, as President of the ALRC, met with CALD representatives led by Professor Michael Coper in his role as Chair of CALD. The outcome of this meeting was the drafting of a Constitution for the establishment of the Academy and the selection of the Academy's 36 Foundation Fellows. Significantly, Clause 4.1 of the Constitution set out the objects of the Academy. These were:

**(a) Advancement of the discipline of law:** To establish a broadly-based and permanent body, comprising individuals of exceptional distinction from all parts of the legal community, including academia, the practising profession (including private and public sector lawyers), and the judiciary, to work together for the advancement of the discipline of law, in the ways set out in the succeeding objects.

**(b) Scholarships and research grants:** To establish and advance funds to provide scholarships and research grants which advance legal education and the discipline of law and promote ethical conduct and professional responsibility.

**(c) Promotion of excellence:** To promote the highest standards of legal scholarship, legal research, legal education, legal practice, and the administration of justice.

**(d) Law reform:** To promote the continuous improvement of the law and of the operation of the legal system.

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<sup>84</sup> Michael Coper, Whitford Keturah and Robin Woellner, 'The Australian Academy of Law' (Sub-Committee Paper, Council of Australian Law Deans June 2000).

<sup>85</sup> Ralph Simmonds, 'Modernising and Reforming National Law: Back to the Future' (Paper presented at the Australasian Law Reform Agencies Conference, Darwin, June 2002).



**(e) Ethical conduct and professional responsibility:** To promote the highest standards of ethical conduct and professional responsibility amongst all members of the legal community, including the use of legal skills not merely for material personal reward but also in the service of society.<sup>86</sup>

An inaugural meeting of the Foundation Fellows took place in October 2005, but there was a further delay until the official launch of the Academy at Government House, Brisbane on 17 July 2007. At the first Annual General Meeting of the Academy held in Sydney in July 2008, the Hon Robert Nicholson, a former Judge of the Federal Court of Australia was elected as the inaugural President of the Academy. The retirement of the Hon Murray Gleeson as Chief Justice of the High Court of Australia in 2008 led to him being succeeded in October of that year as the Academy's Patron by his successor, the Hon Chief Justice Robert French.<sup>87</sup>

Like all new organisations of this nature, the Academy took a great deal of time to become viable. There was some hostility from the other learned academies in Australia which were concerned that another similar organisation might divert some of the limited financial resources made available by the Australian Government on an annual basis to recognised academies (The Academy has not yet been classified to receive such funding.) There was also the lack of perception by many members of the legal community as to the appropriate purpose of the Academy and whether it could fulfil the aims and objectives of its Constitution. This did not prevent the Academy from undertaking a limited number of events of both an academic and social nature.

However, a turning point in its affairs was marked by the election of a new President, the Hon Kevin Lindgren in November 2011. Kevin Lindgren was a former Federal Court Judge who had also been a foundation professor of law at the University of Newcastle, NSW. Because of these attributes and also because he was involved in a flourishing practice at the NSW Bar since retiring from the federal Bench, Kevin Lindgren represented all the three professional legal components which constituted the Academy's membership.

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<sup>86</sup> Australian Academy of Law *Constitution* (2007) cl 4.1.

<sup>87</sup> Australian Academy of Law, *About* <[www.academyoflaw.org.au/about](http://www.academyoflaw.org.au/about)>.

During 2012, the first full year of his presidency, the Academy not only doubled its membership, it also published 12 editions of a newsletter, undertook eight functions, held meetings in every state and territory and sponsored major conferences, and inaugurated a Patron's Annual Address on 30 October 2012 which was presented by the Chief Justice to coincide with the Academy's Annual General Meeting. This event attracted publicity for the Academy and brought its activities to the forefront of recognition within Australia and, in particular, Sydney where it was held.<sup>88</sup>

The President also instituted a major research project into corporate liquidation. This was undertaken on the Academy's behalf by a research team at the Queensland University of Technology led by an Academy Fellow, Professor Rosalind Mason. The Academy also sponsored Corinne O'Sullivan, the President of ALSA to attend a conference in Durban, South Africa, from 13 to 14 April 2013, organised by the Commonwealth Legal Education Association which had as one of its objectives the establishment of a Commonwealth Law Students Association.

Despite these initiatives the Academy's board of directors has struggled to establish the Academy as a major leader among those organisations which have responsibility indirectly for the advancement of legal education. It is still also in the process of endeavouring to attain equal status with the other leading Australian Learned Academies by the promotion of high level legal research.

#### **4.4 Australian Law Students Association (ALSA)**

At a meeting of the Commonwealth Legal Education Association held in Durban in 2013 ALSA was acknowledged as one of the largest and best organised of all current world wide student law associations.<sup>89</sup>

The origins of ALSA can be traced back to individual local university law student societies which began to evolve in the latter part of the 1970s. Consequently, there was a perceived need by representatives of these law student societies to create an organisation to provide a competition structure for their representative teams to moot against each other. In the mid-1970s this evolved into an Annual Conference in

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<sup>88</sup> Kevin Lindgren, 'AAL Newsletter No. 13' (Australian Academy of Law, 2012).

<sup>89</sup> Interview with Corinne O'Sullivan, ALSA President (Sydney, 18 June 2013).

Melbourne where the first such competition took place. Not long after New Zealand law student societies were also invited to participate in an expanded Australasia student mooted competition. In 1978 the association adopted the title of the Australian Law Students Association. In 1979 the mooted competition and meetings of local law students societies' presidents were formalised into an Annual Conference which also included social functions and meetings to consider matters of common interest to law students. This was subsequently registered in Victoria in 1986 as an incorporated association.<sup>90</sup> The rapid increase in the number of law schools in Australia expanded the membership of ALSA which led to 'an increased demand for ALSA's services and gave rise to a great number of issues concerning legal education and professional admission.'<sup>91</sup>

Another major initiative of ALSA was the establishment of the Australian Legal Education Forum which first took place at the University of Tasmania Law School in 1995. The second forum was held at Macquarie University in 1996 with the third at Griffith University in 1997. Since that time it has developed into a major conference event with a wider representative group of delegates such as at the forum hosted by the University of Technology Sydney in 2004 which included a presentation by the federal Attorney-General, the Hon Philip Ruddock. The legal education forum has subsequently been retitled as 'Speakers Forums'.

Since the 1990s ALSA has continually expanded services to its student members 'producing an Academic Journal, an international Careers Guide, a Judges Associates Guide, a Global Scholarships Guide, a biannual magazine and an LSS Wiki Manual.'<sup>92</sup>

The next major development in the expansion of ALSA took place in 2007–08, when ALSA's Council approved a 10-year strategic plan which included 'the strategies and steps proposed for the next five years to reinvigorate ALSA as an organisation'.<sup>93</sup> The aims of this strategic plan were stated to be:

- Ensuring the sustainability of the organisation;

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<sup>90</sup> Australian Law Students Association, *History of ALSA* <[www.alsa.net.au/about/history-of-alsa](http://www.alsa.net.au/about/history-of-alsa)>.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

- Improving the relevance of ALSA as a national body;
- Ensuring greater communication with and between ALSA Executive, Council, Member associations and other stakeholders; and
- Improving our position as a national lobbyist for law student interests.

ALSA maintains a high reputation within Australian legal education as a national law students association which commands respect both from university law schools, law societies and government departments. Because of the growing size of the law student population this is an association whose influence is likely to increase with the passage of time.

#### **4.5 Law Council of Australia: Legal Education Committee**

Chapter 5 of this thesis mentions the founding in April 1933 of the Law Council of Australia, followed in 1935 with the holding of its first convention. Since that time the Law Council held its national convention in various state and territory capital cities in alternate years until the 36<sup>th</sup> Convention in Perth in 2009, after which they were no longer held. However, whilst the Law Council had gradually developed its sphere of influence over all matters affecting legal issues in Australia, and despite that it had occasionally been involved in releasing statements concerning legal education issues or submitting evidence to inquiries on the topic, no part of the Council's official administrative infrastructure had ever had a dedicated role with respect to legal education. This changed in 2007 when Tim Bugg, the President of the Law Council, proposed at the Law Council Convention in Sydney that the Law Council should establish a Legal Education Committee to address national developments in legal education. The reasons for setting up this Committee were explained by Tim Bugg in the following terms:

The law students of Australia represent the future of the legal profession in this country. During my time as President of the Law Council, one of my priorities has been to develop and advance plans for greater engagement with our law students. The need for the Law Council to develop strong links with the tertiary education sector has become more apparent in recent times as law school numbers grow rapidly. For instance, in 1987, there were just 12 university law schools across the country. Today, 29 universities offer law to more than 28,000 students, and the number is likely to continue to grow.

Building closer links with our tertiary institutions is also important to the Law Council as it begins engaging in the promotion of Australian university degrees in foreign countries. At its most recent meeting of Directors, the Law Council gave the green light to the establishment of a Legal Education Committee. The decision means the Law Council is putting the training of lawyers firmly on its formal agenda for the coming years.<sup>94</sup>

The Legal Education Committee included representatives from the Law Council, CALD, ALSA and ALTA. It also included a member from the Australasian Professional Legal Education Council as the representative of all legal professional training courses in Fiji and Papua New Guinea.<sup>95</sup>

During the term of Tim Bugg's Presidency of the Law Council there were regular teleconferences between the members of the Legal Education Committee which enabled them to keep in touch with current activities and decisions among the constituent members relating to legal education. However, successive Law Council Presidents did not share Tim Bugg's enthusiasm for legal education so that there were only two further meetings of the Legal Education Committee until it was disbanded on 17 September 2014.

This was a disappointing outcome for what had been regarded as an important initiative for the consolidation of those organisations representing groups of major stakeholders within legal education. It also portrayed a lack of interest in the topic on the part of the Law Council Presidents who followed Tim Bugg, when the national organisation should have been in the vanguard of supporting adequate funding and increased resources for Australian law schools. However, in 2015 the Committee was reconstituted and immediately produced a discussion paper updating the status of legal education in Australia.

#### 4.6 Australasian Professional Legal Education Council (APLEC)

ALRC Discussion Paper 62 noted:

The trend in Australasia since the 1970s has been away from the system of 'articled clerkships' as the main method of providing post university practical legal training, in

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<sup>94</sup> Tim Bugg, 'Law Council of Australia', *ALTA Newsletter* Winter Edition 2007, 46.

<sup>95</sup> Ibid.

favour of a model recommended by reports here and in the United Kingdom: that is, six to nine months of a second stage professional education in an institutional setting followed by a period of in service training, under supervision.<sup>96</sup>

The requirements of articulated clerkships were generally unpopular with students due to poor supervision, the operation of menial tasks and the lack of exposure to meaningful legal tasks.<sup>97</sup> However, the concept of its replacement by the provision of formal institutional training known as PLT also received a lack of acknowledgement by law academics, the profession and students. Arguably, there was a perception among recognised law academics that those teaching PLT programs in some ways might not be regarded as equal to those teaching law degree programs. It was for these reasons that a new professional body, the Australasian Professional Legal Education Council (APLEC), was formed in the 1970s to represent the interests of those involved with PLT programs and to promote improved standards in the quality and presentation of such programs.<sup>98</sup>

Clause 3 of APLEC's Constitution articulates its objects as being:

3.1 The furtherance of professional legal education and of the work and interests of those engaged in professional legal education in Australia and elsewhere.

3.2 The encouragement and organisation of publications concerning professional legal education.

3.3 The promotion of active co-operation of Australasian Legal Practice Courses with one another, with Legal Practice Courses elsewhere and with Law Schools, tertiary institutions and professional bodies in in Australasia and elsewhere.

3.4 The maintenance of close relations with Law Schools and tertiary institutions and the legal profession in Australasia and elsewhere.

3.5 Co-operation with professional bodies and other bodies in the work of law reform.

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<sup>96</sup> Australian Law Reform Commission, above n 4, [3.44].

<sup>97</sup> Ibid.

<sup>98</sup> Australasian Professional Legal Education Council, *About* <[www.aplec.asn.au/aplec/dsp\\_aplec.cfm](http://www.aplec.asn.au/aplec/dsp_aplec.cfm)>.

3.6 The collection and publication of information about the functions and needs of Legal Practice Courses.

3.7 The organisation of an annual Conference.<sup>99</sup>

APLEC was referred to in ALRC 89 as an authority on current standards for the PLT stage of professional legal education. It was also responsible, in conjunction with LACC, for setting professional standards and developing Competency Standards for Entry Level Lawyers. Its work in this regard demonstrates its professional standing within legal education.

#### 4.7 International Legal Services Advisory Council (ILSAC)

ILSAC was established in 1990 on the initiative of the Hon Sir Laurence Street, a former Chief Justice of the NSW Supreme Court, who was appointed as its inaugural Chairman and who retained this position until 2009 when he was replaced by Tim Bugg. It was established by the Australian Government:

with a mission to enhance the international presence and improve the international performance of Australia's legal and related services. To further this aim, ILSAC undertakes work in four key areas; global legal services and market access; international legal cooperation; international legal education and training; and international commercial dispute resolution.<sup>100</sup>

With regard to legal education ILSAC's particular interest was 'to engage in, and service the growing demand in the Asia-Pacific region for, international legal education and training.'<sup>101</sup>

ILSAC had an important influence in the promotion of Australian legal education internationally and particularly, as it has claimed, in the Asia-Pacific region. One of its major achievements has been the regular publication, in cooperation with CALD, of a major booklet *Studying Law in Australia*,<sup>102</sup> originally in hard copy and now available

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<sup>99</sup> Australasian Professional Legal Education Council, 'Constitution' (APLEC, 1996) cl 3.

<sup>100</sup> International Legal Services Advisory Council, *Home Page* <[www.ag.gov.au/Pages/default.aspx](http://www.ag.gov.au/Pages/default.aspx)> 1.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

online. It has also exercised a major influence on negotiations regarding the mutual recognition of qualifications of international lawyers wishing to practise law in Australia and Australian lawyers wishing to practise law overseas.

ILSAC's effectiveness, and whether it could have contributed to the future of Australian legal education, especially in internationalising the Australian law curriculum, was the topic of its last National Symposium held in Canberra on 16 March 2012. These issues are still to be assessed in light of the federal Attorney-General's Department's decision to close it down:

Following the Australian Government's announcement on 8 November 2013 to abolish or rationalise a number of non-statutory bodies, the International Legal Services Advisory Council will close. The closure of this group is a whole-of-government decision that was taken to simplify and streamline the business of government.<sup>103</sup>

This decision was taken by the Attorney-General's Department without any prior consultation with either Tim Bugg, the then Chairman of the Council, or any of its members. As Tim Bugg stated:

I was surprised to first learn of it the way I did, particularly because there had been no consultation whatsoever with any of the members of ILSAC immediately before its abolition.<sup>104</sup>

This was another example of the federal government treating a legal organisation with scant respect, and the legal community not seeing the need to mount a major challenge to retain a crucial legal education international advisory service.

## 5. External Influences on Australian Legal Education

It is inevitable that there will always be some form of governmental influence on Australian legal education but there has been a marked change in the power structure with the Australian Government gradually eroding the influence of state governments over tertiary education. The majority of funding of state universities, and consequently

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<sup>103</sup> Australian Government Attorney-General's Department, *International Legal Services Advisory Council* <[www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/ILSAC.aspx](http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/ILSAC.aspx)>.

<sup>104</sup> Alex Boxsell, 'Aging of ILSAC Came with No Warning', *Australian Financial Review* (Melbourne), 6 December 2013.



their law schools, is now sourced from the Australian Government which gives it a major control over their operation.<sup>105</sup>

However, there is a distinction between the federal influence over grant-aided funding to the tertiary sector and those programs which are full-fee paying. In contrast with federally funded undergraduate programs, with the development of the Juris Doctor degree program, which has been mainly full-fee paying, the universities have had to return a greater percentage of these fees to the funding of the relevant law programs. Also, the more mature students involved in postgraduate programs have a greater expectation that there will be adequate funding of their courses as compared with their undergraduate counterparts.

However, the post World War II period from 1945 to approximately 2010, after which most law schools had introduced full-fee paying postgraduate Juris Doctor programs, will be regarded by future legal historians as a time when law deans and their equivalents capitulated to senior university management by accepting chronic underfunding of undergraduate law degree programs. There appears to be no rational reason for this attitude other than the fact that it was only in the post war years that law succeeded in its struggle to become an accepted major academic discipline within its own right and, as a result, has been able to increasingly claim a greater share in the distribution of university resources.

Compared with the issue of funding it is much more difficult to discover who is able to influence the quality of law programs and their relevance to both practice and the legal community generally. Whilst LACC and the State and Territory Admissions Boards have responsibility for advice on and the accreditation of law courses,<sup>106</sup> they have no liability for ensuring their quality, which is the concern of the universities and government quality assurance agencies.<sup>107</sup> The introduction by CALD of Standards for Australian Law Schools was obviously a move to develop a commonality of legal educational standards across all law schools. But because this was in the nature of self-

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<sup>105</sup> Hannah Forsyth, *A History of the Modern Australian University* (NewSouth Publishing, 2014) 120–124.

<sup>106</sup> *Legal Profession Uniform Law Application Act 2014* (NSW) s 19; *Legal Profession Uniform Law Application Act 2014* (Vic) s 19.

<sup>107</sup> Australian Government Tertiary Education Quality and Standards Agency, *About TESQSA* <[www.teqsa.gov.au/about](http://www.teqsa.gov.au/about)>.

regulation by the individual law schools there does not seem to have been a dramatic improvement or standardisation of law programs since the ‘Coogee Sands’ Resolution of 2008.<sup>108</sup>

In addition, the work undertaken by ALTA in supporting the raising of teaching standards through its Annual Conference and its sponsorship of the LER, JALTA and LED,<sup>109</sup> is largely unacknowledged by both the law deans and wider law academic membership.

Despite the existence of various ad hoc legal associations, they have never been able to reach a level of cooperation in developing Australian legal education to either present a united front to government or develop a unified approach to the increasing demands of the legal profession. It had been anticipated that the Australian Academy of Law, with its membership being drawn from the judiciary, legal profession and law academics, might have been able to fulfil the role that the Legal Education Committee of the Law Council failed to perform. But as yet it has maintained a respectful approach towards the status of the law deans and other professional bodies.

Within the next decade there will be a need for a lead on the future of the legal profession and consequently legal education. This will require the emergence of strong leadership among legal associations to advance the future intellectual and technological challenges of an ever-burgeoning university law schools sector.

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<sup>108</sup> Council of Australian Law Deans, above n 75.

<sup>109</sup> Australasian Law Teachers Association, *Annual ALTA Conference/Publications* <[www.alta.edu.au/conference.aspx](http://www.alta.edu.au/conference.aspx)>.

## **Chapter 9**

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#### **1. Introduction**

The history of legal education in Australia is complex and goes beyond recounting the teaching of law in law schools, although this is a major component of such a narrative. Legal educators have been continually involved in improving the teaching and quality of legal studies, and exploring how to equip law graduates for success as legal practitioners. That is why the first part of this chapter examines the manner in which law academics and their professional associations have endeavoured to achieve these objectives.

In contrast, the second part of this chapter distinguishes between academic training at a university and subsequent practical training (including institutional and in-service

components) and continuing education. It also considers the background and relevance of the only non-degree course, which is unique to New South Wales (NSW) and satisfies the academic stage for qualification as a legal practitioner.

The chapter then reviews the development of courses that have targeted late and special entry into law programs for those groups who were previously, and still are, under-represented in the legal profession. These have been described by Michael Kirby as 'Aboriginal and Torres Strait Islander People'<sup>1</sup> together with 'students with disabilities, with non-English speaking backgrounds or remote home environments and women who are returning to education after completing parenting responsibilities.'<sup>2</sup> Finally, the influence of the internet on the provision of free legal information to law academics, the legal community and to the general public<sup>3</sup> is also considered.

## 2. Recommendations for Change to Tertiary Legal Education

During the past decade there have been a number of reviews of legal education mainly carried out by or on behalf of the Council of Australian Law Deans (CALD) solely or in collaboration with the former Australian Learning and Teaching Council (ALTC). These have included: Christopher Roper, 'Standards for Australian Law Schools';<sup>4</sup> Susanne Owen and Gary Davis, 'Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment';<sup>5</sup> and Sally Kift and Mark Israel, 'Bachelor of Laws Learning and Teaching Academic Standards Statement (Learning and Academic Teaching Standards Project)'.<sup>6</sup> These three reports are discussed below.

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<sup>1</sup> Michael Kirby, 'Foreword' in David Barker and Anna Maloney (eds), *Access to Legal Education* (Centre for Legal Education, 1995) iii, v.

<sup>2</sup> *ibid.*

<sup>3</sup> Andrew Mowbray, 'Justice and Technology' in Russell Fox (ed), *Justice in the Twenty-First Century* (Cavendish Publishing, 2000) 207, 209.

<sup>4</sup> Christopher Roper with input from the CALD Standing Committee on Standards and Accreditation Council of Australian Law Deans, 'Standards for Australian Law Schools Final Report' (CALD, 2008).

<sup>5</sup> Susanne Owen and Gary Davis, 'Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment: Project Final Report' (Australian Learning and Teaching Council and Council of Australian Law Deans, 2009).

<sup>6</sup> Sally Kift and Mark Israel, *Bachelor of Law Standards, Learning and Teaching Academic Standards Project* (ALTC, 2010).

## 2.1. Standards for Australian Law Schools

### *(a) Establishment of CALD's National Standards*

The changing approach of CALD towards developing a common policy on aspects of legal education can be illustrated by its work in establishing National Standards for Australian Law Schools.

As explained in Chapter 8, CALD was not the first body to attempt to impose an acceptable standard for protecting the quality of Australian law degrees and maintaining the standards of Australian law schools.

Chapter 2 of *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89) provides an account of a previous attempt by the Law Council of Australia in 1994 to establish a National Appraisal and Standards Committee to accredit law schools and the reason for its failure. This was principally because of the 'suggested composition of the Appraisal Committee (with only four of the eleven members being legal educators); the intrusive nature of the terms of reference, which included internal matters of personnel and resource management; and the unexplained method for funding such a labour-intensive system.'<sup>7</sup>

Since then there has been no serious attempt either by a central organisation or by any of the state (Supreme Court) Admission Bodies to exercise control of national standards or the accreditation of law schools. Nevertheless, due to the personalities involved in the Law Council and various legal academic associations, there began in the early part of the 21<sup>st</sup> century a gradual thawing of relations between the various bodies, which gathered momentum at the Australian Law Convention held in Sydney in 2007. There the Law Council established a Legal Education Committee which included representatives from CALD, the Australasian Law Teachers Association (ALTA), the Australasian Professional Legal Education Council and the Australian Law Students Association to discuss mutual problems and developments relating to legal education. Until this point of time CALD did not have a generally accepted view on a system of national standards or accreditation of law schools. As has been evidenced in the account

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<sup>7</sup> Australian Law Reform Commission, *'Managing Justice: A Review of the Federal Civil Justice System'*, Report No 89' (2000) 123 [2.31].

of the development of CALD in Chapter 8, this had been exacerbated by the strong competition between law schools for funding, and the enrolment of both government supported and full-fee paying students. An outcome of this greater cooperation within CALD was the establishment of a CALD Standing Committee on Standards and Accreditation (the Standards Committee), which sought the assistance of Christopher Roper in drafting 'Standards for Australian Law Schools'.<sup>8</sup>

Roper was a good choice. He had an outstanding record in legal education, having been head of the Leo Cussen Institute in Melbourne and the College of Law in Sydney, the Director of the Centre for Legal Education and the College of Law Alliance, and Adjunct Professor at the City University, Hong Kong and Newcastle Law School in NSW.

A brief history of the standards project was written in 2008 by Professor Michael Coper, formerly the Dean of the Australian National University (ANU) College of Law, who was the Chair of the Standards Committee at that time.<sup>9</sup> To ensure that the exercise was inclusive, the Coper history was circulated with a copy of the 'Standards' to all Australian law deans so that it could be considered at their law school meetings. Coper's account encapsulates the history and purpose of the CALD standards project. The most significant statement within his account states:

It should be said immediately that the overwhelming purpose of the CALD standards project is to enhance the quality of Australian law schools in all of their diverse endeavours, and to do so by assisting all Australian law schools to strive for and reach a clearly articulated set of standards.<sup>10</sup>

Coper emphasised that the standards project was part of, and within the context of, another CALD project funded by the former Carrick Institute for improving learning and teaching in the discipline of law.<sup>11</sup> He stated:

The point is that the standards are intended to be beneficial, not punitive, they are written largely in general rather than tightly prescriptive terms, and allow for diversity in the

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<sup>8</sup> Council of Australian Law Deans, above n 4.

<sup>9</sup> Michael Coper, 'A Brief History of the CALD Standards Project' (2008).

<sup>10</sup> *ibid* 2.

<sup>11</sup> Michael Coper, 'CALD Report', *ALTA Newsletter* Summer 2008, 32, 34.

different ways in which law schools might seek to fulfil their particular missions. The object is to lift the quality of our various law schools contributing to the discipline of law as a whole, and work together to do so.<sup>12</sup>

The standards were adopted by unanimous resolution of CALD at its meeting on 4 March, 2008. Because of the location of the meeting, which was at the University of NSW (UNSW) Management Conference Centre, Coogee Sands, its resolution has become known as the ‘Coogee Sands Resolution’.<sup>13</sup>

The Resolution committed members of CALD to the standards set out in the Roper Standards Report. It also committed them to a process of certification of compliance with the standards and, in particular, to identifying which of these should be core or minimum standards and which should be aspirational. Much of the Coogee Sands Resolution was concerned with matters that had been the cause of debate within most law schools until its adoption. It was, however, important that such matters be incorporated in an all-embracing resolution subscribed to by the representatives of all Australian law schools. This meant a commitment to graduate attributes, and to a clear understanding of curriculum design and educational methods, curriculum dissemination and assessment of students.

More relevant was that CALD was willing to define a basic requirement for academic staff, their profile and an outline of their duties. Even more significant was its willingness to define the basic expectations with respect to a law library or law collection, resources and infrastructure, the nexus between teaching and research and governance and administration of the law school. Because of a lack of consensus of its members in the past there were topics that CALD had been unwilling to consider as part of its remit. Statements in the Coogee Sands Resolution such as: ‘The title of the academic head of the law school is **dean**’ and ‘The law school has a dedicated operational budget and the responsibility for managing it’ would have been considered unacceptable in a CALD resolution a few years previously.

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<sup>12</sup> Coper, above n 9, 2.

<sup>13</sup> CALD Meeting, *Special Resolution 2008/1 - Standards* (2008) (‘The Coogee Sands Resolution’).

*(b) Critique of CALD's National Standards*

Shortly after the adoption of the Coogee Sands Resolution, the legal education community raised questions about its acceptability. In an article in the May 2008 edition of the *Law Society Journal* of NSW Luke Slattery, a contributing reporter, stated that:

Australian legal education is set to undergo an historic overhaul as law school heads consider a controversial proposal to set both minimum and aspirational standards for incorporation into a national accreditation process.<sup>14</sup>

Slattery focused on the issues that had previously divided members of CALD, and those that might still create divisions when the standards document was to be reconsidered at the next CALD meeting in Cairns later that year. In that regard he advanced a view that some law deans might consider that the implementation of the recommended standards was a move 'by deans from the Group-of-Eight law schools to stratify legal education and formalize an institutional hierarchy.'<sup>15</sup> There was also a concern articulated by Professor Tyrone Carlin, the Interim Dean of Law at Macquarie University, that the Standards would result in 'a move towards greater curriculum uniformity.'<sup>16</sup> In contrast, Professor Arie Freiberg, the Dean of Monash University's Faculty of Law stated that:

What's important now is to maintain our national and international reputation. You've got to have some way of accrediting or backing up the quality of the lawyers we are putting out.<sup>17</sup>

The consensus view among most law deans at that time was if CALD had not developed this draft national charter of standards then the initiative for such a move would have been taken up by another formal body, such as the Law Council of Australia or the Standing Committee of Attorneys-General (SCAG). Although the document did not create self-regulation by CALD, it did mean that, as suggested by Professor Bill Ford, the Chair of CALD, there was a high probability: 'It would be available to the Law

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<sup>14</sup> Luke Slattery, 'Law Deans Divided on Standards Proposal for Accreditation' (2008) 46(4) *Law Society Journal* 22, 22.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

<sup>17</sup> *ibid.*



Admission Consultative Committee, which [would] use it as the basis for its discussion on accreditation from jurisdiction to jurisdiction.’<sup>18</sup>

## 2.2. Learning and Teaching in the Discipline of Law

Building on the success of its 2008 Report ‘Standards for Australian Law Schools’, a complementary project was finalised by CALD in its 2009 Report entitled ‘Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment.’<sup>19</sup> It was funded by the former ALTC. This 2009 Report was a highly sophisticated exercise which involved detailed consideration of some aspects of legal education which CALD had previously left to individual law schools or research centres to investigate or resolve. The topics the 2009 Report canvassed are considered below.

### *(a) Scoping and Methodologies*

The opening of the 2009 Report incorporated a review of legal education developments in Australia which had taken place in the preceding 20 years,<sup>20</sup> including diversity, fast-tracking of degrees and diverse modes of legal study.<sup>21</sup> Methodologies included workshops, regional round tables and the mapping of current practices, together with student surveys relating to mental health issues and academic surveys on ethics and professionalism.<sup>22</sup> In its summary to this part of the project, Chapter 4 of the 2009 Report stated that there was a need for more engaging approaches and the production of more fully rounded law graduates.<sup>23</sup>

### *(b) Graduate Attributes*

Due to the greater pressure on universities to produce graduates who are to become future members of the profession, the 2009 Report emphasised the need to focus on such aspects as knowledge, skills and personal attributes.<sup>24</sup> The 2009 Report also stated that not only is legal education expected to take cognisance of these broader based

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<sup>18</sup> *ibid.*

<sup>19</sup> Owen and Davis, above n 5.

<sup>20</sup> *ibid* 7.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid* 12.

<sup>23</sup> *ibid* 51.

<sup>24</sup> *ibid* 54.

university-specified graduate attributes, but that the law curriculum should also be expected to meet the legal profession's accreditation standards. In this respect there was a need to note the concerns expressed about the creation of a dichotomy between the focus on content (as required by the professional accreditation process) and that on skills and values (as expected by enlightened members of the legal community, as reiterated in ALRC 89: 'Legal education [should be] around what lawyers need know').<sup>25</sup>

### *(c) Ethics, Professionalism and Service*

The 2009 Report reflects some of the confusion that has arisen in recent years as to the context for teaching ethics in the Bachelor of Laws (LLB) curriculum.<sup>26</sup> It covered the ongoing debate of the role of 'pro bono legal service'—namely whether it should be a compulsory part of the law degree curriculum—reflecting that CALD had made no formal decision as to its role. This ongoing reluctance by CALD to adopt a formal policy whereby all Australian law students would have to become involved in pro bono programs as part of their legal training was adversely commented upon by the Hon Michael Kirby, a former Justice of the High Court of Australia, in his Foreword to the text *Community Engagement in Contemporary Legal Education*.<sup>27</sup>

### *(d) Legal Education and the Mental Wellbeing of Australian Law Students*

One of the goals of the CALD project, leading to the 2009 Report, was the development of 'baseline data regarding the mental wellbeing of law students including their understanding of relevant issues, personal experiences and knowledge of assistance mechanisms which are in place.'<sup>28</sup> This incorporated a study in 2009 undertaken by the Brain and Mind Research Institute at the University of Sydney.<sup>29</sup> This study found that:

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<sup>25</sup> Australian Law Reform Commission, above n 7, [2.21].

<sup>26</sup> Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (A report commissioned by the Australian Universities Teaching Committee, Department of Education, Science and Training, 2003) <<http://www.cald.asn.au/docs>>.

<sup>27</sup> Patrick Keyzer, Amy Kenworthy and Gail Wilson, *Community Engagement in Contemporary Legal Education: Pro Bono, Clinical Legal Education and Services Learning* (Halstead Press, 2009) ii–viii.

<sup>28</sup> Owen and Davis, above n 5, 119.

<sup>29</sup> Norm Keike et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers* (Brain and Mind Research Institute, University of Sydney, 2009).

74.9% of law students stated that they or someone else close to them, had experienced depression. Of these students, 46.9% had personally experienced depression.<sup>30</sup>

Of greater concern was that the study revealed:

An unwillingness to seek professional help with 37.6% of the student participants in the [Brain and Mind Institute] study saying that they wouldn't seek help from any professional—such as a GP, psychiatrist or psychologist—though many did say they would seek help from non-professional sources.<sup>31</sup>

The work on this mental health project had begun with the support of the Tristan Jepson Memorial Foundation established by the parents of a UNSW law student Tristan Jepson who took his own life in 2004 as a result of severe clinical depression.<sup>32</sup>

#### *(e) Infrastructure, Linkages and the Future*

It was appropriate that CALD's 2009 Report was published in that year. This was a time when law schools were looking for a lead on their role in a university environment with a greater emphasis on the auditing of quality within the tertiary sector and the legal profession demanding a more explicit teaching of a wide range of legal skills. The final chapters of the 2009 Report emphasise 'Infrastructure, Linkages and the Future' and identify a workable infrastructure for CALD to consult and engage with key stakeholders in legal education.

One of the encouraging aspects of CALD's project was that it broke down the barriers, and encouraged greater cooperation, between law schools. The 2009 Report said:

This has involved sharing ideas about various law schools' directions and achievements in relation to Graduate Attributes and Assessment topics through involving law academics in workshops and regional round tables to develop collaborative ideas and materials.<sup>33</sup>

The 2009 Report also points the way for the future development of Australian legal education, highlighting factors which can lead to its success. These include:

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<sup>30</sup> ibid 16.

<sup>31</sup> ibid 20.

<sup>32</sup> ibid i.

<sup>33</sup> ibid 147.

- the need for a clear and focused plan and project management, including ongoing formative evaluation processes to ensure working systematically towards outcomes and deliverables<sup>34</sup> ...
- raising awareness of innovations and building skills for individuals and across law schools, through working together and sharing materials across universities ... Wider dissemination communication occurs through materials development and within conferences and other accessible publications and this has the potential to improve programs within the discipline on an Australia-wide basis.<sup>35</sup>

It is expected that these outcomes and aspirations of the 2009 Report will form a firm basis for the development of contemporary legal education in Australia.

### 2.3. Threshold Learning Outcomes

The Learning and Teaching Academic Standards (LTAS) project in Law and, in particular, the six Threshold Learning Outcomes (TLOs)<sup>36</sup> for the Bachelor of Laws degree were intended to have a significant effect by representing what a Bachelor of Laws graduate is expected 'to know, understand and be able to do as a result of learning.'<sup>37</sup>

The TLOs covered six aspects of expected standards in the LLB degree program. The intention of the LTAS project was that the TLOs would assist law schools to demonstrate learning outcomes at the requisite qualification level.<sup>38</sup>

The TLOs are: TLO 1: Knowledge, TLO 2: Ethics and professional responsibility, TLO 3: Thinking skills, TLO 4: Research skills, TLO 5: Communication and collaboration, and TLO 6: Self-management.<sup>39</sup>

The relevance of the TLOs and their application to elements of the LLB were explained in the detailed 'Notes on the Threshold Learning Outcomes for the Bachelor of Laws'.<sup>40</sup>

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<sup>34</sup> ibid 148.

<sup>35</sup> ibid 149.

<sup>36</sup> Kift and Israel, above n 6.

<sup>37</sup> ibid 1.

<sup>38</sup> ibid 9.

<sup>39</sup> ibid 10.

<sup>40</sup> ibid 11.

These accompanying notes explained that they were ‘intended to offer non-prescriptive guidance on how to interpret the TLOs’,<sup>41</sup> and that ‘it is not the role of the LTAS project to tell law schools how they should go about the learning, teaching or assessment of their students.’<sup>42</sup>

The introduction of TLOs was welcomed by most legal educators as a way forward in achieving a relevant standard for ensuring students had achieved the core learning outcomes for the bachelor-level law degree.

Anna Huggins, an academic at UNSW, stated how she believed that TLO 6 on self-management could ‘relevantly be applied in the first year of legal education.’<sup>43</sup> She argued that:

students’ connection with their intrinsic interests, values, motivations and purposes will facilitate student success in terms of their personal well-being, ethical dispositions and academic engagement.<sup>44</sup>

Alex Steel stated that the TLOs were important because ‘they capture both what many see as what the key elements of a law degree should be—a sort of minimum best practice.’<sup>45</sup> He also drew attention to the fact that the LTAS project had generated the publication of a number of Good Practice Guides.<sup>46</sup>

A contrary view was expressed by Joachim Dietrich, an associate professor at Bond University Law School, who questioned whether the TLOs would help maintain standards in legal education or whether implementing them was a waste of time. In his view the ‘project itself was always going to be self-fulfilling and self-justificatory.’<sup>47</sup> After a critical analysis of the various TLOs he concluded by stating:

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<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> Anna Huggins, ‘The Threshold Learning Outcomes on Self-Management for the Bachelor of Laws Degree: A Proposed Focus for Teaching Strategies in the First Year Law Curriculum’ (2011) 2(2) *International Journal of the First Year in Higher Education* 23, 23.

<sup>44</sup> *ibid.*, 23.

<sup>45</sup> Alex Steel, ‘Threshold Learning Outcomes and Good Practice Guide for a Law Degree’ (2013) *Law School Vibes* 1, 1.

<sup>46</sup> *ibid.*

<sup>47</sup> Joachim Dietrich, ‘Law Threshold Lowers the Bar’, *The Australian (Higher Education)* (Sydney), 30 March 2011, 32.

In essence, what we have in the threshold learning outcomes is an assertion that goes little beyond this: law graduates must demonstrate, and universities must ensure their graduates can demonstrate, that they know and can find some law, are able to apply it, and can communicate in some form their understanding. In the university race to the bottom, few institutions need concern themselves with maintaining standards. The threshold learning standards are so widely drawn almost any criticism can be met with a nod to the outcomes and an assertion they are being complied with. Given the generality and banality of them, who could disagree?<sup>48</sup>

Such a view was an exception to those expressed by legal educators who considered the TLOs to be a way forward in achieving some form of comparison between law schools and their various undergraduate and, subsequently postgraduate, law degrees, leading to their acceptance by the legal profession.

In this respect the final comment may be left to Professor Jill McKeough, the former Chairperson of CALD who stated in a letter to the *Higher Education* supplement of *The Australian* newspaper that:

The Legal Admissions Consultative Committee has recommended these TLOs as requirements for admission to legal practice. Embedding and assessing the TLOs will be a challenge for some institutions producing law graduates, but will lead to a closer match between graduates of university law schools and the needs of our society and economy. The professionalism and competence of a sound and ethical lawyer with the threshold skills the TLOs enshrine add value and is an important investment in Australia's future.<sup>49</sup>

#### 2.4. Reflection

The effect of these reviews should not be underestimated. Prior to the CALD standards project in 2008 Australian Law Deans had been reluctant to take any initiative on raising legal education standards. This was in contrast to the United States where the American Bar Association and the Association of American Law Schools agreed on a standardisation of minimum requirements for the accreditation of law schools during the

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<sup>48</sup> *ibid.*

<sup>49</sup> Jill McKeough, 'Letter to the Editor', *The Australian (Higher Education)* (Sydney), 6 April 2011, 33.

post-war period from 1945 onwards.<sup>50</sup> Although there had been four earlier reviews of the legal profession and legal education (considered in Chapter 10 of this thesis) these had all been undertaken at the request of either the federal or state governments.

It was the subsequent law project on learning outcomes commissioned by the Australian Universities Teaching Committee (AUTC)—the outcome of a tender submitted by a number of law deans in 2000 and referred to earlier in this chapter—which recognised a need to evaluate the changes to legal education since the publication of the Pearce Report in 1997. As the coordinators of the AUTC project recognised, these changes involved curriculum and teaching developments which the project needed to ‘identify, describe and evaluate.’<sup>51</sup> It also needed to ‘provide an overall assessment of the quality of teaching and learning across the discipline of law.’<sup>52</sup> However, the report contained a cautionary statement that it was not meant to impinge on the integrity of any particular law school:

The AUTC project is concerned with broad themes and developments in legal education. It is not its function to evaluate individual law schools and their programs or to pass negative comment upon them. Indeed except in relation to information that is in the public domain or involves a clearly positive judgment, it is not intended to identify individual law schools.<sup>53</sup>

Seen within the context of this statement the reviews of legal education considered in the first part of this chapter marked a growing maturity on the part of those charged with providing leadership in legal education.

### **3. Changing Patterns of Legal Education: Teaching and Learning Beyond the Law Schools**

While there is a tendency to think of legal education as what 38 law schools in Australia provide, the reality is a vast network of vocational activities constitutes the wider aspect of legal education.

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<sup>50</sup> Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press/Lawbook Exchange, 2001) 205–15.

<sup>51</sup> Richard Johnstone and Paul Redmond, 'The AUTC Project on Learning Outcomes and Curriculum Development in Law' (2001) 3 *UTS Law Review*, 14.

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

This thought pattern reflects that in the earlier years legal education was directed only towards the training of legal practitioners. However, as the demands of legal institutions such as courts, tribunals and the legal profession increased, there was a proliferation of services and service providers which extended beyond the original remit of law schools to provide training for a career in the legal profession. This part of this chapter deals with some aspects of these extended services, particularly the education of articled clerks and practical legal training (PLT). It also considers continuing professional development/continuing legal education, the NSW Admission Boards Examinations incorporating the University of Sydney Extension Course and access to legal education. It emphasises the need for pre-law preparatory courses for Aboriginal and Torres Strait Islander People and other disadvantaged students including those with disabilities. PLT, the NSW Admission Boards System and continuing legal education were topics discussed in the Bowen Report and are reviewed more fully in Chapter 10 of this thesis.<sup>54</sup>

### 3.1 Articled Clerks and Practical Legal Training

As illustrated in the earlier chapters of this thesis, academic legal education gradually incorporated training in the operational aspects of legal practice. In this respect, the legal profession in pre-federation NSW and other Australian colonies reflected the traditional practice of England and Wales whereby those wishing to enter the legal profession would seek employment as interns to a practising member of the profession, usually a solicitor but also, in exceptional circumstances, a barrister in chambers. This represented the practice of most of the early professions whereby there were relationships of masters and servants, the latter learning by observing and copying the actions of their masters or principals.

#### *(a) NSW*

Until comparatively recently the pattern of PLT closely emulated that which operated many centuries before in England. There was a convention to adopt the process which had been followed in England for the admission of solicitors. This meant that from 1828 onwards potential solicitors became articled to practising solicitors or attorneys within

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<sup>54</sup> Nigel Bowen, 'Committee of Inquiry into Legal Education in New South Wales (The Bowen Report)' (New South Wales Government, 1979).



NSW for a period of five years, on completion of which they could be admitted as a solicitor within the colony.<sup>55</sup> These rules were amended by the legislature in 1834 which provided for such articulated clerks to pass an interview conducted by the Judges of the Supreme Court. In addition, applicants had their suitability for admission vetted by a Master in Equity, a barrister and two attorneys appointed as Examiners by the Supreme Court.<sup>56</sup>

In 1877 further rules were introduced which set a lower age limit of 17 years for an articulated clerk applicant and expanded the requirements about character and education. Additionally, a Board of Examiners, consisting of two barristers and four solicitors appointed by the court, was established to carry out examinations in law. Whilst this board of examiners became known as the Solicitors Admission Board (SAB), it was not officially designated with this title until 1953 in accordance with *Supreme Court Rules—Solicitor Admission Rules 1952* (NSW).<sup>57</sup>

While both the Barristers Admission Board and the SAB continued to function separately there was a gradual combining of the requirements for solicitors and barristers. To illustrate this ongoing unification: from 1935 solicitors have been required to apply for an annual practising certificate granted by the Law Society of NSW<sup>58</sup> and, similarly following the *Legal Profession Act 1987* (NSW), barristers are required to apply for a practising certificate issued by the NSW Bar Association's executive council, the Bar Council.<sup>59</sup> Ultimately, following the passage of the *Legal Profession Act 1994* (NSW) the administration and functions of both admission boards were integrated into a Legal Practitioners Admission Board. In 2005 the Board was renamed the Legal Profession Admission Board (LPAB).

#### *(b) Victoria*

In 1852 the Supreme Court of Victoria established two separate boards of examiners to administer the examinations and the standards for admission to practice for both

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<sup>55</sup> New South Wales State Records, *Examiners of the Supreme Court (1834-1877) Solicitors Admission Board (1877-1994)* <<http://search.records.nsw.gov.au/agencies/1094>>.

<sup>56</sup> Research Data Australia, *Barristers Admission Board* <<http://researchdata.and.s.org.au/barristers-admission-board/164935>>.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*

barristers and solicitors.<sup>60</sup> At this time the qualifying period for potential solicitors remained at five years, the same time restriction as that imposed in NSW. However, in 1872 this period was reduced to three years for those who had graduated with a degree in law or arts from the University of Melbourne.<sup>61</sup> Despite subsequent changes to the process of training as an articled clerk, Victoria has always retained articled clerkships as part of an alternative pre-qualifying process to become a solicitor.

*(c) Leo Cussen Institute for Law, College of Law and other PLT providers*

Although the practice of articled clerkship was the accepted process for qualifying as a solicitor in each Australian state and territory, there was a recognition in some jurisdictions that this form of training might be outmoded and that there might be insufficient numbers of solicitors capable of providing articles for the ever-increasing number of law graduates who wished to be enrolled as articled clerks.

Therefore an alternative procedure was established under the designation of PLT which would be a form of simulation to both replicate and improve on the training undertaken by articled clerks. This training was provided for law graduates seeking admission to the legal profession.

The first such centre for PLT was the Leo Cussen Institute for Law (subsequently renamed the Leo Cussen Centre for Law) which was established in 1972 in the centre of Melbourne, Victoria.<sup>62</sup> This was followed by the founding of the College of Law in St Leonards, Sydney, NSW in 1977.

Both institutions are not-for-profit bodies that undertake the majority of PLT within Australia. The Leo Cussen Centre is the principal provider of PLT in Victoria and authorised by the Western Australia Legal Practice Board to deliver an articled clerks training program in that State.<sup>63</sup> The longstanding Executive Director of the Centre, Elizabeth Lofthouse, has explained that the introduction of a PLT program in Victoria was due to a review carried out by Professor Sue Campbell in 2006 and a view

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<sup>60</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 17.

<sup>61</sup> *ibid* 23.

<sup>62</sup> LEO Cussen Centre for Law, *About Leo Cussen Centre for Law* <[www.leocussen.edu.au/cb\\_pages/aboutus.php](http://www.leocussen.edu.au/cb_pages/aboutus.php)>.

<sup>63</sup> LEO Cussen Centre for Law, *Western Australian Articled Clerks' Training Program* <[www.leocussen.edu.au/cb\\_pages/traineeship\\_articles\\_wa.php](http://www.leocussen.edu.au/cb_pages/traineeship_articles_wa.php)>.

expressed by Rob Hulls, the (then) Attorney-General of Victoria, that the articulated clerks system was not working. It was therefore resolved to abolish articles in Victoria.<sup>64</sup> However, it was decided that articles should be replaced by a supervised training system of 12 months together with a period of compulsory training in the law firm where a graduate is articulated or at Leo Cussen or some other PLT provider. Alternatively, Leo Cussen provides a 22-week PLT course together with a three-week placement with a law firm. This requires it to arrange placements for approximately 140 students a year.<sup>65</sup>

The College of Law is the largest provider of PLT in Australia, with a presence in most states and territories other than Western Australia. The College was one of the major participants in the reform of PLT in NSW leading to the 'Blueprint for the preparation for practice as a solicitor in New South Wales' adopted by the Law Society of NSW in March 1994 and approved by the NSW Legal Practitioners Admission Board on 24 May 1994.<sup>66</sup> Neville Carter has been a long serving member of the College of Law staff, having joined as an instructor in November 1983 and becoming the Director and subsequently the Chief Executive Officer in December 1995.<sup>67</sup> It was at this time that the College and the University of Technology Sydney (UTS) disaffiliated, the College having previously been part of the UTS Faculty of Law and Legal Practice.

In addition, the Law Society of South Australia provides a similar course for students wishing to gain admission to practise in that State.

Some law schools also provide PLT as an adjunct to their academic courses in law. These principal university providers are the ANU Legal Workshop, Bond University, Griffith University, Monash University, Queensland University of Technology, University of Queensland, UTS, University of Tasmania and the University of Wollongong.

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<sup>64</sup> Interview with Elizabeth Lofthouse (Melbourne, 21 November 2013).

<sup>65</sup> *ibid.*

<sup>66</sup> Law Society of New South Wales, 'The Professional Program: A Proposal for Practical Legal Training' (Law Society of New South Wales, May 1994).

<sup>67</sup> Interview with Neville Carter (Sydney, 17 October 2013).

### 3.2 Continuing Legal Education

Christopher Roper has described continuing legal education (CLE) as: ‘Any activity or process where a lawyer learns something which enhances his/her capacity to carry out his/her work, whether or not it takes place in a formal or non-formal setting or way, and whether it occurs consciously or unconsciously.’<sup>68</sup>

ALRC 89 reiterates the statement in the Report of the Committee on the Future of Tertiary Education in Australia (the Martin Report) of legal education in Australia being divided into ‘three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institutional and in-service components; and (3) continuing education.’<sup>69</sup>

Until comparatively recently CLE was regarded as the least essential of these three stages of legal education. Whereas academic training and PLT, with or without a period as an articled clerk were mandatory, there were no regulatory requirements for a solicitor to complete any form of compulsory CLE. As Roper has commented: ‘Until the 1970s all lawyers in New South Wales presumably continued their learning in a variety of ways which were, in a sense, private and voluntary.’<sup>70</sup> However, two reports published in 1993 stressed the importance of CLE both to recently admitted solicitors<sup>71</sup> and more experienced senior solicitors.<sup>72</sup>

In 1987 NSW was the first state to make it mandatory for all solicitors to undertake a minimum amount of CLE. At the time of its introduction it was proposed that all participants be required to undertake 10 units of CLE each year. For each unit of ‘course of instruction’ this was intended to involve one hour’s attendance at a seminar or tutorial. There was an alternative of listening to an audiotape or viewing a video with each hour of such activity being equal to half a unit. There was also credit given for the writing and presentation of seminar papers.

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<sup>68</sup> Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999) 5.

<sup>69</sup> Australian Law Reform Commission, above n 7, [2.7].

<sup>70</sup> Roper, above n 68, 5.

<sup>71</sup> John Nelson, *A Study of the Continuing Legal Education Needs of Beginning Solicitors* (Centre for Legal Education, 1993).

<sup>72</sup> Christopher Roper, *Senior Solicitors and their Participation in Continuing Legal Education* (Centre for Legal Education, 1993).

Since that time there have been changes to the NSW scheme which now provides for each practitioner to include at least one of the CLE units every year in each of the following:

1. Ethics and professional responsibility,
2. Practice management and business skills, and
3. Professional skills.

There is a further condition that every three years at least one of the CLE units has to cover 'equal employment opportunity, discrimination and harassment, occupational health and safety law and employment law.'<sup>73</sup>

That NSW was the first jurisdiction to implement such a CLE scheme was probably because it was also the first state/territory law society to abandon the system of articulated clerks, so alerting it to the need for some form of continuing education on the completion of PLT and admission as a legal practitioner.

In other states and territories there was a reluctance to develop mandatory CLE. However, a meeting of the Legal Education Committee of the Law Council of Australia on 9 April 2008 considered a paper compiled by Rosemary Budavari of the Law Council which updated the CLE and Continuing Professional Development status for solicitor members of the various state and territory law societies in Australia.<sup>74</sup> This paper indicated that at that time all Australian states and territories required their members to undertake 10 hours of CLE per annum except for the Northern Territory which required solicitors to undertake 12 hours and the Australian Capital Territory (ACT) and Tasmania which placed no requirements on their solicitors. The meeting also considered a similar paper relating to the conditions imposed on barrister members of the various bar associations throughout Australia. In this regard requirements for barristers across the states and territories were similar to those imposed on solicitors.

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<sup>73</sup> Law Society of New South Wales, *Mandatory Continuing Legal Education (Continuing Professional Development MCLE/CPD) Scheme* (9 July) <[www.lawsociety.com.au/cs/groups/public/documents/internetregistry/008657.pdf](http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/008657.pdf)>.

<sup>74</sup> Rosemary Budavari, *Continuing Legal Education or Professional Development Requirements: Comparative Tables as at May 2008, Solicitors and Barristers* (Law Council of Australia, 2008).

### 3.3 Admission Boards Examinations and the Law Extension Course

The Law Extension Course is very much an Australian anomaly. It is uniquely Australian in that its origins are buried in the traditions of NSW legal education. As a direct entry examination, it owes its origins to the foundation of the Barristers and Solicitors Admission Boards in the middle of the 19<sup>th</sup> century. It was established out of the need to have a qualifying examination for admission as a legal practitioner before the NSW Admission Boards had recognised the University of Sydney law degree as a qualification for entrance into the legal profession.

From its establishment in 1848 in its previous form as a direct entry examination under the aegis of the Barristers Admission Board, the Extension Course Program has often been threatened with closure on grounds of alleged irrelevance, lowering of educational standards, high failure rates and mediocre teaching. But despite all these alleged deficiencies it has somehow survived. One reason for this might be because it has been recognised as providing an alternative qualification outside the university law schools for admission as a legal practitioner. Notably some members of the judiciary, including the Hon Michael McHugh formerly of the High Court of Australia, qualified as legal practitioners through this process.

In 1994, two years prior to the publication of *Access to Legal Education*, Christopher Roper, the Director of the Centre for Legal Education completed a third review ‘Snapshot of the Admission Boards Course’ of the then Barristers and Solicitors Admission Boards Course.<sup>75</sup> This followed two previous ‘Snapshots’ which had been conducted in October 1992 and June 1993. The review highlighted the high numbers of students registered for the course: 4673 on 1 February 1994. It is also interesting that the main reason given by new students undertaking the course was that it was the most practical/flexible way to study law whilst working (60 per cent of respondents), whilst the next most common reason for choosing the course was that the students’ year 12 marks were not high enough to gain entry into a university law school (21 per cent). The

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<sup>75</sup> Interview with Christopher Roper (Sydney, 26 August 2013).

statistics also indicated that the overwhelming majority of the students intended to be solicitors or barristers on completion of the course (73 per cent).<sup>76</sup>

The relative high standing of the Extension Course can mostly be attributed to Frank Astill who took over the Directorship of the University of Sydney Law Extension Committee in late 1997. He acknowledges that when he took up his appointment the main objective was the survival of the course and that, in this respect, he was to ensure that by the year 2000 the course was viable.<sup>77</sup> Another priority in ensuring the survival of the Extension Course was to develop a defensible, observable curriculum in each subject.

To an objective observer it is apparent that Frank Astill raised the quality of the Extension Course both with regard to the standards of its teaching and education outcomes of its students. It would seem that for a particular type of law student the Extension Course has become the law program of choice. As Astill has stated: ‘We have a lot of people whom I think have made a conscious decision to do it this way, and it’s not just the money.’

He also emphasises that there are other aspects of the course which influence students in undertaking the program:

We ask in our orientation sessions as to how many of them have had some tertiary education and you know hands go up all over the place. So they’re choosing to do it [because of] of two factors. One is the timing—the fact that they can do it from six o’clock to nine o’clock in the evening and the other seems to me to be the nature of the education. That they are making a conscious decision that they want to be taught by practitioners in a context of the fairly practical.<sup>78</sup>

One of the reasons for the setting up of the Bowen Committee was to give strong consideration to abolishing the Extension Committee because it was considered by many leading members of the NSW legal community to have long outlived its usefulness as an alternative qualifying course for admission as a legal practitioner.

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<sup>76</sup> *ibid.*

<sup>77</sup> Interview with Frank Astill (Sydney, 27 2013).

<sup>78</sup> *ibid.*

The editor of the Bowen Committee report, Fred Chilton, recollects that this document recommended closing the SAB because the Committee had discovered evidence from those legal educators who were involved with both the University of Sydney Law School and the SAB that the academic work of the SAB students scored at least 10 per cent lower than at the University of Sydney.<sup>79</sup> The other concern expressed in the Bowen Report was that the SAB was used as a convenient qualifying course by the Magistrates Courts' Administration. The Administration submitted in its evidence to the Bowen Committee that studying the course was an incentive for members of the NSW Attorney General's Department to be employed on a law salary as clerks to the petty sessions in a rural area such as Bourke. The aim was that these employees would, when they were in their mid-30s, eventually qualify through the Admission Board and be able to progress to the role of magistrate. In the view of the Bowen Committee it could take as long as 27 years to complete the SAB qualifying examination without being disqualified from the program. The Committee did not believe that this was a good educational outcome and were concerned that such persons having struggled that much to qualify would not have the competence to be lawyers.

Whilst the deliberations and the outcomes of the Bowen Report are reviewed in Chapter 10 of this thesis, it is relevant to repeat here its views on the Admission Board qualifications: 'The Admission Boards system has seriously fallen short in meeting the requirements of a system of legal education that produces lawyers with the necessary knowledge, skills and professional techniques.'<sup>80</sup>

### 3.4 Access to Legal Education

Access to legal education was considered in 1978 by Anderson, Western and Boreham who in answer to the question: 'Legal education: is there a problem of access?' responded that:

The present generation of young lawyers come from prestigious social backgrounds. The longitudinal study which we commenced in 1965 showed that in that year around two-thirds of the entrants to law schools in Queensland, Victoria and Western Australia came from homes which could be broadly described as upper middle class, self-employed

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<sup>79</sup> Interview with Fred Chilton (Hunter Valley, 19 July 2013).

<sup>80</sup> Bowen, above n 54, 244.



professionals, or in a few instances, senior public servants ... From this data it is possible to sketch a social profile of the present day young lawyer. He, for women are not common among the present generation of young lawyers, comes from a family with a high income; his parents are likely to have had university education, and his father is likely to occupy a senior position in business, industry or government or have a lucrative professional practice. His secondary schooling has typically been at a non-state school, sometimes a Catholic school, but more commonly one of the prestigious private schools.<sup>81</sup>

The monograph *Access to Legal Education* reiterated concern that the legal profession was not representative of the general socio-economic structure of Australian society.<sup>82</sup> As the Hon Michael Kirby stated in his Foreword to the monograph:

There tends to be a very serious under representation of Aboriginality, of some ethnic groups, of geographical location of homes, disability or socio-economic circumstances. These are the features of disadvantage which have prevented such groups getting into the law and, when they do so, staying there to gain the qualification that admits them into the profession.<sup>83</sup>

This had also been emphasised by David Weisbrot, then an associate professor at UNSW, in a later research project which stated that:

the Australian legal profession does not reflect the socio-economic class, ethnicity or gender composition of society at large, ... the social background of young lawyers is, if anything, more elite than in previous generations.<sup>84</sup>

With regard to indigenous students, meaning in Australia those of Aboriginal or Torres Strait Islander descent, it has been emphasised that the statistics relating to the disadvantages against such students gaining admission to law school 'are sufficiently stark as to speak for themselves.'<sup>85</sup> This is illustrated by the evidence that: 'Prior to

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<sup>81</sup> Don Anderson, John Western and Paul Boreham, 'Law and the Making of Legal Practitioners' in Roman Tomasic (ed), *Understanding Lawyers* (Law Foundation of New South Wales and George Allen & Unwin, 1978) 181, 185–6.

<sup>82</sup> David Barker and Anna Maloney, *Access to Legal Education* (Centre for Legal Education, 1995) 2.

<sup>83</sup> Kirby, above n 1, iv.

<sup>84</sup> David Weisbrot, 'Access to Legal Education in Australia' in Rajeev Dhanan, Neil Kibble and William Twining (eds), *Access to Legal Education and the Legal Profession* (Butterworths, 1989) 84, 88.

<sup>85</sup> Peter Devonshire, 'Indigenous Students at Law School: Comparative Perspectives' (2014) 35(2) *Adelaide Law Review* 309, 311.

1990, only twenty LLB graduates were of Indigenous origin Australia-wide',<sup>86</sup> while of even greater concern was the fact that: 'Twenty years later, there were only three indigenous barristers on the bar roll in Victoria.'<sup>87</sup>

To help alleviate this situation two law schools in NSW established pre-law or access courses. The first and principal access course has been an Indigenous Pre-Law Course at UNSW. The course, which runs for approximately one month, includes the development of skills and abilities which should give indigenous students a better chance of succeeding in their law studies. The course also involves cultural and social activities and the teaching of basic introductory law subjects. Students who successfully complete the course receive detailed statements relating to their achievements in each area of their subjects together with direct feedback from their teachers on the course. Admission to the UNSW Law School is based on an interview and the places available on the Law School's LLB course are greatly sought after.

The other access course currently available in NSW is the Gateway Program at the University of Wollongong, Learning Development Centre. This 'University Gateway Program' is a 15-week part-time preparatory course for students who want to gain entrance into the University but who do not possess the traditional qualifications for entry. This program differs from the UNSW access course in that it is not just available to Aboriginal and Torres Strait Islander people but also to mature age and other disadvantaged, non-traditional entry potential students including those with disabilities. It also differs from the UNSW course in being available for students to gain entry into any faculty program in the university. The program is not content based but more directed towards teaching students to think and develop vital skills for completing any university course. This means that students wishing to study law do not normally gain direct access to the law course but usually have to undertake studies for a year in an alternative course such as Science, Arts or Economics before gaining entry to the law program. Outcomes from the Gateway Program indicate that students who progress to

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<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

the law degree course achieve favourable results compared with students who have gained entry by the more traditional route.<sup>88</sup>

### 3.5 Access to Free Legal Information

The challenge of granting greater accessibility to legal education programs has been mirrored by a similar motivation to increase public access to legal information throughout Australia. A satisfactory resolution of this challenge has been brought about by lawyers' increasing utilisation of the internet, a medium which has changed the nature of the profession's approach to information delivery and communications.<sup>89</sup> This has also had wide ramifications for law academics, particularly those involved in legal research.

Previously, a basic problem for a newly established law school was the provision of an adequately resourced law library. The difficulties of developing and funding such a resource has been documented by Ralph Simmonds, the former Dean of the University of Murdoch's Law Faculty, who initiated a fundraising campaign to develop a law library for his new law school.<sup>90</sup> The special relationship which law libraries have with law schools also formed one of the major recommendations of the Pearce Report.<sup>91</sup> However, both the initial and ongoing funding of an adequate law library has been a source of continuing dispute between law schools and their central university administrations, except in a limited number of the traditional law schools.

However, the internet created a major change in how law schools conduct their research into case law and legislation. Not only was this innovation more efficient, it was also more cost-effective and enabled law schools to match their aspirations in providing a relatively cheap and productive range of legal materials for their undergraduate and postgraduate students.

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<sup>88</sup> *ibid.*

<sup>89</sup> Mowbray, above n 3, 209.

<sup>90</sup> Ralph Simmonds, 'From Foundation to Ordinary Politics: Staffing, Financing and Promoting the School of Law at Murdoch University' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 161, 169.

<sup>91</sup> Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)' (Australian Government Publishing Service, 1987) lxxii, rec 30.

Whilst there had been an early development of commercial legal information systems in the United States, it was the Law Faculty at Cornell University that established the first free website to facilitate access over the 'Web' to United States Supreme Court decisions and other legal sources.<sup>92</sup>

In Australia there were early attempts to develop two government sponsored database systems. One was SCALE (Statutes and Cases Automated Legal Enquiry) operated by the Commonwealth Attorney-General's Department,<sup>93</sup> and the other was CLIRS (Computerised Legal Information Retrieval Service), a commercial system supported by SCAG.<sup>94</sup> Neither system gained any major support from the legal profession, so it was left to Australian law schools to take the lead in the further development of legal information databases. The first of these was the DataLex Project, established as a collaborative project between the University of Sydney, UNSW and UTS. While this led to the development of a free text retrieval system, it was not until 1993 that universities realised the possibilities of the World Wide Web for the publication of legal materials. One outcome was the establishment of the Australasian Legal Information Institute (AustLII) under the co-direction of Graham Greenleaf and Andrew Mowbray.<sup>95</sup>

Compared to previous initiatives, AustLII was successful because Andrew Mowbray had developed an exceptional text retrieval search engine known as sino ('size is no object').<sup>96</sup> In addition, the relevant government departments made available all their information relating to legislation and court judgments. Apart from these primary materials, other institutions provided secondary legal materials such as law reform commission reports, bilateral and multilateral treaties, and human rights materials. Realising the advantage of an electronic delivery service to meet the needs of NSW legal practitioners, the Law Foundation of NSW gave AustLII a substantial grant which,

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<sup>92</sup> Andrew Mowbray, *The AustLII Project - Changing the Nature of the Dissemination of Public Legal Information through Information Technology* (MSc Thesis, University of Technology, 1999) 24.

<sup>93</sup> *ibid* 10.

<sup>94</sup> *ibid* 15.

<sup>95</sup> *ibid* 28.

<sup>96</sup> *ibid* 54.

as it continued on an annual basis for some years, ensured AustLII's financial stability in the early years.<sup>97</sup>

Since these formative years AustLII has continued to expand,<sup>98</sup> developing in excess of 675 Australian databases<sup>99</sup> and publishing 1743 databases internationally via the WorldLII (World Legal Information Institute) portal.<sup>100</sup> Its receipt of ongoing grants from government and non-government sources has meant that it can maintain a substantial support staff enabling it to expand its databases and provide a platform for the development of a variety of legal research projects, both within its own organisation and throughout Australian law schools.

#### 4. Conclusion

It is often overlooked that an extensive part of legal education is delivered outside law schools. This has been partly due to a conscious decision to exclude law schools from involvement and partly because law schools consider that providing PLT and CLE is not part of their remit as legal educators.

The award of a qualification in law is only the initial stage in the education of a legal practitioner:

The transition from law school to legal practice is a pivotal event for those who have chosen law as their career. With their entry to the profession commences the process of transformation from law student to legal practitioner. Moreover, this event marks the point of their embarkation upon a voyage of lifelong learning, which, in common with the members of other professions, they are destined to pursue throughout their years of practice.<sup>101</sup>

This reflects the latter part of what has been described as the traditional divide of legal education in Australia being three relatively discrete stages:

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<sup>97</sup> ibid 32.

<sup>98</sup> Email from Andrew Mowbray to David Barker, 1 July 2015.

<sup>99</sup> Australian Legal Information Institute, *News & Database Additions* (9 July 2015) <<http://www.austlii.edu.au/>>.

<sup>100</sup> World Legal Information Institute, *News & Database Additions* (9 July 2015) <<http://www.worldlii.org/>>.

<sup>101</sup> A B Knox and J A B McLeish, 'Continuing Education of the Professional' in T Husein and Postlethwaite T N (eds), *The International Encyclopedia of Education* (Pergamon Press, 1985) 995, 995.

- academic training at university;
- subsequent practical training with both institutional and in-service components; and
- continuing education.<sup>102</sup>

This chapter's focus on the second and third stages of legal education reveals that whilst the academic stage of legal education is clearly defined and has been the subject of structured development, this might not be the case for the PLT and CLE components. Examination reveals that there has been less commonality in state and territory jurisdictions in their approach to these latter two stages of legal education. With regard to PLT this has been the result of differing points of view between the judiciary and legal practitioners of the various jurisdictions, particularly about the relative merits of retaining the articulated clerkship system or accepting the PLT alternative, with some jurisdictions opting for a merger of the two.

Similarly, with respect to CLE or Continuing Professional Education some jurisdictions consider a structured system as being of greater importance while others regard it to be of lesser importance. The advent of a unified legal profession throughout the Federation might have resolved these differences and developed a more unified approach but, as at this time, only NSW and Victoria have embraced this concept, and even then the individual bar associations and law societies have retained their control of these important legal education components.

Increasing access to the legal profession is key. A widening of the socio-economic background of those becoming legal practitioners is important for the future composition of the profession if it is to meet the future needs of society. In this respect, there is certainly reason to retain the LPAB Examinations and the Sydney University Extension Course.

The provision of free online legal information is equally important. It is innovating the culture of legal education whereby such online facilities as AustLII are precipitating an overhaul of the traditional methods of law schools. The outcome has been the creation of a virtual learning environment which is already having a major effect on the support

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<sup>102</sup> Australian Law Reform Commission, above n 7, 115 [2.7].

for legal training and learning.<sup>103</sup> Richard Susskind, drawing on the management theory of Clayton Christensen,<sup>104</sup> has described the effect of such challenges as an aspect of disruptive legal technologies leading to fundamental changes in the functioning of legal education.<sup>105</sup>

This chapter has illustrated the challenges facing university law schools but to which the legal education associations, particularly CALD, have responded in a proactive way. It is also illustrative of the transforming culture of Australian law schools. In particular, it highlights the manner by which they have adapted to the changing needs of the legal community and attempted to develop a coherent approach to the demands placed upon them to generate radical changes to future learning and teaching.

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<sup>103</sup> Caroline Streyens, Richard Grimes and Edward Philips (eds), *Legal Education Simulation in Theory and Practice* (Ashgate Publisher, 2014) 228.

<sup>104</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) 39.

<sup>105</sup> *ibid* 43.





## Chapter 10

### The Four Pillars of Australian Legal Education (and Other Reports)

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## 1. Introduction

Legal education has evolved in a non-structured way as have Australian universities from the establishment of the initial universities of Melbourne and Sydney in the 1850s. The century and a half that has elapsed since this time has meant that there have been many changes in the way that legal education has been conducted. However, it was not until the post-war years that there was any serious inquiry about the quality and the purposes of legal education. In contrast, the United Kingdom as early as 1846 had seen the House of Commons conduct a wide-ranging inquiry into the teaching of law both within Britain and Ireland.<sup>1</sup>

The first attempts at defining the role of the university in general (as distinct to the law school) were made by Charles Badham in Sydney and Charles Henry Pearson, a former Minister for Public Instruction in Victoria at the end of the 19<sup>th</sup> century.<sup>2</sup>

Their efforts were replicated in the mid-1930s by Professor RE Priestley, appointed in 1933 as the first full-time Vice-Chancellor of the University of Melbourne, who ‘in a series of public lectures in 1937 ... spoke of reforms which seemed to him crucial if the institution was adequately to serve its society.’<sup>3</sup>

Nevertheless it was the post-World War II period which saw the introduction of the first formalised inquiry into Australian universities by the Committee on Australian

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<sup>1</sup> Great Britain Parliament, House of Commons, 'Report from the Select Committee on Legal Education (No. 686)' (House of Commons, 1846).

<sup>2</sup> Nicholas Brown, 'Aspirations and Constraints in Australian Universities in the 1950s' in FB Smith and PC Crichton (eds), *Ideas for Histories of Universities in Australia* (Australian National University, 1990) 72, 74.

<sup>3</sup> *ibid.*

Universities. This was established in December 1956 under the leadership of Sir Keith Murray (subsequently Lord Murray) who was at that time the Chair of the British University Grants Committee. The Murray Report, which was published in September 1957, has been described as presenting

a masterly account of the history, present conditions, problems and future prospects of the universities; an account which, with its extended discussion of the place of universities in Australian society of the late 1950s, makes it a sociological document of the first importance.<sup>4</sup>

Susan Davies, a leading commentator on tertiary education, was also complimentary of the Murray Report adding:

The principal task of the Murray Committee, however, was to conduct a national inquiry into the universities, which it did with amazing thoroughness in three months from July to September 1957. Its investigations revealed Australian universities to be short-staffed, poorly housed and equipped, with high student failure rates, and weak honours and post-graduate schools. It believed the principal single cause of these defects to be financial stringency.<sup>5</sup>

The importance of the Committee lay in its inquiry conclusions, the two major ones being:

That a University Grants Committee be set up to advise the States and Commonwealth on university finances and developmental policy; and that, during the lead-time for the establishment of this body, there should be an emergency three-year injection of government funds into the system.<sup>6</sup>

While there is no specific mention of legal education in the Murray Report, it is seen as the forerunner of later reports on law which had a major influence on the development of legal education from the time of the Report's publication in 1957 to the present.

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<sup>4</sup> Allan Martin, 'Menzies and the Murray Committee' in FB Smith and PC Crichton (eds), *Ideas for Histories of Universities in Australia* (Australian National University, 1990) 94, 112.

<sup>5</sup> Susan Davies, *The Martin Committee and the Binary Policy of Higher Education in Australia* (Ashwood House, 1989) 13.

<sup>6</sup> *ibid* 122–3.

## 2. Influential Reports on Australian Legal Education

The Murray Report had a major effect on the development of legal education in the post-war years. It was succeeded by four major reports—here referred to as the ‘four pillars’—three of which had been conducted at federal level and one at state level (namely, New South Wales (NSW)). These reports, discussed chronologically in this thesis, are as follows:

- a) A report published in August 1964, which became popularly known as ‘The Martin Committee Report’;<sup>7</sup>
- b) A report on legal education in NSW, published in 1979, entitled ‘The Bowen Report,’<sup>8</sup> which is the only non-federal report;
- c) A report of the Commonwealth Tertiary Education Committee entitled ‘Australian Law Schools’, published in 1987 and also named ‘The Pearce Report’ after its Convenor, Professor Dennis Pearce;<sup>9</sup> and
- d) A report of the Australian Law Reform Commission (ALRC), published in 2000, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89).<sup>10</sup>

## 3. The Martin Committee Report

Susan Davies has placed the Martin Report within the context of the federal government’s effect on tertiary education, stating that:

Each step along the path of federal government participation in education has been marked by a formal inquiry. The device of a commission or committee of inquiry is much favoured in Australia, and the field of education is no exception. The Martin Committee of 1961 to

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<sup>7</sup> Committee on the Future of Tertiary Education in Australia, ‘Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission (The Martin Report)’ (Government Printer, 1964).

<sup>8</sup> Committee of Inquiry into Legal Education in New South Wales, ‘*Legal Education in New South Wales* (The Bowen Report)’ (Government Printer, 1979).

<sup>9</sup> Dennis Pearce, Enid Campbell and Don Harding, ‘*Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (The Pearce Report)’ (Australian Government Publishing Service, 1987).

<sup>10</sup> Australian Law Reform Commission, ‘*Managing Justice: A Review of the Federal Civil Justice System*, Report No 89’ (2000).

1965 recommended in favour of the extension of Commonwealth grants beyond universities to other institutions of higher or tertiary education, and its Report supplied the rationale for the binary policy of higher education.<sup>11</sup>

She also said that:

The Martin Committee was required to recommend ways in which the demand for university education could be met within financial limits which were (to quote the Prime Minister's memorandum) very much more modest than under our present university system.<sup>12</sup>

Another aspect of the Martin Report was to have a profound effect on legal education within Australia in the short term. This was the concern expressed in the Report and, evident from the statements made by the Prime Minister Robert Menzies, that the federal government was apprehensive about the costs involved in meeting the nation's future demand for higher education. In this respect he stated that:

Unless there is early and substantial modification of the university pattern, away from the traditional nineteenth-century model on which it is now based, it may not—and I say it with reluctance—be practicable for Australian governments to meet all the needs for university education in Australia and at the same time to achieve the best use of resources in the national interest. We think, therefore, that the development of alternative kinds of tertiary education is likely to be of the greatest importance.<sup>13</sup>

This meant that the Committee disregarded Australia developing an alternative to the university system by establishing a junior or community college structure similar to that which operated in the United States of America. Instead it opted to upgrade existing tertiary institutions such as technical or teaching colleges into colleges of advanced education (CAEs).

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<sup>11</sup> Davies, above n 5, 2.

<sup>12</sup> *ibid* 35.

<sup>13</sup> *ibid* 23.

### 3.1 Creation of a Binary System

The Martin Committee effectively created a binary system of tertiary education for Australian higher education, comprising universities and CAEs. With regard to the ongoing development of legal education within the CAEs there were groups of law academics, often well qualified, who were developing their teaching expertise among the many vocational courses which became an integral part of the CAEs' programs.

Although these groups of law academics tended to become submerged within the largely accounting and management dominated business faculties of the CAEs they were obviously well placed to take a more prominent role when the Dawkins reforms of the late 1980s dismantled the binary divide, by merging universities with the CAEs or combining these colleges to form new universities. Eventually when these new universities decided that there was a necessity to establish new law schools there was already available within them a pool of talent of accessible law academics ready to undertake the teaching of most law subjects within the newly accredited Bachelor of Laws (LLB) programs.

### 3.2 Legal Education Influence

Apart from establishing the binary divide, the purpose of examining the Martin Report is to consider its conclusions and recommendations on legal education. The Committee originally comprised 14 members from a variety of backgrounds but it was not until 1962 that a lawyer, Professor Derham, was added to their number.<sup>14</sup>

As has been noted earlier in this thesis, Professor Derham was a highly regarded law academic who subsequently became the Vice-Chancellor of the University of Melbourne, a position which he held from 1968 to 1982. Within legal circles he is chiefly remembered for the crucial role he played as Foundation Dean in the establishment of the Monash University Faculty of Law. It is no surprise therefore to read of the claim in John Waugh's history of the Melbourne Law School that Professor Derham was solely responsible for the drafting of the Legal Education Chapter in Volume II of the Martin Report.<sup>15</sup>

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<sup>14</sup> ibid 38, referring to *The Sydney Morning Herald* (Sydney), 9 April 1962.

<sup>15</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 157.

That Legal Education Chapter reviewed the spectrum of legal education as it existed at the time of the Martin Report, such as the roles of university faculties of law, admission to practice, practical training for lawyers, university law syllabuses and teaching, research and post-graduate work, the optimum size of law schools and a comparison with American legal education.<sup>16</sup>

There is also information about the qualifications of those admitted to practice in each state in 1962,<sup>17</sup> and about the total number of students enrolled in university law schools, 1954–63.<sup>18</sup>

In its deliberations the Committee was faced with the same problems that have formed the central theme throughout this thesis which has been that:

With the growing complexity of society ... and demands for more extensive training for lawyers, and with the development of university faculties of law capable of pursuing university educational aims to the highest levels, there has been a tendency for tension to develop between the pursuit of professional training requirements and university educational aims.<sup>19</sup>

The Martin Report emphasised the dilemma faced by university faculties of law in their attempts to not only maintain university aims and standards but also simultaneously satisfy professional requirements for admission to practice.<sup>20</sup>

It also endeavoured to deal with another ongoing problem concerning the teaching of law at tertiary level in Australia, that of the chronic underfunding of legal education:

In comparison with education provided for other recognized professions, the lawyer's education has never been expensive. In the more populous states little or no support from public moneys had been required for it. This is not the matter for congratulation that sometimes it is thought to be. It is much more a measure of past inadequacies in the teaching

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<sup>16</sup> Committee on the Future of Tertiary Education in Australia, above n 7, 49–50.

<sup>17</sup> *ibid* 71–4.

<sup>18</sup> *ibid* 75–6.

<sup>19</sup> *ibid* 49.

<sup>20</sup> *ibid* 53.

and research facilities provided in comparison with the provision made for other comparable disciplines.<sup>21</sup>

### 3.3 Modernisation of Legal Education

Both the comments on and the quotations from the Martin Report indicate that the Committee regarded itself as having a clear mandate to recommend modernising legal education. In its criticisms of undergraduate teaching at this time the Martin Report publicised the phrase, subsequently much quoted, that ‘*Law, it has been said, can be taught under a gum tree*, and, for much of Australia’s history it might as well have been so taught.’<sup>22</sup> It went on to declare, even more strongly, its concern that teaching law would be regarded merely as the dissemination of information in the form of legal principles which could be memorised for examination, with teaching methods reduced to the expository lecture and the dogmatic textbook. It went even further stating that if this was in fact the situation then ‘since the invention of the printing press, it could be argued that only the textbook would be required.’<sup>23</sup>

In recognising the challenges faced by the conflicting demands of the legal profession in ‘favour of apprenticeship and part-time training for lawyers,’<sup>24</sup> the Committee stated its belief ‘that the likely demands of the future are such that it is very desirable that lawyers seeking admission to independent practice should, wherever possible, have an education founded upon full-time studies at university level.’<sup>25</sup>

This statement was made on the basis that: ‘[students] should have had at least three years of university education designed not so much as to train them as legal practitioners as to provide them with background intellectual training necessary for leaders in the highly complex society of the future.’<sup>26</sup> It, however, added the caveat that: ‘The need for basic education and organized intellectual training must not be subordinated to the immediate practical and detailed requirements of the existing legal system.’<sup>27</sup>

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<sup>21</sup>     ibid 49.

<sup>22</sup>     ibid 57.

<sup>23</sup>     ibid.

<sup>24</sup>     ibid 49.

<sup>25</sup>     ibid.

<sup>26</sup>     ibid.

<sup>27</sup>     ibid.



In the view of John Waugh the message of the Martin Report that lawyers should be trained in universities was more relevant to NSW, where in 1962 only 56 per cent of the locally trained lawyers admitted in that year had university degrees (not all of which were in law). This compared unfavourably with Victoria where the equivalent number was 95 per cent and where there had been compulsory university training for solicitors for over a century.<sup>28</sup>

In a monograph<sup>29</sup> Judith Lancaster comments on the Martin Committee's preference for a university education over an apprenticeship system. She states that:

Mendelsohn and Lippman point out that, whatever its failings, the apprenticeship system was very successful at providing both satisfying personal interaction and heterogeneous influences. Its decentralised nature guaranteed a training which would emphasise by comparatively informal means both diversity of approach and professional stability, thereby fostering a binding sense of duty to clients.<sup>30</sup>

### 3.4 Articled Clerks System and Practical Legal Training

The difficulties with regard to apprenticeship and practical legal training (PLT) are well-canvassed in the Martin Report with a quote describing an article by Sir Victor Windeyer highlighting 'the theory of the value of formal legal education while training as an articled clerk.'<sup>31</sup>

This is because what the student learns in class helps him to understand why he does what he does in the office; and his experience in the office helps him to learn what he is taught at the school. Law and practice and procedure are intertwined. A student should learn about one whilst watching the other. That indeed might be remembered in law schools.<sup>32</sup>

Later in the Martin Report the Committee stated its concern about the current pattern of practical training and the articled clerks system in the following, somewhat poorly expressed, terms:

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<sup>28</sup> Waugh, above n 15, 157.

<sup>29</sup> Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993).

<sup>30</sup> *ibid* 26.

<sup>31</sup> Committee on the Future of Tertiary Education in Australia, above n 7, 54.

<sup>32</sup> Victor Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102, 112.

Some experienced and able solicitors manage to provide invaluable instruction for their articled clerks. Most, however, simply have neither the time nor the energy to treat their articled clerks as students in need of skilled instruction. Many solicitors, however well intentioned, are neither equipped to be successful teachers nor are their offices organized to permit them to perform this task adequately. Most articled clerks find themselves thrust, as very junior employees, into the hurly burly of a busy office to perform such minor tasks as the firm's day-to-day work demands. As a result, most of them receive little instruction, and learn no more—if no less—than would any intelligent young person employed as a junior clerk one step above the office boy.<sup>33</sup>

Although it was unable to recommend an alternative process should the articled clerks system of training be abolished, the Committee did recommend different kinds of law courses, one of which would involve a form of PLT being 'a practice course of at least two years designed to satisfy requirements for admission to the profession. Such a course should be open only to those who have obtained an initial three-year degree or who have had at least three years' preliminary education in the law at university level.'<sup>34</sup>

The Committee acknowledged that 'to the extent that this course would concentrate on practice and technique, some universities might not regard it as suitable for universities to conduct.'<sup>35</sup> It also stated that: 'In any case it would need to be conducted with the close co-operation of the practising profession.'<sup>36</sup>

### **3.5 Expansion of Legal Education**

One of the most useful outcomes of the Martin Report is its effectiveness as a barometer of the state of legal education at the time it was reporting in 1964. There is a timelessness regarding the issues of legal education which were just beginning to manifest themselves and which have been of ongoing interest. Apart from the matters which have already been canvassed in this chapter, there was the developing problem of the lack of resources and facilities available to deal with the increased demand for university places for law students.

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<sup>33</sup> Committee on the Future of Tertiary Education in Australia, above n 7, 55.

<sup>34</sup> *ibid* 49.

<sup>35</sup> *ibid*.

<sup>36</sup> *ibid*.

There was a recognised need for more law schools in Victoria and NSW. This had arisen because of overcrowding at Sydney and Melbourne Law Schools which led to the imposition of quotas on the number of students admitted to both law schools. This had been partly alleviated in the case of Melbourne with the establishment of the Monash Law School in 1964. However, the Committee still needed to comment on the consequences of overcrowding and quotas. With regard to Victoria it discussed the emergency course which the Council of Legal Education had established with the cooperation of the Royal Melbourne Institute of Technology, already referred to in Chapter 6 of this thesis. Whilst John Waugh has commented on the Report as a 'shot across the bows of the alternative admission course recently created by the Council of Legal Education,'<sup>37</sup> the Committee had grave concerns regarding the lack of ongoing funding from the government for the course, apart from there being no proper library facilities and no full-time staff.

In NSW the Law Society referred to a comparable situation with respect to the Solicitors' Board examinations whereby the Society had, for the first time, provided tutorial assistance for the candidates for these examinations. The Society then recognised its inadequacy in that there was no such assistance beyond the first of the five-years of training.<sup>38</sup>

However, these observations did not prevent the Committee from expressing its concern that the current situation in NSW was 'such that large numbers of young people seeking legal education are provided with virtually no instruction'<sup>39</sup> so that 'the need for the establishment of a second law school at a university level is pressing.'<sup>40</sup>

While the Committee wisely did not involve itself with rules for admission to the legal profession, it recognised that these rules affected the nature of tertiary education and was concerned by 'the extent that they explain some of the unsatisfactory aspect of that education as it is provided for at present.'<sup>41</sup> It expressed its view that both the legal profession and the state admitting authorities should reasonably be alert to the fact that:

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<sup>37</sup> Waugh, above n 15, 157.

<sup>38</sup> Committee on the Future of Tertiary Education in Australia, above n 7, 59.

<sup>39</sup> *ibid* 65.

<sup>40</sup> *ibid*.

<sup>41</sup> *ibid* 64.

[A]s developments are made in the tertiary and university education of future members of the profession, those bodies will be aware of the interaction between rules and such education, and will make changes as they become desirable or necessary.<sup>42</sup>

The remainder of the Martin Report traversed factors that have that ring of familiarity to anyone involved in post-World War II legal education. There was the question of research and postgraduate work in law which was embryonic at the time of the Report's publication and relied, to a great extent, upon work done in England and, to a certain extent, the United States. However, the Report was adamant that this reliance should not continue and that Australia should develop its own resources and cease continuing to use English textbooks or copying English legislation when implementing law reform.

For these objectives to be achieved there was a need for university law schools to be provided with:

- Greatly expanded libraries.
- Proper accommodation (which most of them lack at present).
- More full-time staff.
- More scholarships for post-graduate students.<sup>43</sup>

Another concern expressed in the Report was the predictability of the future needs for graduate lawyers by both the legal profession and the community generally. The latter was based on the demand by government service, industry and commerce for those law graduates seeking careers outside the profession. The Report recognised that the lack of reliable data prevented any serious forecasting as to whether legal education would 'produce more lawyers than the community can usefully employ.'<sup>44</sup> The Committee refused to consider whether there was a rational limit that could be set upon the number of students which a law school should enrol. It did, however, express the view that where there was

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<sup>42</sup>     ibid.

<sup>43</sup>     ibid 66.

<sup>44</sup>     ibid.

a properly staffed and equipped law school of some 400–500 students and an equally well equipped school of approximately 1,500 students there is not merely a difference in degree but one of kind; second, that although there are exceptions [and it quotes Harvard Law School as having 1,550 students] and although it is not necessarily so, the smaller school will tend to be the better of the two.<sup>45</sup>

### **3.6 Conclusion**

The Martin Report concluded with a comparison with legal education in the United States and referred to the major influence of the American Bar Association and the Association of American Law Schools in raising standards of legal education throughout that country. Much of this was related to the requirements for ‘two years of college work or its equivalent as a condition for admission to the bar.’<sup>46</sup>

The Report emphasised a further raising of standards in general education by the American Bar Association in 1950 when it passed a further resolution to:

Require as a condition to admission at least three years of acceptable college work, except that a school which requires four years of full-time work or equivalent of part-time work for the first professional degree in law may admit a student who has successfully completed two years of acceptable college work.<sup>47</sup>

In its conclusion the Report invoked the North American influence when referring to the high principles set by Elihu Root, a leading American jurist during the first part of the 20<sup>th</sup> century, declaring the legal system was not for the benefit of lawyers but for the administration of the law. Similarly, the Report stated: ‘no qualification of his view should be tolerated in Australia,’<sup>48</sup> so that:

To satisfy his demand for ‘fitness to render the public service’, more effort, more money, and more time will have to be spent on legal education in Australia. Moreover, inadequate

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<sup>45</sup>     ibid 67.

<sup>46</sup>     ibid 68.

<sup>47</sup>     ibid.

<sup>48</sup>     ibid 69.

educational and training methods will have to be rejected whatever passing pleas of hardship to individuals may be raised.<sup>49</sup>

#### **4. The Bowen Report**

The Committee of Inquiry into Legal Education in NSW was convened by the Attorney General Sir Kenneth McCaw at the request of the Chief Justice of NSW, Sir John Kerr in June 1974. The initial Chair was Justice R M Hope but due to the pressure placed upon him by his involvement in Commonwealth Government inquiries, in particular the Royal Commission on Intelligence and Security, he was forced to resign in 1976. The subsequent Chief Justice, Sir Laurence Street invited Sir Nigel Bowen to replace him. Bowen was the Chief Judge in Equity, from whom the Inquiry took its name. In the same year he became the Chief Justice of the Federal Court of Australia but still continued as the Inquiry's Chair until it submitted its final report in December 1979.<sup>50</sup>

The Committee's terms of reference directed it '[t]o inquire into and report upon and to make recommendations in respect of, all aspects of the system and the control of legal education and of qualifications for admission as a barrister or a solicitor in New South Wales.'<sup>51</sup>

The terms of reference required consideration of the involvement of the Supreme Court and professional associations on matters relating to the fitness for admission to practice of prospective barristers and solicitors and the determination of their minimum academic education and practical training, and matters relating to the relationship between legal educational institutions and regulation of these issues by any admission board.<sup>52</sup> However, there were some specific exclusions. The terms of reference did not include 'the determination of the curriculum of any University or school or College of Advanced Education or of the College of Law nor the system and control in or within any University Law School or College of Advanced Education or the College of Law.'<sup>53</sup>

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<sup>49</sup> *ibid.*

<sup>50</sup> Committee of Inquiry into Legal Education in New South Wales, above n 8, 1.

<sup>51</sup> *ibid* 2.

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

It is understandable that the terms of reference excluded the manner of determining how the curriculum of any law school be constituted or how any law programs should be composed or taught as this would have unreasonably complicated the task of the Committee. It was already anticipated that advice regarding such matters could be incorporated into the terms of reference or the aims of any regulatory Council or admitting body established under sub-paragraph (e) of the original terms of reference for the Committee of Inquiry.

However, this is not the expressed view of Judith Lancaster who has stated that:

Because the system and control in and within legal education institutions traditionally had been heavily influenced by the formal and informal determinations exercised by the judiciary and practising profession, the Bowen Committee's terms of reference effectively deprived it of the capacity to consider the degree to which professional cultural control over legal academia might constitute an important source of the weaknesses the committee was charged with examining.<sup>54</sup>

#### 4.1 Background to the Bowen Report

The proceedings of the Committee were divided into two stages. The first stage, which took the Committee up to 1976, involved the receipt of a substantial number of written submissions.<sup>55</sup> The second stage, which covered the period from 1976 until the publication of the final report in 1979, was concerned with receiving further written submissions and oral evidence, making additional inquiries, and establishing sub-committees, whilst the University of Sydney Sample Survey Centre in cooperation with the NSW Law Foundation provided information relating to a classification of lawyers based on areas of specialisation.

This latter study, entitled: *Supply and Demand Factors Associated with the Legal Profession in New South Wales*, which became known as the Beed-Campbell Report,<sup>56</sup> named after its two principal investigators, contained information of some complexity.

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<sup>54</sup> Lancaster, above n 29, 32.

<sup>55</sup> Committee of Inquiry into Legal Education in New South Wales, above n 8, 2.

<sup>56</sup> Terence Beed and Ian Campbell, 'Supply and Demand Factors Associated with the Legal Profession in New South Wales: A Study Commissioned by the New South Wales Committee of Inquiry into Legal Education: Occasional Paper No 1' (University of Sydney Sample Survey Centre, 1979).

This was because the study was not only concerned with ‘a series of lawyer/population ratios based on the existing level of population and projections of future population’, but also endeavoured to develop a classification on a regional basis.

The study also attempted to identify and quantify additions and attrition of lawyers in NSW, taking into account changes in the pattern of legal services and the effect of factors such as the development of legal aid. It also estimated the number of legal professionals unemployed in NSW during the period of this research. The Bowen Report acknowledged that this investigation was severely handicapped by the lack of funds and time, so that it needed to rely heavily on existing data. The classification of lawyers was described in the Report as ‘functional’<sup>57</sup> because it was not possible to conduct any surveys involving the collection of original data.

This lack of time and available funding impacted on a further survey of student career intentions also prepared by the University of Sydney Sample Survey Centre and analysed by TD Sowerbutts of the NSW Law Foundation. Again, it was acknowledged that lack of funding led to a disappointingly low response rate from the students surveyed so that the survey had to be regarded as limited in its validity.<sup>58</sup>

#### **4.2 Requirements for Admission to Practice in New South Wales**

The historical background contained in Chapter 2 of the Bowen Report is an invaluable source for any legal historian with an interest in the development of legal education in NSW. The chapter explains that an understanding of legal education in the State requires a knowledge of its historical development.

The notes to the chapter explain that the historical survey used as its principal source a paper which had been presented by the Hon R M Hope to a NSW Judges’ Conference in 1975 entitled ‘History of Legal Education and of Admission to Practice in New South Wales’,<sup>59</sup> and also additional information supplied by JM Bennett, the author of *A History*

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<sup>57</sup>     ibid 1.

<sup>58</sup>     ibid.

<sup>59</sup>     Committee of Inquiry into Legal Education in New South Wales, above n 8, 18.



*of the Supreme Court of New South Wales, and the editor of A History of the New South Wales Bar.*<sup>60</sup>

The chapter covers all aspects of the qualifications for admission both as solicitor and to the Bar from the establishment by the second Charter of Justice in 1814 of the earliest Supreme Court through until the publication of the Report. It culminates in making special mention of the contents and recommendations of the 1964 Martin Report in relation to legal education.<sup>61</sup>

### **4.3 Policies and Outcomes for Legal Education in New South Wales**

Chapters 3, 4 and 5 of the Bowen Report form a natural grouping of what the Bowen Committee described as ‘General Perspectives and Policies’. In this respect the Committee referred to the Martin Report, including Professor Derham’s various papers on the nature of the university and law schools in particular, and a quote in the Forty-first Report of the American Bar Association (1916) with regard to the fitness of lawyers to render public service.

The Committee focused on fundamental issues. Apart from the obvious one, that the purpose of legal education was to train legal professionals, the Committee asked itself what sort of lawyers the community would need in future. It recognised there would be differing views as to the needs of the community. While it did not discount the need for future lawyers to meet the varying demands of high office such as judges, legislators or advisers to government or the need for leading barristers with a high legal competence, it also recognised that there were many unmet legal needs within the community, particularly those of the poorer members of society. The Committee expressed its concern about whether these latter demands were capable of being met by the teaching offered by university law schools in NSW, especially at the level of a common professional training. The Committee stressed that in answering these needs of both the community and the legal profession there should be ‘three essential components of training prior to admission

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<sup>60</sup>     ibid.

<sup>61</sup>     ibid 16–17.

to practice.’<sup>62</sup> In its view these were ‘a component of theoretical knowledge, a component of skills and practical knowledge and a component relating to professionalisation.’<sup>63</sup>

Arguably, the Committee was forward-looking with respect to its views on what constituted professionalisation, which it stated as involving ‘some knowledge or understanding of professional ethics and conventions of behaviour and of issues which arise concerning the ethical responsibilities of professional lawyers.’<sup>64</sup> It also expressed its concern at any rigid demarcation between an initial ‘academic’ stage and the practical training stage of law students especially in relation to the development of legal skills.<sup>65</sup>

The Committee was probably one of the first-appointed bodies to inquire seriously on how the growth in law schools might lead to an oversupply of law graduates and how future young lawyers could be absorbed within the legal profession.<sup>66</sup> These deliberations were very much dependent on the study which the Committee had commissioned into the work of Beed and Campbell and the University of Sydney Sample Survey Centre. A difficulty which had arisen with respect to the outcomes of the commissioned survey was a conflict between research by Professor Richardson, initiated by Law Deans representing the Australasian Universities Law Schools Association (AULSA), and the Committee research on the demands and needs of a future legal profession.<sup>67</sup> Although Professor Richardson’s research was based nationally he concluded that a notional ratio of one lawyer to 1250 persons would result in a gross oversupply of lawyers within the future Australian population.<sup>68</sup> In contrast, ‘Beed and Campbell rejected any effort to predict the community’s need for lawyers based simply on a ratio of lawyers to the community.’<sup>69</sup> They stated their views in the following terms:

In recent years the legal profession has come to make use of quotients expressing the relationship of the number of lawyers in a community and the size of that community’s population. In forecasting exercises it is very enticing to take these ratios, apply them to

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<sup>62</sup>     ibid 29.

<sup>63</sup>     ibid.

<sup>64</sup>     ibid 30–31.

<sup>65</sup>     ibid 31.

<sup>66</sup>     ibid 42.

<sup>67</sup>     ibid 43.

<sup>68</sup>     ibid.

<sup>69</sup>     Beed and Campbell, above n 56, 4.

forecast populations and deduce the number of lawyers a community will need for the future.<sup>70</sup>

They also emphasised this point in the first recommendation of their report which states:

That no manpower planning decisions be made which will involve the lessening of opportunities for persons in the community to undertake the study of law as a qualification for admission as a lawyer in this State which is based upon lawyer/ population quotients as a planning tool.<sup>71</sup>

The Committee recognised there were strong reservations about the effectiveness of the Beed and Campbell research. Nevertheless, much of its material was invaluable as it at least opened avenues relating to future projections on the expansion of legal services and the future needs of the legal profession which had not been previously investigated.<sup>72</sup>

In recommendations contained in Chapter 5 of the Bowen Report the Committee expressed the view that there should be a reiteration of the legislation relating to the power reserved by the Supreme Court of NSW for the admission of barristers and solicitors ‘in a more appropriate way.’<sup>73</sup> In expressing this view the Committee rejected submissions that the Court should be divested of this power with it being transferred to professional bodies, particularly, in the case of solicitors, to the Law Society of NSW. In the view of the Committee such a change was undesirable and it stated this in the following uncompromising terms:

The Committee recommends that the authority for the admission of barristers and solicitors, as regards formal admission and the determination of moral fitness, remain with the Court although certain administrative functions should as at present, remain with the Admission Boards.<sup>74</sup>

With regard to the latter part of the Bowen Report Chapters 6 to 10 deal with various factors of detail relating to legal education in NSW, while Chapter 11 contains

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<sup>70</sup> *ibid* 23.

<sup>71</sup> *ibid* 196.

<sup>72</sup> *ibid*.

<sup>73</sup> Committee of Inquiry into Legal Education in New South Wales, above n 8, 86.

<sup>74</sup> *ibid* 87.

recommendations for a proposed Council of Legal Education which did not receive approval. Finally, Chapter 12 includes the summary of conclusions and recommendations of the Report.

As would be expected the chapter relating to NSW law schools is the largest component of the Report. It embraced all university law schools that were producing, or were to produce, graduates for admission as legal practitioners in NSW. This included the University of Sydney as the oldest law school in NSW, together with the University of New South Wales (UNSW) Macquarie University (Macquarie) and the Australian National University (ANU) whose students, although located in Canberra, enjoyed the right of admission as legal practitioners of the Supreme Court of NSW. It also included the NSW Institute of Technology (NSWIT) which was proposing to introduce a new part-time law course.<sup>75</sup>

The Committee expressed particular interest in some trends in the types of courses taken in the NSW law schools. While juris doctor (JD) courses or postgraduate LLB courses are now being advocated as offering the opportunity for law to be taught to mature students, at the time of its report, the Bowen Committee considered that this disadvantage was overcome by students undertaking combined degree courses involving Law and another major subject such as Arts, Business Studies or Science.<sup>76</sup>

#### **4.4 Additional Forms of Legal Education?**

Chapters 7 (The Admission Boards System), 8 (Practical Legal Training) and 9 (Continuing Legal Education) covered what would be regarded by many at the time of the Bowen Committee as the neglected areas of legal education in NSW and yet they have remained a constant subject of review up and until the present.

##### *The Admission Boards System*

The Admission Boards system is the traditional form of examination which was originally adopted when the Supreme Court was established by Charter in 1823. Despite the view that its existence has been superseded by the creation of university law schools, it still

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<sup>75</sup>     ibid 101–2.

<sup>76</sup>     ibid 105.

remains in operation today. In some ways the Admission Boards system might have been viewed as an anachronism even at the time of the Bowen Report, and its demise might have been anticipated among the final recommendations of the Committee.

In an interview, Fred Chilton, the Editor of the Bowen Report recounts that the Committee had grave doubts regarding both the standard and the long term future of the Admission Boards system.<sup>77</sup> This concern was premised on the standard of the program with respect to the lack of commitment by the Law Extension Committee in providing any in-house lecturing or other tuition. This was subject to the initiation in 1962 of a formal system of lecturing and tuition provided by Sydney Law School. However, even this precluded the establishment of any formal law library, with the Committee noting that ‘as a matter of grace, such a student is allowed access to the University of Sydney Law Library.’<sup>78</sup>

It is obvious from the tone of the Report that the Committee was not convinced about the support given by the University of Sydney to the organisation of the Extension Course. This was expressed by statements such as: ‘Because the resolutions of the Senate of the University of Sydney ... included a decision by the Senate that the Law Extension Committee itself should not conduct any examinations on behalf of the Admission Boards,’<sup>79</sup> this precluded ‘lecturers and tutors of the Law Extension Committee from acting as examiners or revising examiners for the Joint Examinations Board.’<sup>80</sup> In effect, this meant that contrary to normal university practice there was no coordination between teaching and examining within the Extension Course.

The overall impression is that the Committee had decided that there were more effective forms of training for the legal profession than that being offered by the Extension Course. On the basis of the evidence presented to it the Committee believed that the type of program offered by the then NSWIT Law School and the external law course of the Macquarie Law School could more than adequately replace the Extension Course.

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<sup>77</sup> Interview with Fred Chilton, Solicitor and Editor of the Bowen Report (Hunter Valley, 20 July 2013).

<sup>78</sup> Committee of Inquiry into Legal Education in New South Wales, above n 8, 155.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

There were two other groups that posed a challenge to any decision to abolish the Extension Committee courses. The first was that of country students; the other was public servants.

With regard to country students the Committee was of the view that whilst the Extension Committee had been the sole provider for this group, this monopoly had been superseded when Macquarie Law School introduced its external degree course in 1975. The Committee concluded that, because rural students had not taken up the total quota of vacancies on the Law Extension Committee correspondence courses nor availed themselves of the places available on the external degree course at Macquarie, the Extension Committee had overplayed its reasons for the retention of the external study course.

The other cohort of students regarded as a special interest group within the Admission Boards system was that of public service members of the Commonwealth, states and of local and semi-government organisations.

It was obvious that at this time the public service was totally reliant on the Extension Board for the training of its officers filling legal positions within the public service. As the Bowen Report stated: 'The needs of the Public Service officers, as a large special interest group in recent years, have necessarily been a major influence on the Admission Board.'<sup>81</sup> The Committee acknowledged that: 'the Admission Boards system has been maintained in a form apparently compatible with the requirement of the Public Service system.'<sup>82</sup>

At this time the Public Service Board had a policy of recruiting only a limited number of qualified persons from outside the service stating that this policy meant that it was: 'important to the Board that avenues of advancement remain available to those in the Service lest Service morale deteriorate.'<sup>83</sup> In addition, even though there was a limited number of law graduates recruited from outside the public service, they had to compete for promotion with officers within the service for whom there was a statutory preference

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<sup>81</sup>     ibid 162.

<sup>82</sup>     ibid.

<sup>83</sup>     ibid 163.

when such appointments were being made. It was also acknowledged that the relevant associations had ‘policies which do not readily accept appointments from outside the service.’<sup>84</sup>

The comments of the Bowen Committee are unsympathetic to all the arguments put forward by the Magistrates Courts Administration for the retention of the Admission Boards system and the Committee stated this view in no uncertain terms:

It is very important that magistrates be no less qualified (and, therefore, skilful) than those who appear before them. The Committee is not convinced that retention of the Admission Boards system as almost the exclusive way of educating magistrates will necessarily preserve the equality, as legal education generally advances and produces more better qualified practitioners. It is also not convinced that the Admission Boards system is capable of making the progress necessary to enable its products who serve as magistrates to keep sufficiently far ahead in terms of qualification of the rapidly rising level of education generally within the community.<sup>85</sup>

These specifically directed criticisms of the arguments put forward by the Public Service Board and the Magistrates Courts Administration for the retention of the Admission Boards system are replicated at the end of Chapter 7 of the Report. The opening paragraph of this section<sup>86</sup> emphasised that many submissions to the Committee were highly critical of the Admission Boards system, noting that ‘[n]o one praised it or supported it unreservedly.’<sup>87</sup> The Committee also described the system as ‘outmoded,’<sup>88</sup> and noted that, whilst it had been acknowledged that it assisted people who would otherwise have been precluded by distance or job problems to obtain legal qualifications, there was ‘no favourable comment or praise of its quality or its adequacy.’<sup>89</sup>

Enlarging on these adverse comments the Committee summarised a long list of criticisms and complaints against the Admission Boards system which it was of the view led to the danger of the Court being involved in what was obviously a flawed system of legal

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<sup>84</sup>     ibid 164.

<sup>85</sup>     ibid 168.

<sup>86</sup>     ibid 171.

<sup>87</sup>     ibid.

<sup>88</sup>     ibid.

<sup>89</sup>     ibid.

education.<sup>90</sup> In recounting these criticisms the Committee stated that on balance ‘[i]t was satisfied that the system was inadequate and should be phased out.’<sup>91</sup> In its conclusions to this chapter the Committee took account of, and responded to, the alleged justifications for retention of the Admission Boards system such as job quotas, distance problems for country students and quota systems operated by the Board. It also drew on the experiences in other states where there had been a trend away from courses of instructions by bodies other than tertiary law institutions.

The Committee stated its view on the failure of the Admission Boards system in the context of those topics which it considered were ‘the essential requirements for a system of legal education to produce lawyers with the necessary knowledge, skills and professional techniques to serve the community of today and tomorrow.’<sup>92</sup> It stated that ‘to produce lawyers with the necessary knowledge, skills and professional techniques’,<sup>93</sup> a system of legal education should ‘teach analytical skills, substantive legal knowledge, basic working skills such as library and research skills, the skill of communication, familiarity with the institutional environment and an awareness of the total non-legal environment.’<sup>94</sup> In emphasising these requirements the Committee considered that ‘the Admission Boards system has obviously fallen short in meeting these requirements.’<sup>95</sup>

The other recommendation which was ignored was that relating to the phasing out of the Admission Boards system of examinations. With respect to this recommendation it was the impression of the Committee that there had been an early leaking of this proposal prior to the official publication of the final report and that forces opposed to its abolition sought support to reject its approval before it could be given any official sanction.

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<sup>90</sup>     *ibid* 172.

<sup>91</sup>     *ibid*.

<sup>92</sup>     *ibid* 177.

<sup>93</sup>     *ibid*.

<sup>94</sup>     *ibid*.

<sup>95</sup>     *ibid*.



*Practical Legal Training*

PLT does not appear to have generated the same amount of tension between the parties concerned as that caused by the Committee and those involved in the provision of the Admission Board system.

Until the establishment of the Committee articles had been the predominant form of PLT for solicitors in NSW. Nevertheless its abolition and replacement by formal training at the College of Law or the ANU Legal Workshop with subsequent restricted practice after admission to satisfy the requirement for in-service training appears to have been reasonably uncontentious. This was in contrast to other states such as Victoria, Western Australia and Queensland where the retention of articles of clerkship were seen as a fundamental part of preparation for legal practice.

In its deliberations, the Committee exhibited the same receptive approach to PLT as it had done to other features of legal education earlier in its Report. However, this did not mean that it was willing to relax its standards when accepting alternative forms of practical training evidenced by its statement that ‘a system which permits methods of doubtful effect and standards varying from good to bad should not be tolerated.’ Nevertheless its acceptance of innovative practical training was reinforced when it added:

The need for such adequate standards however should not inhibit the introduction of new approaches, systems and techniques into the practical training system.<sup>96</sup>

This part of the Report exhibited an understanding of the various problems involved in the introduction of PLT; the recent developments regarding clinical legal education, particularly in the United States; and the educational and financial concerns of law students when approaching this part of their legal education. For these and other reasons the Committee accepted there should be alternative solutions to practical training whereby it should be ‘undertaken at the conclusion of academic training involving attendance at an institutionalised training school followed by a period of in-service training in a solicitor’s office or other suitable environment.’<sup>97</sup>

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<sup>96</sup>     ibid 188.

<sup>97</sup>     ibid.

The Committee adopted a similarly rigorous approach to the practical training of barristers noting that the *Barristers Admission Rules* at that time did not prescribe any form of practical training. It also noted that whilst the Council of the NSW Bar Association had developed requirements for pupillage, reading requirements and practical instruction, these only applied to those who joined the NSW Bar Association. The requirements did not extend to anyone wishing to practise at the Bar, although the great majority of barristers were members of the Association. In view of this the Committee was of the opinion that not only should membership of the Bar Association be made compulsory for practising barristers but that ‘prospective barristers in general be required to undergo training adjusted to their need within the College of Law or some other approved institution for practical training as a prerequisite to admission.’<sup>98</sup>

The Committee also recommended that pupillage should be of 12 months’ duration and that ‘it should be undertaken during a period of conditional admission and not as a prerequisite for call to the Bar.’<sup>99</sup> The Committee conceded barristers should be entitled to practise during this period of conditional admission.

#### *Continuing Legal Education*

At the time of the Bowen Report the concept of Continuing Legal Education (CLE) was in the early days of its development. The opening paragraph of Chapter 9 of the Report extols the need for CLE to embrace the rapidly changing approach to this topic. It acknowledged that legal practitioners had previously relied upon traditional sources and methods such as the reading of new Acts of Parliament, various official Law Reports, legal journals, text books and rules and regulations of practice to keep abreast of developments in the field of law in which they would be practising. In the view of the Committee such traditional processes created problems for the conscientious practitioner endeavouring to keep up-to-date with current developments in substantive law. The substantial increase in the number of legal publications, particularly the proliferation of loose-leaf services, had accentuated the difficulty facing lawyers. The Committee

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<sup>98</sup>     ibid 199.

<sup>99</sup>     ibid.

considered that these factors had led to a growing demand for more formal methods of CLE such as attendance at courses, seminars and conferences.<sup>100</sup>

Since the Bowen Report there has been a great deal of literature published on the need for, and development of, CLE, including a seminal document by Christopher Roper published in 1999<sup>101</sup> in which he considers the various reports published world-wide on the topic. His following comments on the Bowen Report CLE Chapter are quite dismissive:

In the mid-seventies a committee of inquiry was appointed by the Attorney General of the State to report into legal education in New South Wales (Bowen Report 1979). One chapter of its report deals with CLE. It is quite cursory and is of little but historical interest to the reader 20 years later.<sup>102</sup>

It is understandable why Roper adopted this attitude towards the Bowen Report, as his own text is a highly eclectic approach towards CLE. Much of it is concerned with the theoretical approach towards the adult learner and the practical implications relating to competency-based training.

Whilst CLE forms part of Chapter 9 in this thesis relating to ancillary forms of legal education, it is referred to here due to its relevance as a topic considered by the Bowen Committee. At the time of the publication of the Bowen Report CLE was very much in its early stages of recognition and, to a large extent, the university law schools were regarded as the major providers. This fact was acknowledged in the later Pearce Report where a chapter was devoted to CLE within the context of the types of CLE offered and the programs of the various law schools.<sup>103</sup>

Two additional factors mentioned in the Bowen Report were prophetic about the development of CLE. One was the recognition of the influence of the College of Law and the regional law societies in conducting such programs. The other was the final paragraph

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<sup>100</sup>     ibid 209.

<sup>101</sup>     Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999).

<sup>102</sup>     ibid 14.

<sup>103</sup>     ibid.

on the topic which considered the possibility of CLE being made compulsory as part of the annual certification of solicitors in NSW. With regard to the latter in most Australian states it is now compulsory for solicitors ‘to undergo an annual prescribed number of units of mandatory CLE or continuing legal professional development in order to retain a practising certificate.’<sup>104</sup>

#### 4.5 Legal Paraprofessionals

The concept of the ‘managing clerk’, the senior administrator (with limited legal training) in a law firm does not appear to have gained any status within NSW although it appears to have been recognised in Victoria, South Australia and Western Australia.

This is in contrast to England and Wales where a legal executive, the successor to the managing clerk but more highly legally qualified, has an equivalent standing to that of barrister or solicitor.<sup>105</sup> Chapter 10 of the Bowen Report provided a short résumé of the status of legal executives in other Australian states and compared their roles in England and Wales, the Commonwealth countries and the United States.<sup>106</sup>

Although the Bowen Committee acknowledged there had been some concern that with the phasing out of articled clerks there would be an increase in the demand for paralegals the Law Foundation survey did not indicate that this had in fact occurred.<sup>107</sup>

The Committee canvassed the various options available for a role for paraprofessionals in NSW. It expressed the view that, in the event of their being established in the future, their education and training should be vested in a separate paralegal education body. The Committee recommended that:

an inquiry be made into whether there is a need for paralegal training courses in New South Wales and whether a paralegal education body should be established and, if so, its structure, membership, functions and powers.<sup>108</sup>

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<sup>104</sup> Ainslie Lamb and John Littrich, *Lawyers in Australia* (Federation Press, 2007) 252.

<sup>105</sup> Andrew Francis, *At the Edge of the Law* (Ashgate, 2011) 63.

<sup>106</sup> Jacklyn Robinson, *The Need for and Training of Legal Paraprofessionals in New South Wales* (Law Foundation, 1976).

<sup>107</sup> *ibid* 63.

<sup>108</sup> Committee of Inquiry into Legal Education in New South Wales, above n 8, 221.

It appears that this recommendation was not implemented. A commentator might ask why this possibility was not pursued in the aftermath of the Bowen Report. The answer might be that whilst the cost of conveyancing could be substantially reduced by the introduction of licensed conveyancers<sup>109</sup> as a more economical substitute for employing solicitors in this role, there was no apparent recognition that employing paralegals would attract the same cost-cutting in the carrying out of general legal work.

#### 4.6 Council of Legal Education

Throughout its Report the Bowen Committee had been preoccupied with the establishment of a Council of Legal Education in NSW. The recommendation for such a Council was the subject of Chapter 11 of the Report, the opening four pages of which incorporated the history of legal education in NSW since the original provision in the Charter of Justice 1823 conferred powers for the admission of legal practitioners to the Supreme Court of NSW.

This account described the setting up in 1953 of a provisional committee and a steering committee for the establishment of a Council of Legal Education. Following this, in 1957 a Joint Examinations Board was established in accordance with the *Supreme Court Rules*. Its object was to consider the recognition of legal qualifications outside the Board and the conduct of the Board's examinations for intending barristers and solicitors. As the Bowen Committee pointed out:

With the establishment of the Joint Examinations Board, the proposal for the establishment of a council of legal education was unfortunately allowed to lapse.<sup>110</sup>

The Report reiterated its view that there was still a real need for the establishment of a Council of Legal Education in NSW. Part of its concern was that teaching and examining functions with respect to legal education should be the responsibility of an institution independent of the Supreme Court. The Committee recommended that:

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<sup>109</sup> *Conveyancers Licensing Act 2003* (NSW).

<sup>110</sup> *ibid* 227.

a new body be established to be called the Council of Legal Education to take over the functions of determining educational qualifications for admission to practice now performed by the Admission Boards and the Joint Examinations Board.<sup>111</sup>

The chapter reinforced this recommendation with a wide-sweeping review of similar legal education councils in other jurisdictions, such as the English Ormrod Committee on Legal Education, the New Zealand Council of Legal Education, and the Council of Legal Education for Victoria.

The Bowen Report set out the potential role and structure of such a council. An innovation regarding its establishment was that its membership would include four law teachers (professors of law or their equivalent). In addition, the council would not only be responsible for accrediting university law school courses, but also monitoring developments in PLT and identifying the needs for the various types of CLE.<sup>112</sup> Despite the Committee's view of the need for a Council of Legal Education, there is no evidence that this recommendation was acted upon.

Arguably the changes brought about by the *Legal Profession Act 1993* (NSW) achieved many of the objectives of the Bowen Committee. This was because formerly two separate boards—the Barristers Admission Board and the Solicitors Admission Board—were merged into the Legal Practitioners Admission Board, subsequently retitled the Legal Profession Admission Board (LPAB) in accordance with the *Legal Profession Act 2004* (NSW).

Apart from the LPAB, there is a Legal Qualifications Committee and an Examinations Committee, all of which have law academics within their membership. As well as processing applications for admission as lawyers, the Board assesses the qualifications and experience of applicants for admission to the legal profession including those from interstate and overseas. More importantly it accredits law degree courses and PLT courses. Although the latter might not have been envisaged by the Bowen Committee's recommendations, it could be regarded as a compromise between those recommendations

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<sup>111</sup> *ibid* 228.

<sup>112</sup> *ibid* 230–31.

and the retention of close cooperation between the Admission Board and the Supreme Court of NSW.

#### **4.7 Conclusions and Recommendations of the Bowen Committee**

The final chapter of the Bowen Report still maintained as its major premise a recommendation regarding the establishment of a Council of Legal Education.<sup>113</sup> The fact that this recommendation was never adopted by the NSW Government might be regarded as a major failure of the Committee.

However, there is much to commend in the Bowen Report, particularly its approach to general concepts of legal training. In this regard the statements of the Committee about the sort of lawyers which might be needed by the community in the future, that legal education does not stop with admission, that potential lawyers need to receive a balanced view of community needs and work expectations and receive both a general education and interdisciplinary training, would resonate with today's forward-looking legal educators. In the same way the recognition of 'three essential components of training prior to admission to practice' being 'theoretical knowledge', 'skills and practical knowledge' and 'professionalization'<sup>114</sup> with an acknowledgement that 'there is no fundamental reason why these components should be dealt with exclusively by one institution in the legal education process'<sup>115</sup> reflects an enlightened approach to the development of these important aspects of legal training.

The Bowen Report also contextualised the importance of admission to the legal profession being conditional on completion of an appropriate law degree, but recognised that whilst this would be a full-time program for most students, tertiary educational institutions should provide part-time or external courses. These courses should be maintained at the same standards as those provided for full-time students. Assuming that a law school program is the only acceptable form of academic training for admission to

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<sup>113</sup> *ibid* 241.

<sup>114</sup> *ibid* 242.

<sup>115</sup> *ibid*.

the legal profession, it was essential to ensure that ‘the criteria for admission to the law schools should be as fair and appropriate as possible.’<sup>116</sup>

In its approach to the future development of law schools the Committee reiterated much of what it had stated in its early chapter on this aspect of legal education. Fred Chilton, the editor of the Bowen Report, has expressed the view that the Committee was the first to identify the inequity of law programs cross-subsiding tertiary programs in other subject areas<sup>117</sup> although this does not come through strongly in the Report. Nevertheless, the Report’s summary condemns the effect of current financial stringencies leading to a failure to complete the building of law school accommodation and law libraries and also causing a worsening in the staffing position.

The Committee’s concern to develop and maintain a high standard of practical training was also a focus of the Report. It wanted to ensure students would be able to develop the skills required of practising barristers or solicitors so that they would be ‘equipped with the skill necessary to serve the community properly.’ The Committee also recognised that because of the abolition of articles, practical training should incorporate some form of in-service training leading to admission to practice as a solicitor, and that barristers should be granted conditional admission subject to their undergoing a period of 12 months’ pupillage.

Mention has already been made of the willingness of the Committee to consider the supply and demand for lawyers, a factor which the earlier Martin Committee had chosen to ignore. With respect to legal employment the Committee was concerned that some form of planning should take account of the future demands for, and the supply of, lawyers.<sup>118</sup> It also rejected any attempt to impose quotas at later stages of a student’s progress through legal training. It took the view that if there was to be any restriction on the numbers of lawyers then this should be enforced when a person was embarking upon a legal education. It recognised that whilst there were no immediate plans for the

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<sup>116</sup> *ibid* 243.

<sup>117</sup> Interview with Fred Chilton, Solicitor and Editor of the Bowen Report (Hunter Valley, 20 July 2013).

<sup>118</sup> *ibid* 247.



establishment of another law school in NSW this eventuality might arise should the Admission Boards system be phased out.<sup>119</sup>

In reviewing the outcomes of the Bowen Report it is clear that much of its vision for reform was premised on the establishment of a Council of Legal Education which did not eventuate. Nevertheless, many of its recommendations about the future of legal education in NSW became embodied in the Legal Practitioners Admission Board and its successor, the Legal Profession Admission Board. There is also much to approve in its adoption of a more transparent attitude to both the academic and practical training components of legal education.

## 5. The Pearce Report

Although the Pearce Report<sup>120</sup> was released as long ago as March 1987 it still retains a major influence on the development of Australian legal education, although not necessarily a solely benign one. In the Preface to the report 'Learning Outcomes and Curriculum Development in Law', published in 2002,<sup>121</sup> the authors stated that: 'Some law schools were also reluctant to participate because of concern that this project would replicate the *1987 Pearce Review of Legal Education*, which had its critics.' In the words of one, 'Pearce' generated a considerable amount of rivalry between law schools —it's therefore never far from our minds.'<sup>122</sup>

As the Convenor of the Report, Professor Dennis Pearce reminds anyone who would read or quote from the Report,<sup>123</sup> it was part of a general ongoing review initiated by the Commonwealth Tertiary Education Commission (CTEC) to ensure that there was:

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<sup>119</sup> *ibid.*

<sup>120</sup> Pearce, Campbell and Harding, above n 9.

<sup>121</sup> Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (A report commissioned by the Australian Universities Teaching Committee, Department of Education, Science and Training, 2003) <<http://www.cald.asn.au/docs>>.

<sup>122</sup> *ibid* Preface.

<sup>123</sup> Interview with Dennis Pearce (Canberra, 2 October 2013).

a program of thorough and authoritative assessments of the work of higher education institutions measured against objectives which are acceptable in academic and social terms.<sup>124</sup>

Additionally, the Background to the Review states that:

It is intended that each discipline assessment will be undertaken by a small committee of people pre-eminent in their fields, who will act independently of the Commission and furnish advice to the Commission.’

Charles Sampford and Sophie Blencowe put the Pearce Report into context noting its issue coincided with the introduction of the Dawkins reforms for the higher education section.<sup>125</sup> In stating that ‘Australian legal education changed mightily’<sup>126</sup> in the years that followed, they believed that some of the changes were ‘due in part to Pearce; many of them were in spite of Pearce; and many were driven by the Labor Government’s reforms and institutional response to them.’<sup>127</sup>

The Pearce Report was commissioned in 1985 and submitted in 1987. The members of the Committee were Professor Dennis Pearce, Professor of Law, ANU, (Convenor); Professor Enid Campbell; Sir Isaac Isaacs, Professor of Law, Monash University; and Professor Don Harding, Professor of Law at UNSW.<sup>128</sup>

## 5.1 Contents of the Report

The Pearce Report is a weighty document consisting of four volumes.<sup>129</sup> Volume 1 includes 48 recommendations to the CTEC and 64 principal suggestions to law schools. This first volume focuses on the principal matters with which law schools are involved such as the aims and issues of law schools and legal education, teaching and its evaluation, graduate studies, teaching law to non-law students and CLE.<sup>130</sup> Volume 2 is concerned

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<sup>124</sup> Pearce, Campbell and Harding, above n 9, li.

<sup>125</sup> Charles Sampford and Sophie Blencowe, ‘Context and Challenges of Australian Legal Education’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 1, 1.

<sup>126</sup> John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing Australia, 1998).

<sup>127</sup> *ibid.*

<sup>128</sup> Pearce, Campbell and Harding, above n 9.

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid* vol 1.

with other aspects of law schools such as research and publications, service to the community, enrolments in law courses and access to law studies. It also deals with resources including law academics and the quality of legal education together with law school accommodation and equipment.<sup>131</sup>

In Volume 3 the Pearce Committee focused on practical matters with which law schools were concerned such as administration, law libraries, PLT and relationships between various legal education institutions such as the then AULSA, now the Australasian Law Teachers Association, meetings of Law School Heads (the forerunner of the Council of Australian Law Deans (CALD), Australasian Law Students Association and the Australian Professional Legal Education Conference, the organisation representing practical legal training providers.<sup>132</sup>

Volume 4 is devoted to a survey of recent Australian law graduates.<sup>133</sup> This was carried out by a private organisation, MSJ Keys Young Planners Pty Limited. As the CTEC was unable to finance the study because of budgetary constraints during the 1985–86 financial year, the Pearce Committee obtained alternative funding from the Law Foundation of NSW and the Victoria Law Foundation.<sup>134</sup>

The terms of reference for the Pearce Committee's review are set out in Volume 1.<sup>135</sup> However, these are succinctly summarised by Judith Lancaster in her monograph as

includ[ing] assessment of the quality and economic efficiency of each institution providing legal education; the suitability and feasibility of the aims set and followed; the nature and quality of both undergraduate and postgraduate courses; the standards of teaching and research; staff contributions to law reform, the work of government, the profession, and the community's welfare; the effectiveness of resource utilisation and the extent of unnecessary duplication; current deficiencies; the community requirement for graduates, and selection and admission processes of law schools.<sup>136</sup>

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<sup>131</sup> *ibid* vol 2.

<sup>132</sup> *ibid* vol 3.

<sup>133</sup> *ibid* vol 4.

<sup>134</sup> *ibid* 1.

<sup>135</sup> *ibid* vol 1, li.

<sup>136</sup> Lancaster, above n 29, 51.

No doubt the Pearce Report was a major undertaking for the three members of the Review Committee involving a significant commitment of their professional lives from the time the Report was commissioned in 1985 until its publication in March 1987.

## 5.2 The Nature of the Report

Any evaluation of the Pearce Report is aided by the fact that in 1988 John Dawkins, the then Commonwealth Minister for Education, Employment and Training, sought advice from the National Board of Employment, Education and Training on both the development of a 'plan for future discipline reviews ... and arrangements for follow-up.'<sup>137</sup> This led to the establishment of a working party which concluded in 1990 with a recommendation that:

Studies to report on the implementation of recommendations arising from discipline reviews be carried out under the Evaluations and Investigations Program about three to five years after the completion of each review.<sup>138</sup>

A major outcome of this recommendation was the commissioning in 1992 by the Department of Employment, Education and Training of an impact study to evaluate the effects, efficiency and effectiveness of the 1987 Pearce discipline review. The study was conducted by Simon Marginson and Craig McInnis, assisted by Alison Morris, all from the Centre for Study of Higher Education, University of Melbourne.<sup>139</sup>

Further assistance is afforded by the publication in 1997 of a report 'Australian Legal Education a Decade after the Pearce Report'<sup>140</sup> and a summary of the effect of the Pearce Report by Sampford and Blencowe.<sup>141</sup>

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<sup>137</sup> Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Centre for Study of Higher Education, University of Melbourne, 1994) vii.

<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.* v.

<sup>140</sup> Eugene Clark, 'Australian Legal Education A Decade after the Pearce Report' (1997) 8 *Legal Education Review* 213, 213–35.

<sup>141</sup> Sampford and Blencowe, above n 125, 5–6.

Most commentators would agree with the statement that the Pearce Report was ‘the most comprehensive and significant investigation undertaken of Australian legal education.’<sup>142</sup>

This statement is supported by David Weisbrot who commented:

It is nevertheless true that the Pearce Report is the first important review of, and comprehensive compilation of data on, Australian legal education, and will be the point of departure for all debate on legal education for some time.<sup>143</sup>

One of the most important factors of the Pearce Report, noted by McInnis and Marginson and other commentators, was that it set ‘three standards (or goals) which many law schools did not meet.’<sup>144</sup> The most important of these three standards was attention to the ‘theoretical and crucial dimensions of legal education’ alternatively described as the ‘generation of critical reflection on course content and the role of skills teaching.’<sup>145</sup> The other two standards related to encouragement of small group teaching with a student to staff ratio 15:1, with half of such a ratio for skills teaching; and a library collection of 100 000 volumes or volume equivalents.

In a document as far reaching as the Pearce Report it is necessary to be selective in considering those matters which are directly relevant to the development of legal education in Australia.

Most matters of primary relevance to Australian legal education in 1987 are contained in Volume 1 of the Report. Its contents had a profound effect on those involved with teaching law in the tertiary sector, apart from being of major interest to the general legal community.

A measure of its influence may be judged from a paper presented at the LAWASIA Downunder Conference in 2005 by Sally Kift.<sup>146</sup> Sally Kift’s description of her own experiences as a law student a decade after Pearce illustrates how she was ‘completely disengaged from and uncritical about (what [she] now knows to be) the traditional model

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<sup>142</sup> Clark, above n 140, 214.

<sup>143</sup> *ibid.*

<sup>144</sup> *ibid.*

<sup>145</sup> McInnis, Marginson and Morris, above n 137, 242.

<sup>146</sup> Sally Kift, ‘For Better or For Worse? 21st Century Legal Education’ (Paper presented at the LAWASIA Downunder Conference Gold Coast, Queensland, 20–24 March 2005).

of legal education delivery.’<sup>147</sup> She went on to explain that her experience was much as it had been captured by the Pearce Report. This included ‘long, two hour lectures ... on dry discrete, doctrinal subject areas’, ‘one hour tutorials where, if you kept your head down and avoided eye-contact, you also avoided any attempt (if there was one) at interactivity or engagement between yourself and the tutor’.<sup>148</sup> In addition:

very little guidance about course and/or subject structure was provided—you got what you got (and were grateful for it) and most of it, possibly together with something that had never been mentioned ) would be on the end of year 100% closed book exam.<sup>149</sup>

The question of teaching practices is relevant to the legal educator, past and present. Kift saw her role as a student at that time as a ‘student–receptor’<sup>150</sup> able to ‘absorb and to report back accurately’<sup>151</sup> in the exam. She noted that the ‘traditional legal education model has been preoccupied with the study of narrow legal rules’<sup>152</sup> and recognised:

Many of my teaching colleagues had similar undergraduate experiences and it is problematic that most uncritically replicate the learning experiences that they had when students.<sup>153</sup>

The Pearce Report was willing to explore the challenges which have been highlighted by Kift and other commentators. It stated:

It sometimes seems to be suggested that there are only 2 methods of teaching adopted in Australian law schools and that they are mutually exclusive and mutually opposed to one another. They are labelled the expository or straight lecture method and the case, discussion or Socratic method.<sup>154</sup>

The Report goes on to describe these forms of teaching objectively and in some detail, although the Pearce Committee’s preference was clearly against the expository method and in favour of casebook, discussion or Socratic teaching or its later development into

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<sup>147</sup> *ibid* 6.

<sup>148</sup> *ibid*.

<sup>149</sup> *ibid*.

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid*.

<sup>152</sup> *ibid*.

<sup>153</sup> *ibid* 7.

<sup>154</sup> Pearce, Campbell and Harding, above n 9, 155.

the problem method. However, it has never been recognised in any of the subsequent reports or papers that the Pearce Report was remarkably open-minded as to the teaching style adopted in Australian law schools. Although it might not be the conventional approach to current teaching methods, the statement in the Report that: ‘teachers have tended to use the method with which they feel most comfortable and which they think is best suited to the subject matter with which they are dealing,’<sup>155</sup> recognises the realities of the teaching situation as was evident in Australian law schools at that time. This view is supported by the subsequent recognition that:

Not all teachers are able to use the same techniques effectively; not all material is best dealt with in the same way; but above all we think there is considerable advantage in students being exposed to a variety of teaching methods.<sup>156</sup>

Importantly, these statements were subject to the caveat about what the Report might ‘have to say later about review of individual teacher’s performance and resources available.’<sup>157</sup>

Another aspect of teaching law considered in the Pearce Report, and noted by McInnis and Marginson in their report, is the identification of the following trends in legal education curriculum and teaching:

The growth of the combined degree; the introduction of elective subjects; the use of small group teaching; attempts to introduce skills training; the provision of coursework higher degrees; and specialised focus in teaching and research.<sup>158</sup>

With regard to the latter there was concern as to the quality of legal research echoing the criticism of Professor Julius Stone that: ‘The bulk of legal scholarship was firmly located in Austinian positivism, stressing above all the identification and analysis of *black-letter rules*.’<sup>159</sup>

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<sup>155</sup> *ibid* 156.

<sup>156</sup> *ibid* 157.

<sup>157</sup> *ibid*.

<sup>158</sup> McInnis, Marginson and Morris, above n 137, 170.

<sup>159</sup> Michael Chesterman and David Weisbrot, ‘Legal Scholarship in Australia’ (1987) 50 *Modern Law Review* 709, 714.

Volume 2 is principally concerned with research and publications. The Committee was faced with a difficulty in drawing a distinction ‘ between *legal research* carried out by lawyers in assisting clients, and academic research in law.’<sup>160</sup> This required:

Distinguishing between *doctrinal research* or legal scholarship which started from law as a given field of knowledge (law as the subject), from *non-doctrinal research* which had its starting point outside law and looked at the social, economic, political or cultural implications of legal practices (law as the object).<sup>161</sup>

Chesterman and Weisbrot emphasised that

Both the recent Report on Australian law Schools and the submission of the law school deans to the writers of that Report refer to the predominance of *doctrinal, black-letter* research in Australian law schools, and the submission contains a plea for more *theoretical* and *reform-oriented* research.<sup>162</sup>

### 5.3 The Macquarie Law School Issue

Of great interest to those who have taken notice of the influence of the Pearce Report on the future of Australian legal education are the two principal recommendations in Volume 3. These relate to the problems that gave rise to a crisis in governance of Macquarie Law School and a statement concerning the need for any future law schools within Australia. Of these two, the problems involving Macquarie Law School are the most memorable. As reported in Volume 3:

The disputes that have racked Macquarie Law School for some years now are of public notoriety. They have been pursued not only within the law school but also in the University and in the media.<sup>163</sup>

McInnis and Marginson were more forthright in their view as to the approach adopted by Pearce stating that:

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<sup>160</sup> McInnis, Marginson and Morris, above n 137, 181.

<sup>161</sup> *ibid.*

<sup>162</sup> Chesterman and Weisbrot, above n 159, 723.

<sup>163</sup> Pearce, Campbell and Harding, above n 9, 944.



The Pearce Report appeared careless of the interests of Macquarie University, of its law school and, most importantly, of the law school's students and graduates. It played the game tough. The impression was left that the Pearce Committee was out to *get* Macquarie.<sup>164</sup>

Judith Lancaster also agreed, stating that:

By far the most controversial of the Committee's finding was its recommendation to phase-out or reconstitute Macquarie University Law School.<sup>165</sup> ...

Because the recommendation is at odds with the Committee's *expert* evidence, it provides a good example of the limitations of the corporatist mode.<sup>166</sup>

Although the divisions within Macquarie Law School were arguably based upon ideological divisions between the proponents of the Critical Legal Studies movement and those who supported a more traditional approach towards law teaching, Pearce reported that such divisions were more deep rooted. As the Report stated:

This division is, unfortunately, not only ideologically based nor is it founded only on differences of view as to the appropriate basis for legal education ... There are fundamental incompatibilities of personality in the law school.<sup>167</sup> ... These are not differences of opinion [that] can lead to a stimulating, dynamic atmosphere in a university environment.<sup>168</sup>

The Report noted that in contrast to such an intellectual approach:

We are told, obscene remarks are made to proponents of different views at school meeting; when staff members are visited after school meetings and an explanation demanded as to why they voted a certain way, and, as we understand, at least one complaint of a threat of assault has been made, intellectual debate has gone and factionalism has replaced it.<sup>169</sup>

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<sup>164</sup> McInnis, Marginson and Morris, above n 137, 103.

<sup>165</sup> Lancaster, above n 29, 52.

<sup>166</sup> *ibid.*

<sup>167</sup> Pearce, Campbell and Harding, above n 9, 945.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

Naturally a different perspective is given in the official history of Macquarie Law School which reported the:

Pearce's Committee belief that the School should be closed, phased out or divided due to the *irreconcilable differences*. There was a fire burning and the Pearce Report threw a huge bucket of petrol on it and made it much worse.<sup>170</sup>

The view of Professor Kercher, downplaying these events, has already been stated in Chapter 6 of this thesis<sup>171</sup> as has the equally sanguine view adopted by the authors of the Macquarie Law School history.<sup>172</sup>

Macquarie Law School's problems are also fully covered in the official history of Macquarie 1964–1989 under the heading 'The Law School and its Troubles'.<sup>173</sup> Again, the description refers to extreme behaviours, such as a:

small and determined group of staff, alienated by what they perceived to be their lack of power over decision-making in the university, were threatening to destabilise its structures.<sup>174</sup>

The history also describes a breach of confidentiality relating to a referee's report circulated at a Law School meeting as being:

traceable not to the pathological activities of a rump (or even a majority group) in the Law School, but [to] the direct and inevitable—and clearly justifiable—result of a comprehensive set of paternalistic and authoritarian attitudes and practices of governance in this university.<sup>175</sup>

However, there was a suggestion that the internal problems of Macquarie Law School highlighted by Pearce might have had a more serious effect on the future of Macquarie which, at the height of the Dawkins reforms, was endeavouring to extend its influence by

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<sup>170</sup> Rosalind Croucher and Jennifer Shedden, *Retro 30: Thirty Years of Macquarie Law School* (Macquarie University, 2005) 76.

<sup>171</sup> *ibid.*

<sup>172</sup> *ibid.*

<sup>173</sup> Bruce Mansfield and Mark Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989* (Macquarie University, Hale and Ironmonger, 1992) 276.

<sup>174</sup> *ibid* 279.

<sup>175</sup> *ibid* 283.

amalgamating with CAEs in NSW. Macquarie was concerned about the attitude of the NSW Minister of Education, Terry Metherell, whom it had been rumoured (unsubstantiated) would not approve any such mergers for Macquarie. The history states that:

A very long and frank talk with Ron Parry, Director of the Higher Education Office, confirmed the impression. How far, it was asked, was the Minister's mind affected by the problems of the Law School?<sup>176</sup>

Despite this unpromising assessment from the Pearce Committee, Macquarie Law School did survive, but notably among the alternative remedies canvassed by the Pearce Report was for the Law School to be divided with 'those who are not ideologically prepared to pull together on the provision of such courses [being] transferred to another school.'<sup>177</sup> This meant they could teach on Bachelor of Arts and Bachelor of Economics programs which incorporated a wide range of law courses beyond the normal business law subjects. Although this recommendation had been rejected by a Macquarie Review Committee appointed in 1978 to resolve the difficulties within the Law School, it was eventually accepted as a remedy and introduced in 2000.

#### **5.4 A Restriction on Further New Law Schools**

The other recommendation for which the Pearce Committee is still remembered is its statement that it did 'not think that there will be the need for a new law school, except perhaps in Queensland.'<sup>178</sup> However, very soon after the publication of the Report there was (in this thesis author's words) 'An Avalanche of Law Schools'.<sup>179</sup>

In defence of the statement in the Pearce Report this author's article in question emphasises a number of circumstances which could not have been anticipated by the Pearce Committee. The principal reason was that, contemporaneously with the publication of the Pearce Report, John Dawkins, the Federal Minister for Employment, Education and Training introduced legislation that abolished the binary system (of

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<sup>176</sup> *ibid* 296.

<sup>177</sup> Pearce, Campbell and Harding, above n 9, 949.

<sup>178</sup> *ibid* 998.

<sup>179</sup> David Barker, 'An Avalanche of Law Schools: 1989 to 2013' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Canberra, 1 October 2013).

universities and CAEs) which had been established by the Martin Report. He replaced it with the merger and amalgamation of the 19 universities and 69 CAEs to create a new single system of 36 universities by 1994. It is arguable that the Dawkins reforms created an expansion of universities and university law schools which realised the expectation of more students wishing to study law.

Although this outcome has been examined in some depth in Chapter 7 of this thesis it is appropriate to mention it here in connection with the outcomes of the Pearce Report. Contrary opinions were stated in ALRC 89 such as one view that the expansion of legal education in Australia:

could be attributed to the dynamic changes which had come about in the legal profession, such as national admission and practice, globalisation, the application of competition policy, emergence of multi-disciplinary partnerships and the influence of new information and communication technologies.<sup>180</sup>

In contrast, an opposing view, also stated in ALRC 89 was that:

Law faculties were attractive propositions for universities bringing prestige, professional links and excellent students at a modest cost as compared to the professional programs such as medicine, dentistry and engineering.<sup>181</sup>

These statements will be examined in greater depth when ALRC 89 is investigated as the final document in this quartet of reports relating to legal education.

## **5.5 The Legacy**

Where does this leave the Pearce Report, when considering its place in the history of Australian legal education? No doubt, at its time, it was regarded as a major influence throughout Australian legal education. This was not only because it incorporated a comprehensive survey of legal education in 1987 but also because of its wide-ranging review of Australian law schools and its analysis of the many aspects of teaching and learning practised by them at this time. Many commentators have emphasised the intangible benefits that flowed from the Pearce Report to legal education generally, in

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<sup>180</sup> Australian Law Reform Commission, above n 10, 117 [2.13].

<sup>181</sup> *ibid* 118 [2.15].

that it encouraged greater cooperation between the law schools, especially through the then Committee (now Council) of Australian Law Deans leading to the development of law as an academic discipline.<sup>182</sup>

If there had to be a concluding statement as to the ongoing effectiveness of the Pearce Report approximately two and half decades after it was published, then this could be left to the Report itself which stated:

The committee has been most anxious in the Report to avoid any suggestion that there is one form of legal education with which all schools must comply. There is no agreement among commentators on the form of legal education and it has in fact changed markedly over the years. Nonetheless the Committee thinks that there are some minimum levels that have to be met if the degree awarded is to be recognised as a professional law degree and it has indicated here it thinks law schools fall short of this standard.

## 6. Australian Law Reform Commission Report, *Managing Justice*

The launching of ALRC 89 by the Hon Daryl Williams, the Commonwealth Attorney-General, in Parliament House, Canberra on 17 February 2000 marked a significant achievement by the ALRC. As the Commission stated, the report entitled *Managing Justice* represented ‘the culmination of a major four year inquiry, which commenced with terms of reference directing the Commission to consider “the need for a simpler, cheaper and more accessible legal system”.’<sup>183</sup>

The explanatory notice introducing the launch went on to explain how ALRC 89 was ‘backed by an extensive consultation process and one of the most comprehensive empirical research studies of the civil justice system ever undertaken in Australia.’<sup>184</sup> The explanation closed with a confirmation of how its ‘138 recommendations for reform cover such other matters as legal and judicial education, judicial accountability, lawyers’ practice standards and legal aid.’<sup>185</sup>

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<sup>182</sup> McInnis, Marginson and Morris, above n 137, 247.

<sup>183</sup> Australian Law Reform Commission, above n 10, 7.

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid.*

ALRC 89 had been preceded by Discussion Paper 62 (DP 62) published in August 1999.<sup>186</sup> At this stage it was obvious that legal education was contemplated only as comprising a minor part of the review under a heading: '3. Education, training and accountability.'<sup>187</sup> This part constituted only 36 pages of DP 62 with legal education forming 17 pages. Within these 17 pages there was little reference to modern contemporary Australian legal education. Much of this section was given over to reports on legal education in the United Kingdom and North America with further comment on dispute resolution, PLT and CLE. It concluded with only one proposal which was for the establishment of a broadly constituted advisory body to be known as 'the Australian Council on Legal Education'<sup>188</sup> which would be charged with 'developing model standards for legal education and training for lawyers and other key participants in the justice system.'<sup>189</sup>

Part of the change of emphasis between DP 62 published in 1999 and ALRC 89 published in 2000 may have been due to the changing in autumn 1999 of the President of the ALRC from Alan Rose, a previous Secretary of the Commonwealth Attorney-General's Department, to Professor David Weisbrot, a former Dean of the University of Sydney's Faculty of Law and well-known commentator on Australian legal education.

One senses that the whole focus of the subject matter of DP 62 changed with his appointment. The space of time from him taking up this position and the publication of DP 62 in August 1999—preceding the official launch of ALRC 89 on 17 February 2000—was only a few months and yet there was a dramatic change with regard to ALRC 89's objectives. Consequently, these objectives were widened to incorporate more aspects of the federal judiciary system, the supply of legal services and the influence of all aspects of legal education. The latter, under the heading of 'Education, training and accountability' included not only education for the legal profession, but the education and professional development for judges, judicial officers and tribunal members.

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<sup>186</sup> Australian Law Reform Commission, 'Review of the Federal Civil Justice System, Discussion Paper No. 62' (1999).

<sup>187</sup> *ibid* 40.

<sup>188</sup> *ibid* 57.

<sup>189</sup> *ibid*.

## **6.1 Education, Training and Accountability**

In its opening statement under the subheading of ‘Education for the Legal Profession’ the ALRC, whilst noting that it had stated in DP 62 that the ‘requirement of higher educational qualifications is classically one of the defining features of a profession’, now set a more challenging goal for ALRC 89 by stating that:

Theory and practice in relation to the nature, shape, siting, funding and regulation of professional education is contingent and dynamic, and thus open to contest and controversy.<sup>190</sup>

Within this context ALRC 89 examined the changing patterns of legal education. It described the conduct of current legal education as being ‘divided into three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institution and in-service components; and (3) continuing education’,<sup>191</sup> noting that these arrangements had originally been recommended in the Martin Report.<sup>192</sup>

ALRC 89 then drew guidelines with regard to the various aspects of these three stages of legal education. Even at this opening part of ALRC 89 it is obvious that its main thrust would revolve around the academic training stage. In contrast to subsequent developments during the opening decade of the 21<sup>st</sup> century ARLC 89 stated:

By and large, first phase legal education in Australia is provided by universities in courses leading to the award of a Bachelor of Laws (LLB), the degree which is generally recognised for the purposes of admission to practice.<sup>193</sup>

However, ALRC 89 proceeded to acknowledge that most Australian law students would be enrolled in combined or dual degree programs such as Bachelor of Laws and Bachelor of Business.<sup>194</sup> Therefore, on completion of their academic program they would be awarded two testamurs i.e LLB and BBus which recognised that they had graduated both

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<sup>190</sup> Australian Law Reform Commission, above n 10, 114 [2.5].

<sup>191</sup> *ibid* 115 [2.7].

<sup>192</sup> *ibid* [2.8].

<sup>193</sup> *ibid*.

<sup>194</sup> *ibid*.

as a Bachelor of Laws and Bachelor of Business. Such a degree program was uniquely Australian and rarely found in other jurisdictions.

At the time of the publication of ALRC 89 it could quite correctly make the claim that the status of the Australian academic legal qualification ‘places the Australian pattern somewhere between the United Kingdom model, which is still predominantly undergraduate, and the model in the United States and common law Canada which is entirely postgraduate.’<sup>195</sup>

The remaining two stages of legal education are dealt with in ALRC 89 in a mainly descriptive, almost pre-emptive, fashion. It explained that PLT has largely been the preserve of the profession either by articulated clerkships, pupillage programs or through specially designated institutional courses provided by the College of Law in NSW or the Leo Cussen Institute (later renamed ‘Centre’) in Victoria. CLE was barely described at this stage.<sup>196</sup>

## **6.2 Education for the Legal Profession**

That part of Chapter 2 of ALRC 89, entitled ‘Education for the Legal Profession’ is chiefly concerned with academic training at a university, although ALRC 89 acknowledged the ongoing presence of the LPAB Extension Course and that, at this time articulated clerkships had not been completely replaced by PLT in some jurisdictions.<sup>197</sup>

However, even here the spectre of the 1987 Pearce Report and its recommendation that there should be no more law schools established in Australia other than the possibility of one in Queensland is acknowledged, although this recommendation had been completely ignored. At the time of ALRC 89 the original number of twelve law schools had more than doubled to twenty-eight.<sup>198</sup>

ALRC 89 broke new ground by its willingness to undertake a comparative study of legal education in other jurisdictions, particularly the United States.<sup>199</sup> Of special interest to the

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<sup>195</sup> *ibid.*

<sup>196</sup> *ibid* 116 [2.9].

<sup>197</sup> *ibid* 117 [2.12].

<sup>198</sup> *ibid* [2.14].

<sup>199</sup> *ibid* 118–20 [2.18–2.22].



ALRC was the effect of an American Bar Association report published in July 1992 entitled 'Legal Education and Professional Development: An Educational Continuum'. This subsequently acquired the title of the 'MacCrate Report' named after Robert MacCrate, Chair of the Bar Association Task Force responsible for its publication.<sup>200</sup>

One commentator, Jonathan Rose, has stated that the MacCrate Report was controversial because it advocated that 'skills training not only belongs in law schools, but warrants greater emphasis.'<sup>201</sup>

The MacCrate Report was relevant to the ALRC's deliberations. ALRC 89 strongly emphasised its relevance to the modern form of legal education and its superiority to the current state of Australian legal education. Significantly, the MacCrate Report had been emphasised within the context of legal education in the United States as a counterweight to the previous influence of the Casebook System as originally introduced by Christopher Langdell of Harvard Law School in 1870.<sup>202</sup>

In focusing on the conflict in the United States about the reform of North American legal education, ALRC 89 emphasised the influence of the MacCrate Report which provided a conceptual analysis of 10 fundamental lawyering skills which were linked to four professional values.<sup>203</sup> It also favourably considered recommendations made in a Canadian Bar Association's (CBA) Task Force report on systems of civil justice, which stated that:

The CBA and the Canadian Council of Law Deans, the Canadian Association of Law Teachers and the Federation of Law Societies form a joint multi-disciplinary committee to consider and propose a comprehensive legal education plan to assist in civil justice reform for the 21<sup>st</sup> century.<sup>204</sup>

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<sup>200</sup> American Bar Association, 'Legal Education and Professional Development: An Educational Continuum (MacCrate Report)' (American Bar Association, 1992).

<sup>201</sup> Jonathan Rose, 'MacCrate Report: A Restatement of Legal Education - The Need for Reflection and Horse Sense' (1994) 44 *Journal of Legal Education* 548.

<sup>202</sup> David Barker, 'The American Case Method and its Influence on Modern Legal Education' (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Victoria University, Melbourne, 2006).

<sup>203</sup> Australian Law Reform Commission, above n 10, 119–20 [2.20].

<sup>204</sup> *ibid*, 120 [2.22].

The ALRC recognised an ‘emerging trend in Australia toward the teaching of generic “professional skills,”’ which it defined as ‘skills which will be needed in any subsequent legal practice.’ It acknowledged the current differences between Australian legal education and that of North America (expressed in the MacCrate Report) which had previously been identified in DP 62, stating that:

MacCrate would orient legal education around *what lawyers need to be able to do*, while the Australian position is still anchored around outmoded notions of *what lawyers need to know*.<sup>205</sup>

### 6.3 National Standards and/or Accreditation

ALRC 89 deliberated over whether there was ‘a need for national standards and/or accreditation’, and whether there was a need for a body, described as the Australian Council on Legal Education, to oversee such activities. The ALRC was extremely cautionary in the use of its language proposing such a body.

However, this suggestion was inhibited by a previous attempt of the Law Council of Australia in 1994 to incorporate such a body, which it described as a National Appraisal and Standards Committee to accredit law schools, in its Blueprint for the Structure of the Legal Profession (the Blueprint). Unfortunately, the Law Council did not consult CALD or the law schools on this proposition. In addition, its plan to include only four legal educators out of the 11-person membership of the Committee further compounded tensions between the Law Council and CALD.

ALRC 89 correctly described CALD as being offended by ‘the intrusive nature of the terms of reference, which included internal matters of personnel and resource management; and the unexplained method for funding such a labour-intensive system.’<sup>206</sup>

As President of the Commission, David Weisbrot would have been well aware of CALD’s reaction because, in his role as Dean of the University Sydney Law Faculty, he had

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<sup>205</sup> Australian Law Reform Commission, above n 10, 120 [2.21].

<sup>206</sup> Australian Law Reform Commission, above n 10, 123 [2.31].

attended the CALD meeting considering the Blueprint which had taken place at the University of Tasmania Law School in July 1994.<sup>207</sup>

Although ALRC 89 traversed all possible options for the constitution of a National Appraisal Council with responsibilities for a formal national accreditation system of Australian law schools, the ALRC was not in a position to make a positive recommendation for the establishment of such a Council. It expressed its reasons in the following terms:

The views expressed about the nature, composition, and functions of an Australian Council on Legal Education were contradictory—and to a large extent mutually exclusive—such that the Commission feels unable to make a positive recommendation at this time.<sup>208</sup>

Having canvassed and focused on the various participants within legal education at this time, particularly a number of law school deans, the ALRC detailed its preferred approach for the ‘establishment of a body which sets (appropriately high) national minimum standards for legal education.’ In making this recommendation it acknowledged the ‘formal auditing and accrediting process should remain at the State and Territory level.’<sup>209</sup>

Unfortunately, the Law Council persisted in its support for a National Appraisal Council which it saw as a determinative body on legal education and training, and not just an advisory body which individual law deans and CALD thought would be more appropriate. The ALRC recognised this ‘disjunction between the prevailing academic view and that of the profession and judiciary (as represented by the Law Council and the Consultative Committee).’<sup>210</sup>

In the view of the ALRC these diverse opinions had maintained an ongoing dichotomy between the two branches of the legal community which it viewed as disappointing. It commented that:

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<sup>207</sup> *ibid.*

<sup>208</sup> *ibid* 132 [2.63].

<sup>209</sup> *ibid* 137 [2.76].

<sup>210</sup> *ibid* [2.74].

the relationship between the legal profession and the legal academy—which, in 1987, the Pearce report described as ‘uneasy’, and the law deans declared ‘contains an element of tension’ ... has not been advanced.<sup>211</sup>

Seven years earlier, David Weisbrot in his academic capacity had recognised that: ‘Most critically, the divide serves to marginalise the legal academy and its ideas and perspectives.’<sup>212</sup>

Ultimately, the ALRC withdrew its former proposal for the establishment of an Australian Council on Legal Education in favour of a suite of recommendations which it hoped would encourage the major stakeholders to work together constructively and develop a sense of commonality of interests. These recommendations incorporated an emphasis upon legal ethics and professional skills; a regime for quality assurance in Australian law schools; another discipline review expanding on the Pearce Report; the establishment of an Australian Academy of Law; greater diversity in the delivery of PLT programs and the promotion of the participation of practitioners in high quality professional development programs.<sup>213</sup>

Reflecting on these recommendations approximately a decade and a half after they were first put forward as the ALRC’s preferred approach, most commentators would accept that, other than the rejection of the introduction of another discipline review similar to the Pearce Review, they have since been incorporated into the general legal education or professional development of the Australian legal community.

Whether this was due to the support of the ALRC for these reforms is open to conjecture, but nevertheless they did eventuate and certainly some recommendations, such as the need for an Australian Academy of Law, can be directly attributed to ALRC 89. It could be argued that because these recommendations were in ALRC 89 they motivated the relevant authorities to incorporate them into the general law curriculum. Currently, the

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<sup>211</sup> *ibid* [2.75].

<sup>212</sup> David Weisbrot, ‘Competition, Cooperation and Legal Change’ (1993) 4(1) *Legal Education Review* 1, 19.

<sup>213</sup> Australian Law Reform Commission, above n 10, 138 [2.77].

NSW LPAB insists that ethics has to be in the curriculum of all law degree programs which must be an outcome of Recommendation 2 of ALRC 89 which stated that:

In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.<sup>214</sup>

Recommendation 3, which advocated all university law schools being subject to an ongoing quality assurance auditing process, was really overtaken by the Australian Government introducing successive forms of national auditing for quality of all university educational programs. Originally this responsibility was that of the Australian Universities Quality Agency but later became ‘an area of responsibility of the higher education regulatory authority established in 2011, the Tertiary Education Quality and Standards Agency.’<sup>215</sup>

Recommendation 4 was the only recommendation not expressly adopted either by state, federal or university authorities. It was evident that there was no desire by any law school or law academic for further discipline review of Australian legal education similar to that which gave rise to the Pearce Report.<sup>216</sup>

Recommendation 5 related to specified standards of minimum competency and required that admitting authorities ‘should render practical legal training requirement sufficiently flexible to permit a diversity of approaches and delivery modes.’<sup>217</sup> Again, this was an acknowledgement that the ALRC was recognising current trends within legal education, namely that some university law schools ‘already have established PLT programs—some of them integrated, some of them “add-on”—which are approved for admission purposes by the relevant State admitting authorities.’<sup>218</sup> However, the ALRC recognised that:

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<sup>214</sup> *ibid* 142.

<sup>215</sup> Julie Wells and Lin Martin, ‘Regulation’ in Gwilym Croucher et al (eds), *The Dawkins Revolution 25 Years On* (Melbourne University Press, 2013) 200.

<sup>216</sup> Johnstone and Vignaendra, above n 121.

<sup>217</sup> Australian Law Reform Commission, above n 10, 150.

<sup>218</sup> *ibid* 149 [2.111].

Questions about the best venues for PLT have been overtaken by the need to clarify the goals, improve the content and develop a set of national minimum standards and competencies.<sup>219</sup>

#### **6.4 An Australian Academy of Law**

Of all the ALRC's recommendations a major achievement was Recommendation 6, which sought the establishment of an Australian Academy of Law, the purpose of which could 'serve as a means of involving all members of the legal profession—students, practitioners, academics and judges—in promoting high standards of learning and conduct and appropriate collegiality across the profession.'<sup>220</sup>

As has been outlined in Chapter 8, while still President of the ALRC, David Weisbrot convened a small group of leading law academics and led the discussion and negotiation whereby the Academy was able to come into existence in 2008 and, for a short period, he acted as its temporary inaugural President. The fact that the Academy is currently recognised as a vibrant institution with approximately 250 selected members owes much to the earlier foresight of the ALRC and Professor David Weisbrot in particular.

#### **6.5 Affirmation of Life Long Learning for Legal Practitioners**

The final Recommendation 7 concerning education for the legal profession emphasised the importance of 'all legal practitioners completing a program of professional development over a given three year period,'<sup>221</sup> as a condition of maintaining their current practising certificate. This reflects the current requirements of the Law Society of NSW which have basically been adopted in various forms by other state law societies. However, a reading of this part of ALRC 89 will reveal that the NSW Bar Association successfully argued for NSW barristers to be exempted from a similar requirement, although subsequently the requirements have been extended to NSW barristers and most other state bar associations.

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<sup>219</sup> *ibid* 150 [2.114].

<sup>220</sup> *ibid* 154.

<sup>221</sup> *ibid* 159.

## 7. Review

In assessing the effect of these reports on the changing scene of Australian legal education it has to be remembered that, even the last of these, ALRC 89 was published over 15 years ago, and that at least half a century has elapsed since the publication of the Martin Report in 1964.

Therefore it is necessary to consider the effect over a long period of years of these various reports on the development of legal education. Except in unusual circumstances, such as the introduction of the binary divide (the Martin Report) and its dissolution (the Dawkins reforms), it is difficult to measure how many changes in legal education have been influenced by the outcomes of the reports considered in this chapter. Nevertheless, they mark an increasing involvement of government in legal education primarily at the federal level, with the Bowen Committee being a state-based exception.

As expressed by Susan Davies: ‘The device of a commission or committee of inquiry is much favoured in Australia and the field of education is no exception.’<sup>222</sup> The reports considered in this chapter not only illustrate their effect on the formulation of government policy but also the approach adopted by stakeholders. This can mean that stakeholders such as CALD will take notice of the possibility of the government intervening and setting standards for law schools, as anticipated in the Pearce Report and ALRC 89, and then forestall this by introducing their own scheme of self-regulation, as set out above and in Chapter 8 of this thesis.

Chapter 11 of the Martin Report (‘Legal Education’), reviewed the whole spectrum of legal education that existed at the time of the Report, such as the role of university schools of law, admission to practice, PLT, university law syllabuses and teaching, research and postgraduate work, the optimal size of law schools, and a comparison with American legal education.<sup>223</sup>

The Bowen Report reflected a continuation of the change taking place as an outcome of the Martin Report. This was especially so with regard to the statements of the Bowen

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<sup>222</sup> Davies, above n 5, 2.

<sup>223</sup> Martin, above n 4, 53–69.

Committee about the type of lawyers which might be needed by the community in the future. The fact that the Committee recognised that legal education does not stop with admission to practice would resonate with today's forward-looking educators. However, there is a need for potential lawyers to not only develop a balanced view of community needs and work expectation but also to receive a general education and interdisciplinary training.

In assessing the impact of the Pearce Report, Eugene Clark stated that:

disciplinary reviews, such as the Pearce Report and the McInnis and Martinson post-Pearce evaluation are important, even indispensable, if legal education is to continue to advance and remain of a high quality.<sup>224</sup>

McInnis and Martinson acknowledged that:

The Pearce Report generated a climate of debate, discussion, critical thinking, self-evaluation and continuous self-improvement which has served law schools well since 1987.<sup>225</sup>

The achievement of the ALRC has to be acknowledged for the major contribution to legal education made by ALRC 89. Under the heading of 'Education, Training and Accountability' the report covered not only education for the legal profession, but the 'education and professional development for judges, judicial officers and tribunal members.'<sup>226</sup> To the ALRC's President, David Weisbrot, must be attributed the expansion which the ALRC made on the statement in DP 62 that the 'requirement of higher educational qualifications is classically a defining feature of a profession'<sup>227</sup> to the more challenging goal for ALRC 89 by stating that:

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<sup>224</sup> Clark, above n 140, 213.

<sup>225</sup> McInnis, Marginson and Morris, above n 137, viii.

<sup>226</sup> Australian Law Reform Commission, above n 10, 113 [2.0].

<sup>227</sup> *ibid* 114 [2.5].



Theory and practice in relation to the nature, shape, siting, funding and regulation of professional education is contingent and dynamic, and thus open to contest and controversy.<sup>228</sup>

It is easier to identify situations in which the recommendations of a particular report are not acted upon. Obvious examples are the recommendation in the Pearce Report for the abolition of Macquarie Law School or the Pearce Committee's view that there should be no further law schools established in Australia other than the possibility of a further one in Queensland.

It could also be argued that the Pearce Report was intended to be part of a program of national reviews incorporating a system of discipline assessment, which the Australian Vice-Chancellors Committee considered 'lacked clarity of purpose'.<sup>229</sup> If they 'could not influence discipline change at the institutional level then it was unlikely that institutions would continue to co-operate.'<sup>230</sup> Similarly, the rejection of the recommendation of the ALRC that there should be a further national discipline review of legal education on the basis of the earlier Pearce Report, or the abolition recommended by the Bowen Committee of the LPAB Extension course, are further examples of recommendations being ignored.

Nevertheless, close examination of the outcomes of these reports would suggest that there is a timelessness regarding the issue of legal education which continues to manifest itself in the current era.

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<sup>228</sup> *ibid.*

<sup>229</sup> McInnis, Marginson and Morris, above n 137, 3.

<sup>230</sup> *ibid.*



## Chapter 11 Conclusion

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### 1. Introduction

This thesis has reviewed the historical development of legal education in Australia since the time of European settlement in 1788 and, as exemplified in Chapters 8 and 9, its influence on the major areas of the federal and state legal structure, the legal profession and the general legal community. The dominant theme of this thesis has been the education and training of law students. Allied to this has been an examination of the character and quality of legal education.

The history of legal education in Australia indicates an obvious English influence during the formative years. There is some debate over the extent of this influence. Rosemary Hunter, Dean of Griffith University Law School, is of the view that: ‘Australian legal history tended to be written and taught as a footnote to the great sweep of English legal history.’<sup>1</sup> In contrast it is possible to borrow the title adopted by Bruce Kercher in the Second Alex Castles Lecture in Legal History: ‘Why the History of Australian Law is not English’<sup>2</sup> and argue that, despite having its origins in the English legal system, Australian legal education has unique home-grown elements that distinguish it from its English antecedents.

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<sup>1</sup> Rosemary Hunter, 'Australian Legal Histories in Context' (2003) 21 *Law and History Review* 607, 607.

<sup>2</sup> Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History' (2004) 7(2) *Flinders Journal of Law Reform* 177, 177.

## 2. An Historical Overview

Given the topic of this thesis is the history of Australian legal education, it is necessary to recount briefly those events that served as a backdrop to the progression of teaching law since the early lawyers from the United Kingdom commenced practising law in New South Wales (NSW). It was natural that these legal practitioners would reflect their native background in their approach to the conduct of litigation and their adoption of customs and etiquette that accompanied their role in the early Australian legal process.

However, these overtly anglicised legal influences were gradually superseded as the legal system became populated by practitioners who had graduated from the early law schools located in the capital cities of the Australian colonies. Nevertheless, this was a slow process in the formative years of legal education in the second half of the 19<sup>th</sup> century. Initially there was an insistence on law students having an education in the classics, mathematics and science, before being able to undertake legal studies.<sup>3</sup> In the same way, until the end of the 19<sup>th</sup> century, universities were reluctant to appoint any law professors who had not obtained their legal qualifications from one of the traditional United Kingdom universities, such as the University of Oxford or the University of Cambridge.<sup>4</sup>

During the first 60 years of the 20<sup>th</sup> century—described in Chapter 4 as the ‘Cinderella Period’ and in Chapter 5 as the ‘Waiting Years’—until the establishment in 1960 of the Australian National University (ANU) Law School, there evolved a form of legal education which typically embraced the study for a university law degree (although some students could undertake their studies in conjunction with a diploma course as an articled clerk) together with the undertaking of articles with a solicitor if the graduate intended to follow that profession. For intending barristers, irrespective of whether they had law degrees or had been previously admitted as solicitors (or both), the practical element for their admission depended very much on the conditions laid down by their particular state or territory bar association and admission boards. Nevertheless, there

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<sup>3</sup> John Bennett, ‘Out of Nothing ... Professor Pitt Cobbett 1890-1909’ in John Mackinolty and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 34.

<sup>4</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 57.

was an expectation that the majority of law students who graduated from university would become practising lawyers.

It was probably the advent of the ‘second-wave’ and ‘third-wave’ law schools—commencing with the establishing of Monash University (Monash) Law School in 1964 and the University of New South Wales (UNSW) Law School in 1971—that raised questions about whether all graduating law students would join the legal profession. There were several reasons for this issue. First, the introduction of the joint or combined degree, which combined the study of law with another major discipline, meant that a graduate had a choice of at least two fields as a career. Thus, a graduate might not choose a career in the law but might opt instead to become an accountant, a computer programmer or a company secretary.

Secondly, for the first time a large proportion of law graduates were not choosing to enter the legal profession but instead selecting a career in a law-related area. This change was documented at the time in reports by the Centre for Legal Education<sup>5</sup> and the Australian Law Reform Commission.<sup>6</sup> These reports indicated that students were making this choice either because they genuinely wished to follow a different career to that of a practising lawyer or they believed that the legal profession had become overcrowded.

The explosion in the number of law schools, and consequently law graduates, was compounded by the introduction in 2000 of the Juris Doctor (JD) Degree at the University of Melbourne (Melbourne) Law School. This made available a full-fee paying postgraduate law degree for students who had already studied for an earlier non-law degree, a model subsequently followed by a number of other law schools. This led to a concern being expressed that there were indeed ‘too many law students’ and ‘too many lawyers’<sup>7</sup> in Australia in the modern era, and that a law degree had become the equivalent of a Bachelor of Arts (BA) or generalist degree. However, this appears to be a misapprehension: research suggests that such law graduates in fact used their law

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<sup>5</sup> Sumitra Vignaendra, *Australian Law Graduates' Career Destinations* (Centre for Legal Education, 1998).

<sup>6</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89' (2000) 118 [2.17].

<sup>7</sup> Ibid.

qualification to follow a career in a law-related area.<sup>8</sup> According to one study, some 80 per cent of students who were not practising law were members of this alternative career group.<sup>9</sup> Moreover, statistics reveal that there are very few unemployed law graduates as compared to architects, scientists, accountants or teachers.<sup>10</sup>

### 3. Reflections on Key Themes in Legal Education

Chapter 1 identified nine key themes that are relevant to the historical development of legal education in Australia. In this concluding chapter it is pertinent to reflect on these themes and their significance for the development of Australian legal education over the *longue durée*.

The first theme related to the overarching question of the **purpose of legal education**. While this thesis illustrates how participants in legal education have endeavoured to improve the quality of the law school experience, the history of the discipline illustrates the complex relationships that exists between law schools, the tertiary education sector and the legal profession.

Incorporated in this theme is the resolution of an hypothesis relating to whether the purpose of legal education is the provision of a liberal education or the training of law students to become effective legal practitioners. This conflict was clearly articulated by the Australian Law Deans in their submission to the Pearce Committee when they acknowledged that: ‘uneasiness has stemmed from attempts by the profession (through the various state admission authorities) to set the agenda for law school curricula and other academic issues.’<sup>11</sup> They accepted that ‘the majority of law students wished to be admitted as qualified legal practitioners,’<sup>12</sup> and that law schools needed to provide an academic curriculum for intending practitioners, but they were concerned that this action had ‘historically put at risk the achievement of their other primary function—the

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<sup>8</sup> Ibid.

<sup>9</sup> Maria Karras and Christopher Roper, *The Career Destinations of Australian Law Graduates: First Report of a Five Year Study* (Centre for Legal Education (NSW), University of Newcastle, 2000) 94.

<sup>10</sup> Tim Dodd, ‘Unemployment Rises Among Postgraduates’, *Australian Financial Review* (Sydney), 17 September 2014, 13.

<sup>11</sup> Dennis Pearce, Enid Campbell and Don Harding, ‘*Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (The Pearce Report)’ (Australian Government Publishing Service, 1987) vol 3, App 3, 22 [71].

<sup>12</sup> Ibid.

provision of a legal education in the academic tradition.’<sup>13</sup> Given that today only approximately 50 per cent of law students enter legal practice, the Pearce Report foresaw the need for law schools to broaden their curriculum by suggesting that ‘all law schools examine the adequacy of their attention to theoretical and critical perspectives, including the study of law in operation and the study of the relations between law and other social forces.’<sup>14</sup>

The tensions that have arisen have been well documented by Margaret Thornton, who is sceptical of the effect that market forces have increasingly brought to bear on the university sector. This has been described by one commentator as ‘a vibrant community of scholars and teachers ... inspiring a committed cohort of engaged and intelligent students with compellingly relevant curriculum and innovative pedagogy’, transforming into ‘a world-weary rag-bag of underpaid journeymen and women ... teaching large numbers of disengaged students with the mindset and demand of the consumer.’<sup>15</sup> However, despite the concerns expressed about the adverse impact of the changing nature of legal education, this thesis demonstrates the various ways in which

many law schools [have been able to] strive to equip their students not merely with the technical legal skills that underpin the lawyer’s craft, but also with a strong sense of professional responsibility that emphasises ethical behaviour, altruism and a desire to make the legal system, and through that the world, a better place.<sup>16</sup>

This thesis also traces the attempt by those involved with legal education, principally law academics, to conceptualise and develop innovative methods of learning the law, which is relevant to the subject of the second theme, **expanding teaching methods**. One of the great English teachers of the law, Glanville Williams, described this as a ‘complex and challenging’ process asserting that: ‘its study promotes accuracy of expression, facility in argument and skill in interpreting the written word.’<sup>17</sup> The thesis illustrates an achievement on the part of Australian law teachers striving continually to improve the quality of teaching methods in law programs.

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid lxxv [Suggestion 1].

<sup>15</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) x–xi.

<sup>16</sup> Ibid.

<sup>17</sup> Glanville Williams, *Learning the Law* (Thomson Reuters, 14<sup>th</sup> ed, 2010) 2.

A turning point was reached in 1988 when the Australasian Law Teachers Association (ALTA) launched its first law teaching workshop, which heralded a continuing encouragement to improve the quality of student learning in the law.<sup>18</sup> Its influence is described by Marlene Le Brun and Richard Johnstone in the following terms:

Since its inception, more than 140 law teachers and law librarians have participated in the Workshop. The activities of the Workshop have spawned greater interest in legal education, particularly in Australia, as evidenced by the growth and development of teaching interest groups in various institutions and the number of grants awarded to Workshop participants for projects which focus on teaching excellence in law.<sup>19</sup>

Further impetus was given to these improvements in student learning by the establishment in 1992 of the NSW Centre for Legal Education which had as its overall aim 'promoting the advancement and improvement of legal education'.<sup>20</sup> This also led in the same year to the publication by the Centre on a quarterly basis of the *Legal Education Digest* which was wholly devoted to this objective.<sup>21</sup>

An observer of the annual ALTA conferences would draw the same conclusion from reading the contents of the annual conference programs. Each year there are approximately 100 presentations by conscientious ALTA members devoted to achieving this very laudable purpose.<sup>22</sup> These efforts have often involved a conflict between deeply held beliefs as to how this might be achieved. This is illustrated by the dispute that arose at Macquarie Law School regarding the introduction of teaching methods influenced by the Critical Legal Studies movement, referred to in Chapter 6 of this thesis and documented both by the Pearce Report<sup>23</sup> and by Margaret Thornton.<sup>24</sup>

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<sup>18</sup> Ben Boer, 'The Australasian Law Teaching Clinic: Its Past, Present and Future' (1989) 1 *Legal Education Review* 145.

<sup>19</sup> Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Co, 1994) xxiv.

<sup>20</sup> Christopher Roper, *The Centre for Legal Education: The First Seven Years* (Centre for Legal Education, 1999) 4.

<sup>21</sup> Ibid 23.

<sup>22</sup> Australasian Law Teachers Association Conference 2014 'Thriving in Turbulent Times: Re-Imagining the Roles of Law Schools and Lawyers' (Gold Coast, Conference Program, 10-12 July 2012).

<sup>23</sup> Pearce, Campbell and Harding, above n 11, 950 [22.71].

<sup>24</sup> Thornton, above n 15, 62.



Improvements in the quality of teaching were generally introduced across the university sector during the last decade of the 20<sup>th</sup> century. At that time there was a greater concentration on the evaluation of teaching (involving both university administrators and students), the need for academics to undergo teacher training, and the introduction of performance indicators for most academic staff.<sup>25</sup> Many of these reforms had already been introduced into Australian law schools and the conclusion might be drawn that legal education has been an academic discipline at the forefront of improving the teaching and learning environment of universities.

Very much linked with teaching and learning is the program content for both undergraduate and postgraduate law courses. The content of the **law curriculum**, which is the third theme, has been particularly relevant to the Bachelor of Laws (LLB) and JD degrees which need to take account of the requirements of the professional legal organisations to ensure that courses undertaken by law students satisfy the academic requirements for admission as legal practitioners. The problems inherent in curriculum development were covered in Chapter 8 with particular reference to the Pearce Report,<sup>26</sup> ALRC Report No 89<sup>27</sup> and the Report published in 2003 entitled 'Learning Outcomes and Curriculum Development in Law'.<sup>28</sup>

Nevertheless it is relevant to revisit the question as to what subjects, if any, should be accepted as the basis for any Australian law degree? Chesterman and Weisbrot emphasise the fact that until the 1960s there was no consensus about a national law curriculum. In their view, this was due to the separation caused by the distance between most state capitals, where the only law schools were located at that time. In addition, the distribution of legislative power under Australia's federal constitution led to significance differences between courses taught within each jurisdiction, giving rise to the feeling that the primary, if not the sole, task of the law school in each state was to

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<sup>25</sup> Don Smart, 'Higher Education Policy in Australia: Corporate or Coercive Federalism?' (1991) 6(1) *Journal of Education Policy* 97, 97.

<sup>26</sup> Pearce, Campbell and Harding, above n 11.

<sup>27</sup> Australian Law Reform Commission, above n 6, 944–5 [22.56].

<sup>28</sup> Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Development in Law' (A report commissioned by the Australian Universities Teaching Committee, Department of Education, Science and Training, 2003) <<http://www.cald.asn.au/docs>>.

present courses tailor-made to the perceived needs of persons intending to practise law in that state.<sup>29</sup>

The recommendation for a number of mandatory subjects to be incorporated into the law degree as part of the academic stage for admission as a legal practitioner was first mooted in England by the Ormrod Committee on Legal Education in 1971. The Committee originally stipulated the following subjects should form part of any qualifying degree: English Legal System, Public Law (Constitutional Law), Contract (Law of Obligations), Torts, Land Law and Criminal Law. Subsequently Equity and Trusts, Law and Politics of the European Union and Theory of Dispute Resolution have been added; all these subjects are now termed the 'Foundations of Legal Knowledge'.<sup>30</sup>

There was a far more convoluted process in Australia before there was an acceptable group of compulsory subjects for the academic stage of legal study. As noted in Chapter 10, whilst there were a number of earlier reports, such as the Martin, Bowen and Pearce Reports, none of these identified a group of compulsory core subjects to be incorporated into all law degree programs. The first time an attempt was made to achieve this was in 1976 when a National Conference on Legal Education established the Australian Legal Education Council (ALEC) chaired by Justice Gordon Samuels to identify a common 'core' of compulsory subjects for undergraduate law degrees.<sup>31</sup> Concurrently, the Victorian Council of Legal Education established an Academic Course Appraisal Committee under the chairmanship of Justice McGarvie to accredit subjects in a law course that provided students with a basic understanding and competence in academic subjects that had been approved by the Victorian Council of Legal Education.<sup>32</sup> The Council conducted a further enquiry which culminated in a report on *Legal Knowledge Required for Admission to Practise* which reported in 1982 (the McGarvie Report).

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<sup>29</sup> Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 712.

<sup>30</sup> London Law Society and the Council of Legal Education, *Joint Statement on Qualifying Law Degrees* <<http://www.sra.org.uk/documents/students/academic-stage/academicjointstate.pdf>>.

<sup>31</sup> Law Admissions Consultative Committee, *Rethinking Academic Requirements for Admissions* <<http://www1.lawcouncil.asn.au/LACC/images/pdfs/RethinkingAcademicRequirementsforAdmission.pdf>>.

<sup>32</sup> Ibid.

Further reviews and subsequent recommendations were made by both ALEC and the McGarvie Committee, which formed the basis for a Law Admissions Consultative Committee (LACC) chaired in 1992 by Justice Priestley. It recommended 11 broad areas of knowledge which applicants for admission would need to have studied. This group of subjects, which became known as the 'Priestley Eleven', comprise the following subjects: 'Criminal Law and Procedure, Torts, Contract, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence and Professional Conduct (including basic Trust Accounting).'<sup>33</sup> These were subsequently adopted by all state and territory admitting authorities as the basic academic component of the legal education required for admission. Whilst the 'Priestley Eleven' have been subjected to occasional reviews, their composition has effectively remained unchanged to the present day.

At the instigation of the Council of Chief Justices, LACC conducted a limited review seeking views from the legal community as to whether some subjects (namely Civil Procedure, Company Law, Evidence, and Ethics and Professional Responsibility) should be omitted from the Priestley Eleven, and whether Statutory Interpretation should be added as an additional subject.<sup>34</sup> The proposed changes were rejected by the Council of Australian Law Deans (CALD); and instead it recommended that guidelines be adopted on the topic of 'Statutory Interpretation', which might be incorporated into other subjects where relevant.<sup>35</sup> LACC subsequently affirmed in August 2015 that there would be no changes to the subjects comprising the Priestley Eleven.<sup>36</sup> In addition, as referred to in Chapter 9, a student is expected to have satisfied the six learning and teaching aspects designated as Threshold and Learning Outcomes (TLOs), one of which is ethics and professional responsibility.

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<sup>33</sup> Law Admissions Consultative Committee, 'Towards a National Legal Profession: Revised Uniform Admission Rules' (February 2002) 27–32.

<sup>34</sup> Law Admissions Consultative Committee, *Review of Academic Requirements for Admission to the Legal Profession* <<http://www1.lawcouncil.asn.au/LACC/index.php/review-of-academic-requirements>>.

<sup>35</sup> Jeffrey Barnes et al, *The Council of Australian Law Deans Good Practice Guide to Teaching Statutory Interpretation* (CALD, 2015).

<sup>36</sup> Law Admissions Consultative Committee, *Documents About Present Admission Policies: Model Admission Rules 2015* <<http://www1.lawcouncil.asn.au/LACC/index.php/ct-menu-item-3/documents-about-present-admission-policies>>.

The nexus between **teaching and research**, the topic of the fourth theme, is a relative latecomer to the process of legal education. The first time that it received any official mention was at the inaugural meeting of the Australasian Universities Law Schools Association (AULSA) at Sydney in 1946 when AULSA's constitution stated that one of the objects was 'the encouragement and organization of legal research and the publication of contributions to legal knowledge.'<sup>37</sup>

However, whilst AULSA can be complimented for making this aspirational statement, for several reasons, particularly a lack of resources, there was no initiative on the part of any law school to develop a deep culture of legal research. Scholarly writing was left very much to the discretion of individual academics, whose time was largely devoted to the teaching enterprise. Even though the establishment of the ANU Law School in 1960 had been welcomed by AULSA as exemplifying ANU's commitment to research, the ANU Law School was unable in its early years to translate this object into the creation of a research culture. Consequently, even in 1964, the Martin Report was critical of the lack of research in Australian law schools, stating that 'the record of Australia in legal research is poor.'<sup>38</sup> As Martin and Marginson later observed, it was not until the 'Pearce Report was released in 1987 [that] the Martin Report's objective had been achieved and research had become an established part of the schools.'<sup>39</sup>

Subsequent successful development of legal research in most law schools is documented in Chapters 5, 6 and 7, whilst the problems that have emerged with respect to assessment and government support of research is given in the account of CALD in Chapter 8. The current standing of legal research as a major component of legal education can be illustrated by Jeremy Webber, a former Dean of the University of Sydney Law School who, in his conceptualisation of legal research, described one of the essential tasks of law schools as being: 'the systematic investigation of law's effects, consideration of law's function in society, and reflection on law's nature and

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<sup>37</sup> George Paton, 'Australian Universities Law Schools Association' (1946) 20 *Australian Law Journal* 99, 99.

<sup>38</sup> Committee on the Future of Tertiary Education in Australia, 'Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission (The Martin Report)' (Government Printer, 1964) 65–6.

<sup>39</sup> Craig McInnis and Simon Marginson, *Australian Law Schools after the Pearce Report* (Australian Government Publishing Service, 1994) 179.

foundational principle.<sup>40</sup> This transformation of legal research and its role in the modernisation of legal education is also characterised in the statement by Terry Hutchinson that:

Legal research is now taking place in an expanding paradigm built on interdisciplinary perspectives, broader research objectives, enhanced writing requirements and an extensive choice of methodologies.<sup>41</sup>

The fifth theme, **legal education personnel**, describes one of the major transitions that has taken place in legal education. The early account of legal education in Australia revealed a typical law school headed by a full-time professor who also doubled as the dean of the faculty, with the remainder of the staff consisting of legal practitioners undertaking the role of part-time lecturers. This is confirmed by John Goldring who commented:

Until 1970, the majority of law teachers were part-time. They did not require offices, telephones, secretaries, or research libraries. They gave lectures to large groups of students; and in the rare cases that there were tutorials, these were offered by part-time staff.<sup>42</sup>

Chapters 6 and 7 indicate how quickly change took place, with the advent of the influence of the 'second-wave' and 'third-wave' law schools. Michael Coper comments on the effect that this had on the ethos of law schools:

The rapid creation of this critical mass, coupled in recent times with strong financial incentives for engaging in serious research, has seen a proliferation of new law journals and a vast increase in the volume of scholarly writing.<sup>43</sup>

However, while this change from part-time to full-time law academics has been welcomed, there is concern that it has led to a separation of the links between the law schools and the legal profession. This view was expressed in 2002 by the Chief Justice

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<sup>40</sup> Jeremy Webber, 'Legal Research, the Law Schools and the Profession' (2004) 26 *Sydney University Law Review* 565, 580.

<sup>41</sup> Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065, 1087.

<sup>42</sup> John Goldring, 'The Future of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 15, 21.

<sup>43</sup> Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 388, 391.

of the High Court, Murray Gleeson who referred to a ‘gulf that exists between the view of the legal institutions and of the Court from within the universities, and the view from within the practising legal profession.’<sup>44</sup> Jeremy Webber acknowledged that:

Although the strongest concerns are by no means universally shared, they include a sense that the law schools have turned away from the profession, no longer providing the assistance they once did; that academics and practitioners have divergent understandings of law; that they are drifting towards profoundly different, perhaps even mutually unrecognisable, standards of interpretation and evaluation.<sup>45</sup>

There is a close connection between academic personnel and the sixth theme of **teaching resources**. The initial problem with regard to the provision of teaching resources has been the chronic underfunding of law schools and, in particular, law programs, which were a focus of Chapter 1. During the 21<sup>st</sup> century there has been a change in the willingness of CALD to engage in a dialogue with the Australian Government highlighting the unreasonable underfunding of law schools and urging a review of the current legislation, the *Higher Education Support Act 2003* (Cth). This can be illustrated by a CALD submission in 2007 to the Australian Government.<sup>46</sup> This submission emphasised the unfairness of the 2003 legislation which, under the Higher Education Contribution Scheme (HECS), levied the highest student contribution (maximum \$8333) from individual law students while it contributed only \$1528 towards the funding of their place in an undergraduate law degree.<sup>47</sup>

One short-term solution has been the subsidisation of Commonwealth-funded LLB programs, at first, from full-fee paying LLB students and subsequently (following the abolition of those programs) from full-fee paying postgraduate programs, particularly the JD programs. Many postgraduate students would have been supported by funds from the Department of Education, Science and Training under the Higher Education Loans Program. This illustrates the problems that law schools face in finding resources and it could be argued that there has been little improvement in this respect since these

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<sup>44</sup> Murray Gleeson, 'The Launch of the Oxford Companion to the High Court of Australia' (2002) *Winter Bar News* 56, 57.

<sup>45</sup> Webber, above n 40, 565, 566.

<sup>46</sup> Council of Australian Law Deans, 'Review of the Impact of the Higher Education Support Act 2003: Funding Cluster Mechanism' (February 2007).

<sup>47</sup> *Ibid* 2.

difficulties were first publicised in 1994 in a joint publication of the Centre for Legal Education and CALD.<sup>48</sup>

This lack of resources led law schools to explore new ways of meeting the shortfall. Originally, the most obvious way to attract extra funding was for law schools to provide Continuing Legal Education (CLE) /Continuing Legal Development courses. One of the early examples took place at Monash Law School: ‘during the mid-1970s, Bob Baxt instigated the faculty’s first moves into continuing legal education, with programs aimed at both lawyers and non-lawyers.’<sup>49</sup> Such courses not only satisfied the need for additional funding but also extended the influence of the law school:

As dean, Baxt looked for a great expansion of the continuing education program, to boost income and build links with the legal profession and other professional groups such as accountants, engineers and managers.<sup>50</sup>

UNSW Law School also developed a large CLE program, claiming the promotion of over 100 courses a year. These comprise an extremely varied offering of topics varying from ‘Sports Law’, ‘Key Skills for Competent Statutory Interpretation’ to ‘Wireless Devices: Risk, Regulation, Compliance and Liability’.<sup>51</sup>

Full-fee paying programs for international students have also been a source of additional revenue. The University of Technology Sydney (UTS) Law School adopted this approach with enthusiasm in the 1990s. It originally promoted:

a major intellectual property initiative supported by AusAid. Since 1996 the Indonesian-Australian Specialised Training Project [IASTP] has regularly brought groups of Indonesian professionals from the courts, judiciary, legal profession, universities, police

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<sup>48</sup> Centre for Legal Education and Committee of Australian Law Deans, ‘The Cost of Legal Education in Australia’ (Centre for Legal Education, 1994).

<sup>49</sup> Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash University Law School* (Monash University Publishing, 2014) 202.

<sup>50</sup> Ibid.

<sup>51</sup> University of New South Wales, *Continuing Legal Education Law* <<http://www.cle.unsw.edu.au/course-seminars/upcoming>>.

and custom services to Sydney for three months intensive courses on patents and trademarks as well as intellectual property law.<sup>52</sup>

In 2000 UTS Law School extended these activities by instituting Mandarin versions of the Master of Laws and Master of Legal Studies, which became a joint program between it and the Beijing Management College and Shanghai Justice Bureau in China.<sup>53</sup>

**Practical legal training** (PLT), the seventh theme, is an important element of legal education, being the middle of three educational stages required for admission to legal practice in Australia. The other two stages consist of a law degree and CLE, which is discussed below.

The development of PLT was comprehensively examined in Chapter 9, with emphasis on the manner in which it has replaced the requirement for a qualifying student to undertake articles of clerkship in most jurisdictions. However, there are still some outstanding problems with regard to students undertaking PLT programs, which were not anticipated when they were first introduced in the 1970s. These focus principally on the outcomes of the practical experience component of the PLT program as conducted in NSW, which has been used in this thesis as a case study.

In 1994 the Law Society of NSW adopted the 'Blueprint for the Preparation for Practice as a Solicitor'.<sup>54</sup> This anticipated that students would be able to undertake the practical experience component of the PLT program with a sole practitioner or firm of solicitors, while receiving payment at a minimum rate as provided by the appropriate industrial relations legislation.<sup>55</sup> It was not anticipated at that time that there might be changes in the financial circumstances of many sole legal practitioners and small legal practices, or that there would be an increased number of law students seeking admission as legal practitioners.

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<sup>52</sup> Madeleine Murray and George Marsh (eds), *Verdict, UTS Law: 1977–2002, The Past Twenty-Five Years* (UTS Law School, 2002) 9.

<sup>53</sup> *Ibid.*

<sup>54</sup> Law Society of New South Wales, 'The Professional Program: A Proposal for Practical Legal Training' (Law Society of New South Wales, May 1994) 7.

<sup>55</sup> Law Society of New South Wales, 'Award Arrangements, The Professional Program, Handbook for Employers, Other Principals and Students Participating in Stage 11, 1994-95' (Law Society of New South Wales, 1994) 11.



However, these changes resulted in many students experiencing difficulty in finding a placement with a qualified solicitor. Some of those who were successful then discovered that they would only be able to undertake a placement on the understanding that it was vocational and unpaid in accordance with the *Fair Work Act 2009* (Cth).<sup>56</sup> However, with the support of some NSW regional law societies in organising placements and the provision of an alternative clinical experience module by the College of Law<sup>57</sup> most, if not all, students have overcome these difficulties.

The placements have also proved to be an invaluable learning experience in preparing qualified new young practitioners for obtaining full-time employment on admission as legal practitioners. There are indications that graduate lawyers are looking beyond employment as practising solicitors in the private profession and seeking employment in corporate and government practice or similar law-related employment.<sup>58</sup>

The eighth theme of **CLE** concerns the final stage of qualification and continuing membership of the practising legal profession. It is a post-admission requirement for all Australian legal practitioners seeking approval for the granting or renewal of their practising certificate that they undertake a stipulated number of hours of legal training and education involving Continuing Professional Development.

It is important to emphasise that this part of legal education is in the process of ongoing development. While it is accepted that the mandatory time allocated for CLE is 10 hours per annum for barristers and solicitors in all Australian jurisdictions, the type and number of compulsory subjects varies from jurisdiction to jurisdiction. Currently, despite the Uniform Legal Profession Law as enacted by Victoria and adopted by NSW in early 2014, differing CLE provisions have been retained by the Law Institute of Victoria, the Law Society of NSW, Victorian Bar Association and the NSW Bar Association. It has yet to be seen whether the uniform regulatory system now governing the legal profession in Victoria and NSW will lead to a common CLE program in the future.

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<sup>56</sup> Fair Work Ombudsman, *Vocational Placements* <[https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/unpaid-work#vocational\\_placements](https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/unpaid-work/unpaid-work#vocational_placements)>.

<sup>57</sup> College of Law, *Work Experience* <<http://www.collaw.edu.au/what-we-offer/law-students-and-graduates/work-experience/>>.

<sup>58</sup> Law Society of New South Wales, 'Future Prospects of Law Graduates (Report and Recommendations)' (2015) 5.

The final theme, **institutionalisation**, was addressed in Chapter 8 and concerns the effect that various external organisations have had on legal education. While these organisations have been influential in improving teaching and learning, this has not resulted in the granting of any concessions from the Australian Government by way of increased resources to support tertiary legal education. However, it should be emphasised that, as referred to under the sixth theme above, there is now evidence that the present activities of CALD indicate a greater willingness to engage the Australian Government in attempts to improve the resources available for law schools.

There are also indications that the Australian Academy of Law, with its ever-increasing appointment of new fellows resulting in a current membership of over 250 fellows, is now taking a greater interest in legal education. Improved coordination between the membership of all these legal associations could only serve to benefit the legal education community by ensuring greater cooperation between ‘academia, the practising profession (including private and public sector lawyers), and the judiciary’<sup>59</sup> for the promotion of ‘the highest standards of legal scholarship, legal research [and] legal education.’<sup>60</sup>

#### 4. Legal Education Today: The Everlasting Saga

It is appropriate in concluding this thesis to revisit the statement by the late United States scholar, John Merryman, which has provided both a challenge and an impetus for this thesis. By reiterating his statement that ‘The examination of legal education in a society provides a window on its legal system,’<sup>61</sup> it is possible to place in context the purpose of the thesis as stated in Chapter 1 which was ‘to examine Australian legal education by tracing its evolution and assessing its effect and influence on the development of the legal profession generally from the time of European settlement in 1788 until the present day.’

The history of legal education does not easily resolve the paradox created by the dichotomy between the teaching of law as an intellectual pursuit as compared to training

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<sup>59</sup> Australian Academy of Law, Constitution, cl 4.1(a).

<sup>60</sup> Ibid cl 4.1(c).

<sup>61</sup> John Merryman, ‘Legal Education There and Here: A Comparison’ (1975) 27 *Stanford Law Review* 859, 859.

for professional practice. When the early law schools at Sydney and Melbourne were established, potential law students were required to undertake an initial degree incorporating the study of classics, mathematics and science before going on to study law.<sup>62</sup> It was also mandatory to acquire a knowledge of Latin.<sup>63</sup> This confirmed an early intention of university administrators and admission boards to prioritising potential lawyers receiving a grounding in a wide number of subject disciplines before commencing the study of law. However, when the University of Adelaide Law School was established in 1883 law students were only required to undertake law subjects because limited University resources prevented the teaching of arts subjects within the law program.<sup>64</sup> This decision was reversed in 1890 when there was a perceived impression that the Adelaide law degree would not be accepted in Victoria because of its shorter length and the absence of non-law subjects.<sup>65</sup> Consequently, the Adelaide law degree was extended from three to four years with mandatory Latin and English being added to the curriculum.<sup>66</sup> Nevertheless, the original decision by the Adelaide Law School to prioritise law subjects over arts subjects was a portent of the changes that were to come in respect of the law curriculum in other Australian law schools.

In 1890 Pitt Cobbett, Dean of the University of Sydney Law School, removed the BA degree as a condition precedent to the LLB,<sup>67</sup> whilst effectively in 1895 the University of Melbourne Law School achieved the same objective when it uncoupled the LLB degree from the BA degree.<sup>68</sup> At both these traditional law schools this meant that the LLB became an undergraduate degree, setting a precedent for future law degree programs until the introduction of the JD degree at the University of Melbourne Law School a century later in 2000.<sup>69</sup> However, prior to this time a limited number of law schools had made postgraduate LLB programs available to graduates qualified in other disciplines.<sup>70</sup>

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<sup>62</sup> Bennett, above n 3.

<sup>63</sup> Waugh, above n 4, 171.

<sup>64</sup> Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School 1883–1983* (Faculty of Law, University of Adelaide, 1983) 11.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Bennett, above n 3, 37.

<sup>68</sup> Waugh, above n 4, 89.

<sup>69</sup> Ibid 265.

<sup>70</sup> Pearce, Campbell and Harding, above n 11, 74, [2.27].

The liberalisation of law programs was reconsidered by the Pearce Committee in 1987. It commented that the inclusion of non-law subjects in LLB programs was, in its view, 'of questionable value.'<sup>71</sup> It argued that 'production of a multi-lingual and educated lawyer ... was best achieved by making it possible for students to combine their law studies with work in another discipline.'<sup>72</sup> This statement was made under the heading 'Justification for combined courses.'<sup>73</sup> Since the publication of the Pearce Report, there has been a proliferation of combined LLB programs taught in most, if not all, university law schools.

It is against these concepts of Australian legal education that the proponents for the teaching of law as an intellectual liberal philosophy have to substantiate their argument. Although they have been canvassed throughout the thesis, it is relevant to re-quote the concerns exemplified by the statements of Margaret Thornton who, as a socio-legal scholar is 'committed to a critical approach to legal scholarship.'<sup>74</sup> She considered that the advent of 'social liberalism provided a brief space during which orthodoxy could be challenged and the presuppositions of law interrogated.'<sup>75</sup> She also considered that: 'Scepticism was not only an essential prerequisite to social justice, but it also marked the coming of age of law as an intellectually robust university discipline.

A similar compelling argument is made by Mary Keyes and Richard Johnstone who are of the view that there are challenges to the traditional model of legal education which would assist law schools in 'seeking to provide a learning environment in which students can actively engage in learning about law, in a framework that does not simply prepare students for private legal education.'<sup>76</sup> They argue that a major challenge is for:

Australian law schools to rethink their relationship with the legal profession, to ensure that law schools assert their autonomy in matters of curriculum, teaching and learning and

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<sup>71</sup> Ibid 112 [2.29].

<sup>72</sup> Ibid 71 [2.20].

<sup>73</sup> Ibid 70 [2.20].

<sup>74</sup> Thornton, above n 15, xiv.

<sup>75</sup> Ibid.

<sup>76</sup> Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney University Law Review* 537, 537.

research, so that legal education aims for more than preparing students for work in private legal practice.<sup>77</sup>

Michael Coper has sought to reconcile these opposing views when he states:

The emergence of the ideal of legal education as the study of law as an intellectual discipline in its own right has led to continuing tensions with the idea of legal education as training for professional practice.<sup>78</sup>

Yet he believes that ‘the two conceptions are profoundly consistent,’<sup>79</sup> because:

the best and most effective lawyers, in any form of practice, are those with a deep understanding of the law and the legal system; a deep understanding not just of the rules but of their context, their dynamics, their role in society, and their limits; an understanding, in particular, of where the law has come from, as well as an intuition about where it might go.<sup>80</sup>

As a corollary of this view it is important to add a postscript to this final chapter. This thesis reveals that legal education has shown a remarkable resilience in both retaining and enhancing its status as a major university discipline. It has managed to achieve this while maintaining the role of law schools as the only recognised providers (other than the NSW Law Extension Course) of the academic stage of the three phases of training for the legal profession. This research also discloses the notable achievement of law schools in being able to retain their relationship with the legal profession while also complying with increasing demands placed upon them and their staff in terms of performance appraisal relating to teaching/learning and research. The thesis also demonstrates that this has been achieved in an era in which universities have been subject to increasing bureaucratic control over resources, curriculum and funding.<sup>81</sup>

Law teaching has been described as ‘a great and noble occupation’<sup>82</sup> and throughout this research there is no evidence of legal academics relaxing in their efforts to maintain

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<sup>77</sup> Ibid, 537–8.

<sup>78</sup> Coper, above n 43, 392.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Thornton, above n 15, 113.

<sup>82</sup> Fiona Cownie and Ray Cocks, *A Great and Noble Occupation: The History of the Society of Legal Scholars* (Hart Publishing, 2009).

this perception. It is also symbolic that whilst there are often complaints of too many law students this does not seem to have deterred an increasing number of well-qualified students from undertaking tertiary legal studies. This is further evidence that legal education cannot only provide training to become a legal practitioner but also supply a liberal education incorporating the development of intellectual knowledge and transferable skills.<sup>83</sup>

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<sup>83</sup> Law Society of New South Wales, above n 58, 25.

## **Appendix 1 Empirical Study: List of Participants**

**Adams, Michael** – Professor and Dean, School of Law, Western Sydney University, former President and Chair, Australasian Law Teachers Association, Deputy Chair, Council of Australian Law Deans, Fellow, Australian Academy of Law. (Sydney, 19 December 2013)

**Astill, Frank** – Director, Law Extension Committee, Diploma Course, University of Sydney. (Sydney, 27 August 2013)

**Bates, Frank** – Emeritus Professor and former Dean, School of Law, University of Newcastle. (Sydney, 27 November 2013)

**Carter, Neville** – CEO and Principal, College of Law, Sydney. (Sydney, 17 October 2013)

**Chilton, Fred** – Solicitor, Emil Ford & Co, Editor of the Bowen Report. (Hunter Valley, 19 July 2013)

**Fairall, Paul** -- Professor and Dean, School of Law, Curtin University, former Chair, Council of Australian Law Deans, Fellow, Australian Academy of Law. (Canberra, 30 September 2013)

**Lindgren, AM. Hon Kevin** – Former Justice of the Federal Court, former Professor of Law, University of Newcastle, President of the Academy of Law. (Sydney, 9 August 2013)

**Lindsay, Hon Justice Geoffrey** – NSW Supreme Court, Secretary, Francis Forbes Society, Fellow, Australian Academy of Law. (Sydney, 19 December 2013)

**Lofthouse, Elizabeth** – Executive Director, Leo Cussen Institute of Law, Melbourne. (Melbourne, 21 November 2013)

*Appendix 1: List of Participants*

**Mason, Rosalind** – Professor and Head of Law, Queensland University of Technology, former Chair, Australasian Law Teachers Association, Fellow, Australian Academy of Law. (Sydney, 23 August 2013)

**Mowbray, Andrew** – Professor, University of Technology Sydney, Co-Director, Australasian Legal Information Institute (AustLII). (Sydney, 16 September 2014)

**O’Sullivan, Corinne** – Former President, Australian Law Students Association. (Sydney, 18 June 2013)

**Pearce, AO. Dennis** – Emeritus Professor and former Dean, College of Law, Australian National University, Chair, Committee – Australian Law Schools – A Discipline Assessment for Commonwealth Tertiary Education Commission. (Canberra, 2 October 2013)

**Porter, QC. Chester** – Barrister and Legal Author. (Sydney, 30 January 2014)

**Roper, AM. Christopher** – Former Director, Centre for Legal Education, former Director of College of Law, Sydney, former Executive Director, Leo Cussen Institute, Melbourne. (Sydney, 26 August 2013)

**Sanson, Dr Michelle** – Former Editor in Chief, Legal Education Review, Law Academic. (Sydney, 12 February 2014)

**Slattery, Hon Justice Michael** – NSW Supreme Court, former Chair, Legal Profession Admission Board, former President, NSW Bar Association, Fellow, Australian Academy of Law. (Sydney, 10 December 2013)

**Waugh, Dr John** – Author, *History of Melbourne Law School 1857-2007*, Law Academic. (Melbourne, 13 February 2014)

**Weisbrot, AM. David** – Emeritus Professor and former Dean, Faculty of Law, University of Sydney, Former President, Australian Law Reform Commission, Former Chair, Council of Australian Law Deans, Chair, Australian Press Council, Fellow, Australian Academy of Law. (Sydney, 8 November 2013)



*Appendix 1: List of Participants*

**York, Sophie** – Barrister, Law Academic. (Sydney, 1 August 2013).

*Appendix 1: List of Participants*

## **Appendix 2**

### **Empirical Study:**

### **Interview Questions**

#### **ALL PARTICIPANTS**

- Q.1 Name and professional qualification, description of the law school which you attended and the period of time during when you were in attendance at law school?
- Q.2 With regard to the teaching at your law school – did it reach your expectations, were there any law academics who had a major influence on you and how did you rate the curriculum, standard of teaching and forms of assessment?
- Q.3 How suitable were the forms of extra-curricular activities at the law school? If they were available, did you participate in mooting, client-counselling, mediation or any other form of law student activity?
- Q.4 Did you consider that your law school made adequate provision for your preparation to enter the legal profession? Did you undertake articles, work experience and practical legal training and how relevant did you find these to the studies undertaken in your legal programme?
- Q.5 Are there any other comments that you would wish to make regarding your time at law school?

## **CURRENT AND FORMER DEANS AND HEADS OF LAW SCHOOLS**

**In addition to Questions 1–5, these participants were asked the following questions:**

- Q.6 What made you decide to undertake a leadership position within the law school? Had you had any previous experience or training in a leadership role or previous experience or training in administration? Did you continue to maintain a teaching research role when Dean/Head of the law school?
- Q.7 On taking up the position of Dean/Head of the law school did you contemplate any immediate changes in the organisation of the law school, and how did you prioritise its requirements with regard to staffing, students, teaching and research?
- Q.8 Did you receive the expected support from Senior Members of the University with regard to the school's funding requirements, curriculum changes and the requirements of external organizations such as the Federal or State Governments, State Admission Board or professional law associations?
- Q.9 What did you consider were the most pressing claims for improvements in the culture of the law school? Did these involve student or staff morale, accommodation, teaching requirements, library or computer support?
- Q.10 Looking back on your time as Dean/Head of the law school what do you consider were your main achievements in that role and would you do anything differently if you were given a further opportunity in that position?

## **MEMBERS OR FORMER MEMBERS OF THE JUDICIARY/MAGISTRATES**

**In addition to Questions 1–5, these participants were asked the following questions:**

- Q.11 Did any part of your legal training assist you with your career in professional practice and on the Bench and do you believe that the current forms of legal education are adequate for those embarking on a legal career?
- Q.12 In the light of your experience on the Bench do you consider there should be any further mandatory subject added in the law degree curriculum and should any be removed?
- Q.13 A current criticism of practising lawyers by the High Court is a lack of knowledge of statutory interpretation on the part of practising lawyers – do you agree and if so, what recommendations would you make to remedy the situation?
- Q.14 Have you served in any capacity on your state professional admission board or in an advisory capacity to any law school, law reform or law educational body? If you have, do you consider such roles as being of value and do you have any comments as to how the role of members may be improved?
- Q.15 Do you consider the current forms of continuing legal education to be adequate for those practising at the Bar or as solicitors? If not do you have any recommendations as to how they might be improved?

## **LEGAL PRACTITIONERS AND LAWYERS IN LAW RELATED EMPLOYMENT**

**In addition to Questions 1–5, these participants were asked the following questions:**

- Q.16 Do you consider your legal education adequately prepared you for your employment in your current position?

- Q.17 Did your legal studies incorporate a joint/combined degree – if so, what was the subject component of your second degree? What are your views on the appropriateness of studying for another degree at the same time as a law degree?
- Q.18 From your personal experience in your current position do you agree with the proposition that the initial law degree is now a generalist degree?
- Q.19 Do you still continue to maintain your research and professional interests in the law?
- Q.20 Do you consider that the arrangements by professional legal associations such as the Law Society and Bar Association for continuing legal education are appropriate for those lawyers such as yourself employed in legal practice?

## **GOVERNMENT OFFICIALS, LEGAL POLICY MAKERS**

**In addition to Questions 1–5, these participants were asked the following questions:**

- Q.21 When conducting an inquiry into legal education did you consider the legal education representatives were well-prepared and conducted an efficient preparation?
- Q.22 Do you consider that professional legal organisations understand the complexities of legal education?
- Q.23 Do you have a view as to whether it is reasonable for legal education programmes to cross-subsidise other subject programmes in tertiary education – should this occur?
- Q.24 Are you of the opinion that current legal education is relevant to the needs of the legal profession?
- Q.25 Do you agree with the recommendations of the Australian Law Reform Commission Report No 89 that: ‘The Commonwealth Department of Education, Training and Youth Affairs (DETYA) – [Now the Commonwealth Department of Tertiary Education, Skills, Science and Research] should give serious consideration to

*Appendix 2: Interview Questions*

commissioning another national discipline review of legal education in Australia, commencing as soon as practicable?’

- Q.26 Do you see the need for a formal system of national standards and accreditation of Australian legal education?
- Q.27 Do you consider that there are too many entrants in the current legal profession and, if so, how would you restrict such entry in the future?
- Q.28 Do you believe that the current system of legal education discriminates against racial minorities and those from low socio-economic backgrounds? If so, do you have a view as to how they might be assisted to enter the legal profession?
- Q.29 Are you of the view that the current arrangements with respect to Continuing Legal Education relating to legal ethics, profession responsibility and practice management are adequate for the maintenance of professional standards for the legal profession?
- Q.30 Do you see a need for greater co-operation between the judiciary, legal profession and legal educators to ensure a better standard for legal education or are the present arrangements adequate?





## **Appendix 3**

### **Macquarie University Ethics Approval**



Arts Research Office &lt; artsro@mq.edu.au &gt;

**Ethics Application Approved - 5201300091(R)**

1 message

Faculty of Arts Research Office &lt; artsro@mq.edu.au &gt;

Mon, Mar 11, 2013 at 2:43 PM

To: Professor Brian Opeskin &lt;brian.opeskin@mq.edu.au&gt;

Cc: Faculty of Arts Research Office &lt;artsro@mq.edu.au&gt;, Emeritus Professor David Leslie Allen Barker &lt;david.barker1@students.mq.edu.au&gt;

Dear Mr Opeskin

Re: 'History of Australian Legal Education'

The above application was reviewed by the Faculty of Arts Human Research Ethics Committee. Final Approval of the above application is granted, effective (date), and you may now commence your research on completion of the following.

Appendix 1, page 27, Q9 - remove the second 'the' in the first sentence.

The following personnel are authorised to conduct this research:

Emeritus Professor David Leslie Allen Barker  
Mr Brian Opeskin

Please note the following standard requirements of approval:

1. The approval of this project is conditional upon your continuing compliance with the National Statement on Ethical Conduct in Human Research (2007).
2. Approval will be for a period of five (5) years subject to the provision of annual reports.

Progress Report 1 Due: 11th March 2014  
Progress Report 2 Due: 11th March 2015  
Progress Report 3 Due: 11th March 2016  
Progress Report 4 Due: 11th March 2017  
Final Report Due: 11th March 2018

NB. If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report for the project.

Progress reports and Final Reports are available at the following website:  
[http://www.research.mq.edu.au/for/researchers/how\\_to\\_obtain\\_ethics\\_approval/human\\_research\\_ethics/forms](http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms)

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).
4. All amendments to the project must be reviewed and approved by the Committee before implementation. Please complete and submit a Request for Amendment Form available at the following website:

[http://www.research.mq.edu.au/for/researchers/how\\_to\\_obtain\\_ethics\\_approval/human\\_research\\_ethics/forms](http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/forms)

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that affect the continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at the following websites:

<http://www.mq.edu.au/policy/>

[http://www.research.mq.edu.au/for/researchers/how\\_to\\_obtain\\_ethics\\_approval/human\\_research\\_ethics/policy](http://www.research.mq.edu.au/for/researchers/how_to_obtain_ethics_approval/human_research_ethics/policy)

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide the Macquarie University's Research Grants Management Assistant with a copy of this email as soon as possible. Internal and External funding agencies will not be informed that you have final approval for your project and funds will not be released until the Research Grants Management Assistant has received a copy of this email.

If you need to provide a hard copy letter of Final Approval to an external organisation as evidence that you have Final Approval, please do not hesitate to contact the Faculty of Arts Research Office at [ArtsRO@mq.edu.au](mailto:ArtsRO@mq.edu.au)

Please retain a copy of this email as this is your official notification of final ethics approval.

Yours sincerely

Dr Mianna Lotz

Chair, Faculty of Arts Human Research Ethics Committee



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