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## **Overcoming ‘Intellectual Colonialism’: Aspects of the Teaching of Legal History in Australia from c.1890 to 2006**

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At the first Australian Law and History Conference held at La Trobe in May 1982 the organisers, Ian Duncanson and Christopher Tomlins, stated that its aim was

To bring together historians of law and legal institutions and lawyers interested in the history of their profession and discipline, and to explore similarities and differences in scholarship and perspectives at the point where law and history intersect.<sup>1</sup>

Duncanson and Tomlins had recently arrived in Australia, were aware of the latest developments in legal history that had occurred in England and America, and soon realised that an exciting field of research lay waiting to be exploited. They urged the development of a distinctively Australian legal history and not one that catalogued ‘common law events which happen to have occurred in a particular physical location called Australia’.<sup>2</sup> Australian legal historians needed to eschew, on the one hand, ‘antiquarian researches and the constant rewriting of the past to fit present professional objectives’, and, on the other hand, Anglocentric historiographies. The forty registrants at the first conference decided that ‘the time was ripe for lawyers and historians to show increasing interest in Australian history and the place of the law in Australian social and economic development’.<sup>3</sup>

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<sup>1</sup> I.W. Duncanson and C.L. Tomlins, ‘The First Australian Law and History Conference’, *Australian Historical Association Bulletin*, no. 32, 1982, p. 21.

<sup>2</sup> Duncanson and Tomlins, ‘First Australian Law’, pp. 18, 21.

<sup>3</sup> Duncanson and Tomlins, ‘First Australian Law’, p. 21; for an analysis of legal history written before 1980 see J. Finn, ‘A Formidable Subject: Some Thoughts on the Writing of Australasian Legal History’, *Australian Journal of Legal History*, vol. 7, no. 1, 2003, pp.53-71.

As we have now reached the 25<sup>th</sup> annual conference, it seems an opportune time to take a stock take of how far we have come since that call to arms in 1982. One way to assess the progress we have made is the extent to which Australian legal history is taught in law schools and this will be the focus of the paper. But first I will briefly summarise how Australian legal history has developed. Then I will provide an overview of legal history courses in Australia to 2006. I will end by looking at the state of Australian legal history teaching in 2006 and concentrate on elective units not first year units. The paper concludes that Australian Legal History is not taught as widely as might be expected and suggests ways of increasing the number of courses.

### **The Development of Australian Legal History**

The holding of regular conferences is a sign that a subject is in good academic health and at the 25 conferences so far held a wide range of papers, not just on Australian legal history, have been presented. The conferences have been crucial in providing a forum for new research, especially by postgraduates. New Zealanders have played a significant part in most conferences and have organised some, although direct comparisons between Australian and New Zealand legal history have been underexploited. Canadian, American, and English historians regularly attend the conferences, which indicates that Australian and New Zealand legal history is attracting world-wide interest. In the early years some conference papers were published in a series called *Law and History in Australia* and later in the *Australian Journal of Law and Society*.<sup>4</sup> The published papers showed ‘a new critical awareness of the potentialities of both disciplines for understanding the significance of law as an historically-specific construction’.<sup>5</sup>

An important spin-off from the annual conference was the formation of the Australian and New Zealand Law and History Society in April 1993. This had been broached at the first conference, but the energy and enthusiasm of Bruce Kercher brought the proposal to fruition. Historians and lawyers have been joined at various times by anthropologists, criminologists, and political scientists to make up a diverse membership. In addition to holding an annual conference, the aims of the society when formed were to publish bulletins of information about new publications, conferences etc; to establish a journal or

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<sup>4</sup> Volumes 1 to 4 were published by La Trobe University and volume 5 by Adelaide University; thereafter see volumes 6 and 11 of the *Australian Journal of Law and Society*.

<sup>5</sup> I. Duncanson and D. Kirkby, ‘Introduction’ in *Law and History in Australia*, vol. 2, 1984, p. 1.

yearbook to publish articles about history and law; to underwrite publishing of other kinds, such as primary source documents; to promote courses on law and history, exchange course materials and encourage undergraduate and honours research; to establish an email network for the exchange of information; to develop a bibliography of Australian and New Zealand legal history materials; and to raise funds for the above purposes.<sup>6</sup>

A number of these aims have been achieved. The society used to publish a bulletin of news, theses and publications, but this has become more irregular in recent years. Student research is encouraged by a prize of \$150 for the best undergraduate essay that falls within the field of law and history. Remarkably useful is the Law and History Bibliography Australia and New Zealand, which can be found on the society's web site.<sup>7</sup> The bibliography reveals a growing body of published work on Australian legal history characterised by diversity and plurality of approaches, the traditional and increasingly the modern. The web site explains the work of the society and contains links to legal history sites. The society supported the proposal by Adelaide University's Adelaide Law Review Association to publish the *Australian Journal of Legal History*, which began publication in 1995. In recent years the journal has been published by the Division of Law at Macquarie University and has recently changed its name to *Legal History*. Acquiring an international editorial board, this refereed journal is published twice a year and contains articles predominantly on Australian legal history as well as articles on England and New Zealand. It also contains review articles and book reviews.

Other legal history societies that have appeared include the Legal History Society of New South Wales, later called the Francis Forbes Society for Australian Legal History. The aims of the Francis Forbes Society include to encourage the study and advance the knowledge of the history of Australian law, publish and promote, for the benefit of the public, books, journals, periodicals and other literary publications, and promote the compilation of authentic records relating to Australian and Indigenous law.<sup>8</sup> One of the leading lights of the Francis Forbes Society is Geoff Lindsay, SC, who is also editor of the *Australian Bar Review*, which from about 2003 has shown an interest in legal history by publishing a History Page. ALTA has a Legal History Interest Group, in 2006 attracting considerable interest under the coaxing of Elise Histed. Finally, there is the Queensland branch of the Selden Society and the

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<sup>6</sup> *Law and History Newsletter*, December 1993, p. 2.

<sup>7</sup> <http://www.waikato.ac.nz/law/anzlhs/resources.htm>

<sup>8</sup> <http://www.forbessociety.org.au/>

Queensland Supreme Court History Program, which seeks ‘to foster research and publication in the area of legal history through an ongoing publications program. In addition, it seeks to preserve Queensland's legal heritage and ensure its accessibility to the wider Australian community by undertaking curatorial functions that facilitate the acquisition, preservation and dissemination of relevant historical material.’<sup>9</sup>

Conferences, a learned society, a journal and an up-to-date bibliography are crucial steps in the advance and maturity of Australian legal history. Another sign and crucial to the teaching of legal history is the publication of source books and textbooks. The only general source book so far published has been J.M. Bennett and Alex Castles’ *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* in 1979.<sup>10</sup> Despite the sub-title, the book deals only briefly with the twentieth century. A more recent and specialised compendium of sources is John Williams’ *The Australian Constitution: A Documentary History* published in 2005.<sup>11</sup> Another useful teaching and research tool is Alex Castles’ *Annotated Bibliography of Printed Materials on Australian Law 1788-1900*.<sup>12</sup>

The first substantial textbook was Castles’ *An Australian Legal History*, published in 1982.<sup>13</sup> It too concentrated on the nineteenth century and took a traditional approach in its emphasis on courts and statutes, but was of fundamental importance in laying the foundations to teach Australian legal history and in opening up potential areas for detailed research. In his 1995 textbook *An Unruly Child: A History of Law in Australia*, Bruce Kercher drew more explicitly upon the work of the leading exponents of the new legal history in America and England to place the development of the law in its social, political, economic and intellectual contexts.<sup>14</sup> Kercher identified five phases in Australian constitutional development; the frontier when imperial law was gradually imposed, but with local variations; the establishment of professional

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<sup>9</sup> <http://www.courts.qld.gov.au/schp/about/>

<sup>10</sup> J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries*, Sydney: Law Book Company, 1979.

<sup>11</sup> John Williams, *The Australian Constitution: A Documentary History*, Melbourne: Melbourne University Press, 2005.

<sup>12</sup> A.C. Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788-1900*, Sydney: Law Book Company, 1994.

<sup>13</sup> A.C. Castles, *An Australian Legal History*, Sydney: Law Book Company, 1982.

<sup>14</sup> B. Kercher, *An Unruly Child: A History of Law in Australia*, Sydney: Allen and Unwin, 1995.

superior courts and legislative bodies; the 1850s when self-government was granted albeit with a British veto on colonial laws; Federation in 1901 when appeals to the Privy Council became the main British limitation on local law-making and Australian adherence to English precedence remained strong; and the 1960s onwards when the deference to English legal ideas was increasingly rejected. Going beyond the courts and the legal profession, Kercher notes that the various Australian Parliaments passed original legislation in the nineteenth century and that generally the problem of communication and the different circumstances at times lessened the adherence to English models in the courts and the profession. Unusually, he provided two chapters on Australian law in the twentieth century, still an under-researched area. A textbook on the legal history of twentieth century Australia is desperately needed along the lines of Lawrence M. Friedman's *American Law in the Twentieth Century* published in 2002, which deals with national and state developments.<sup>15</sup>

Other textbooks also incorporated legal history into their analysis. These include Parkinson's introduction to the Australian legal system and Hunter and Ingleby's collection of essays, while Ellinghaus et al's collection deals with the emergence of Australian law in relatively neglected areas such as contract, torts, landlord and tenant law and bankruptcy.<sup>16</sup> Although some research monographs have been published in Australian legal history, their number is low.<sup>17</sup> Legal historians can only welcome the collaboration between Macquarie University Law School and Australian Scholarly Publishing in producing a new series of legal history monographs.

Another sign of progress was the discussion of Australian legal histories published in the world's leading legal history journal *Law and History Review* in 2003. Rosemary Hunter stressed inter alia the work on 'the history of colonization and the dispossession of indigenous peoples and histories of women and gender relations'.<sup>18</sup> Although she did not quote him, Hunter

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<sup>15</sup> Lawrence M. Friedman, *American Law in the Twentieth Century*, New Haven: Yale University Press, 2002.

<sup>16</sup> P. Parkinson, *Tradition and Change in Australian Law*, 3<sup>rd</sup> ed Sydney: Law Book Company, 2005; R. Hunter and R. Ingleby, *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, Sydney: Allen and Unwin, 1995; M.P. Ellinghaus, A.P. Bradbrook and A.J. Duggan (eds.), *The Emergence of Australian Law*, Sydney: Butterworths, 1989.

<sup>17</sup> See those mentioned in S. Petrow, 'The Future of the Past—The Development of Australian Legal History', *Australian Law Librarian*, vol. 8, no. 1, 2000, pp. 9-10.

<sup>18</sup> R. Hunter, 'Australian Legal Histories in Context', *Law and History Review*, vol. 21, no. 3, 2003, pp. 607-14; see also B. Kercher, 'Many Laws, Many Legalities', *Law and History*

seemed to advocate more of what American legal historian Robert Gordon calls critical legal history, which in part embraced ‘any approach to the past that produces disturbances in the field—that inverts and scrambles familiar narratives of stasis, recovery or progress’.<sup>19</sup> Another participant in the forum, American legal historian Peter Karsten, noted two strengths in Australian, (and also Canadian and New Zealand) legal history. One was the way historians from these countries had ‘greatly enriched ... understanding of the tension/interaction between “formal” law and “informal” law (custom)’ and the other was how they engaged in ‘more comparative analysis’ than American legal historians.<sup>20</sup> The recent establishment of the Centre for Comparative Law, History and Governance at Macquarie founded and headed by Andrew Buck strengthens this latter tendency.

Outside of the articles published in the *Australian Journal of Legal History*, articles on legal history can be found in most law journals, but are not as common in history journals.<sup>21</sup> One senses generally that those historians not actively researching legal history either are not interested in the subject (wrongly believing it is too dry) or find it too daunting.<sup>22</sup> Very few non-legal historians handle statutes as evidence effectively, for example, or at least do not incorporate this and other legal evidence in their analyses when they often should.<sup>23</sup>

The other major development that deserves to be mentioned is making New South Wales and Tasmanian superior court judgments from 1824 available on the web. This project began with New South Wales and was initiated by Bruce Kercher, who realised that the judgments provided valuable information on

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*Review*, vol. 21, no. 3, 2003, pp. 321-22; for the importance of connection gender and legal history more generally see F. Batlan, ‘Engendering Legal History’, *Law and Social Inquiry*, vol. 30, no. 4, 2005, pp. 823-51.

<sup>19</sup> R. Gordon, ‘Forward: The Arrival of Critical Historicism’, *Stanford Law Review*, vol. 49, 1997, p. 1024.

<sup>20</sup> P. Karsten, ‘The CANZ Approach to Legal History’, *Law and History Review*, vol. 21, no. 3, 2003, pp. 615-20.

<sup>21</sup> For a survey of articles to 1999 see Petrow, ‘The Future of the Past’, pp. 10-11.

<sup>22</sup> See also W. Prest, ‘Law and History: Present State and Future Prospects’, *Law and History in Australia*, vol. 1, 1982, p. 43.

<sup>23</sup> For Alex Castles’ criticisms of Australian historians see A. Athaide, ‘Alex Castles on the Recognition of Australian Legal History 1955-1963’, *Australian Journal of Legal History*, vol. 7, no. 1, 2003, p. 147.

Australian life and law.<sup>24</sup> The judgments were either in newspapers or in manuscript form in the State Archives Office and thus not easily accessible. Kercher selected the most important judgments according to specified criteria, including their use to historians and practising lawyers. The text is reproduced as fully as possible and Kercher writes a commentary using sources such as letters between the protagonists and other non-court material to show, he writes, ‘the complexity and ambiguity of what is often simply called the law’. To date cases from 1824 to 1842 to have been made accessible and the project is on-going. In 2000 Stefan Petrow joined forces with Kercher and they have processed Tasmanian cases from 1824 to 1843, but this project has stopped due to lack of funds.<sup>25</sup>

Clearly, a substantial body of work has been produced on different aspects of Australian legal history since the early 1980s and primary source material is more easily accessible. While the bulk of attention has been on the nineteenth century, the twentieth century has been relatively neglected. Nonetheless, the problem that Wilf Prest identified—in a 1982 survey of legal history in Australia—of the lack of published work has been overcome and firm foundations have been laid for courses on Australian legal history.<sup>26</sup> Before looking at the current state of play, I will give an overview of legal history courses in Australia to 2006.

### **Courses on Legal History to 2006**

In this survey of legal history courses it might be mentioned that Roman law was taught in some if not most Australian Law Schools from the early 20<sup>th</sup> century, but the teaching of this subject will not form part of this paper.<sup>27</sup> Recent histories of law schools are not as forthcoming as they might be on the

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<sup>24</sup> B. Kercher, ‘Publication of Forgotten Case Law of the New South Wales Supreme Court’, *Australian Law Journal*, vol. 72, pp. 876-88; [www.law.mq.edu.au/scnsw](http://www.law.mq.edu.au/scnsw).

<sup>25</sup> For an article drawing on cases from this database see S. Petrow, ‘Sad, strange, gruesome and seductive: Tasmanian Supreme Court Cases 1824-1843’, *Australian Law Librarian*, v.13, no.4, Summer 2005, pp. 31-39

<sup>26</sup> Prest, ‘Law and History’, p. 41.

<sup>27</sup> J.J. Bray, ‘A Plea for Roman Law’, *Adelaide Law Review*, vol. 9, 1983-1985, pp. 50-60; John and Judy Mackinolty (eds.), *A Century Down Town: Sydney University Law School's First Hundred Years*, Sydney: Sydney University Law School, 1991, passim; *An Account of the University of Queensland During Its First Twenty-Five Years 1910-1935*, St. Lucia: University of Queensland, 1935, p. 34; Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893-1993*, Hobart: The University of Tasmania Law School, 1993, pp. 4-5.

development of the law curriculum, which is a subject crying out for more systematic historical attention. However, these histories sometimes provide insight into the teaching of legal history, which in effect meant English legal history.<sup>28</sup> At Melbourne the situation is muddled. It appears that ‘a good deal of innovation and curriculum revision’ occurred around 1900, but when Legal History was first taught is unclear.<sup>29</sup> Its introduction was mooted in 1890, but Professor Edward Jenks was overloaded and, denied extra staff, declined to teach it in the 1890s.<sup>30</sup> Nevertheless, a ‘new double subject’ called Constitutional and Legal History was officially offered to students but Jenks seems to have ignored this and continued to teach Constitutional Law. In 1896 Professor Harrison Moore taught Constitutional History and by 1919 (if not before) it appears that Legal History was taught in its own right.<sup>31</sup> At Melbourne to the 1950s, Alex Castles recalled, a species of ‘intellectual colonialism’ flourished and students were taught ‘the whole history of English Law, whether that was relevant to Australia or not’.<sup>32</sup>

Richard Davis notes in his history of the University of Tasmania Faculty of Law that one of Maitland’s students, Jethro Brown, was appointed to teach Law and History in 1892.<sup>33</sup> He taught Constitutional Law and Legal History. When Kenneth Shatwell arrived from Oxford in 1934 he was even keener on Legal History, which was taught as a separate subject in 1934 and was still part of the curriculum in the 1970s.<sup>34</sup> Formally established as a teaching institution in 1890, Sydney University Law Faculty, under the guidance of Professor William Pitt Cobbett, introduced Legal History in 1902 and at least from 1910 the subject appears to have been compulsory most probably until the introduction of a new curriculum reduced the number of compulsory subjects in 1974.<sup>35</sup> In 1959 Dean Kenneth Shatwell, who had moved from Tasmania, had made it a major subject in first year.

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<sup>28</sup> No mention is made of legal history in E. Edwards, ‘Law’ in B. de Garis (ed.), *Campus in the Community: The University of Western Australia, 1963-1987*, Nedlands: University of Western Australia Press, 1988, ch. 18.

<sup>29</sup> Ruth Campbell, *A History of the Melbourne Law School 1857 to 1973*, Melbourne: Faculty of Law, University of Melbourne, 1977, pp. 12.

<sup>30</sup> Campbell, *History of the Melbourne Law School*, pp. 92-4.

<sup>31</sup> Campbell, *History of the Melbourne Law School*, pp. 14, 107-8.

<sup>32</sup> Athaide, ‘Alex Castles on the Recognition of Australian Legal History 1955-1963’, pp. 109-110.

<sup>33</sup> Davis, *100 Years*, pp. 3, 5, 11, 40, 59.

<sup>34</sup> Davis, *100 Years*, pp. 29, 69.

<sup>35</sup> John and Judy Mackinolty, *A Century Down Town*, pp. 45, 58, 74, 110-111, 125, 140.



Perhaps to differentiate itself from Sydney or perhaps because of a strong law and society interest amongst its staff, legal history seems not to have been included in the curriculum at the University of New South Wales Law School when it was established in 1971, although it did so later.<sup>36</sup> This was not the case at Macquarie when its Law School was established in 1975 as the interdisciplinary History and Philosophy of Law course was taught in first year.<sup>37</sup> Similarly, the more practitioner-oriented Law School at the Queensland Institute of Technology apparently ignored legal history when it was set up in 1976.<sup>38</sup> At Adelaide the picture is not totally clear, but the History of English Law formed part of the Master of Laws degree in 1924 and Elements of Law and Legal History was introduced for first year in 1925.<sup>39</sup> In 1952 the Bonython Professor of Law Richard Blackburn introduced a new course in Legal History at third year.<sup>40</sup> In the 1980s Blackburn remained adamant that ‘elementary legal history’ should be a core compulsory subject.<sup>41</sup> He argued that ‘law is not history, but cannot be understood in a context from which history is absent’. The Australian National University Law School clearly disagreed and dropped its History of Law subject in 1974.<sup>42</sup>

The chances of Australian Legal History courses developing up to the 1970s were not strong. The cultural cringe meant we still relied heavily on English law. Moreover, many academic lawyers in Australia had been trained in England and, if interested in legal history at all, taught medieval legal history.<sup>43</sup> This meant the study of constitutional arrangements and not the social, economic, and political context of legal developments. As they reviewed their

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<sup>36</sup> M. Dixon, *Thirty Up: The Story of the UNSW Law School 1971-2001*, Sydney: University of New South Wales Law School, 2001; for the reference to Legal History see M. Chesterman and D. Weisbrot, ‘Legal Scholarship in Australia’, *Modern Law Review*, vol. 50, 1987, p. 717.

<sup>37</sup> Chesterman and Weisbrot, ‘Legal Scholarship’, pp. 718, 720.

<sup>38</sup> T. Cain, *The Founding of the Queensland University of Technology Law School*, Red Hill: QUT, 1998.

<sup>39</sup> V.A. Edgeloe, ‘The Adelaide Law School 1883-1983’, *Adelaide Law Review*, vol. 9, 1983-1985, pp. 26, 41; A. Castles, A. Ligertwood, and P. Kelly (eds.), *Law on North Terrace: The Adelaide University Law School 1883-1983*, Adelaide: Faculty of Law, University of Adelaide, 1983, p. 57.

<sup>40</sup> Edgeloe, ‘Adelaide Law School’, p. 33. Later in this article, Edgeloe gives 1957 as the year Legal History was introduced, p. 42.

<sup>41</sup> R. Blackburn, ‘Law School Curricula in Retrospect’, *Adelaide law Review*, vol. 9, 1983-1985, pp. 46-7.

<sup>42</sup> D. Harris, J. McLaren, W. Wesley Pue, S. Bronitt, and I. Holloway, ‘“Community Without Propinquity”—Teaching Legal History Intercontinentally’, *Legal Education Review*, p. 8n20.

<sup>43</sup> Prest, ‘Law and History’, p. 36.

syllabi, law faculties seemed to be losing interest in legal history in the 1960s. For example, in 1963 Leslie Downer of the Australian National University, in an article called ‘Legal History—Is it Human?’, lamented that ‘Perhaps no subject in the curriculum of the Faculties of Law in Australian Universities is called upon to justify itself more frequently than legal history’.<sup>44</sup> However, a change seemed likely from the findings in Wilf Prest’s 1982 survey. He found that a quarter of the twelve departments of law or legal studies—ANU, Newcastle and Queensland—did not offer the subject at all and that only Melbourne and Sydney taught ‘unadulterated’ Australian legal history courses.<sup>45</sup> Prest also found evidence that two of the recalcitrant law schools intended to teach the subject and he saw an optimistic future for legal history courses, which would be studied by students from law and other disciplines.

Hopes were soon dashed, however, in 1987 when the Pearce report appeared. This report noted that Legal History had been a compulsory part of the curriculum into the 1960s at least, but depressingly revealed that legal history ‘as a separate subject in its own right’ had ‘virtually disappeared from the curricula of law schools’ and did not expect to see a revival ‘as a subject in its own right occurring in the foreseeable future’.<sup>46</sup> The Pearce report quoted favourably from Sir Walter Scott’s 1815 novel *Guy Mannering*—as cited in the once widely used textbook Windeyer’s *Lectures on Legal History*—that ‘a lawyer without history or literature is a mechanic, a mere working mason; if he possess some knowledge of these, he may venture to call himself an architect’.<sup>47</sup> I wonder if there is an equivalent saying for an historian without a knowledge of law. The Pearce report recommended that Australian legal history be taught, but that its purpose be clearly spelled out and that it be given a much more Australian orientation, although the report echoed Prest in lamenting that there was ‘as yet very little Australian legal historiography’.<sup>48</sup> Noting that in Canadian law schools historians were being appointed, the report thought it preferable that legal history be taught by teachers ‘versed in historical methodology’.

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<sup>44</sup> L. Downer, ‘Legal History—Is It Human?’, *Melbourne University Law Review*, vol. 4, June 1963, p. 1.

<sup>45</sup> Prest, ‘Law and History’, p. 42.

<sup>46</sup> D. Pearce, E. Campbell, and D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Canberra: AGPS, 1987, vol. 1, pp. 107-8.

<sup>47</sup> W.J.V. Windeyer, *Lectures on Legal History*, 2<sup>nd</sup> ed revised, Sydney: Law Book Company, 1957, p. vii.

<sup>48</sup> Pearce et al, *Australian Law Schools*, p. 108.

In 1999 my examination of handbooks and web pages confirmed the impression that legal history had not caught the imagination of law faculties. Only five law schools (Adelaide, Flinders, La Trobe, Macquarie and Melbourne) offered units in Australian legal history and ANU taught an innovative comparative Australia-Canada unit.<sup>49</sup> This exciting course challenges students ‘to develop an understanding of and a broader context for interpreting law and culture in both Australian and Canadian colonies through the medium not only of a narrative text, but also through various artefacts (maps, photos, and artwork), ballads, poetry, historical novels, CDs and CD Roms’.<sup>50</sup> Much depends on staff with an interest and expertise to teach Australian Legal History, but in recent years the narrowing of the law degree and the limitation on elective units is a serious threat to the future of the subject.<sup>51</sup>

### **Australian Legal History in 2006**

My examination of the web pages of History Departments and Law Schools in 2006 found that not much had changed since Prest’s survey in 1982. In History Departments there is still no course on Australian Legal History and not even that many on the social history of crime, which was popular in most departments around the world before 2000. ANU has a course on Riots and Rebellions—Eighteenth and Nineteenth-Century Protest Movements under British Rule, Monash has Fears and Fantasies: Deviance in History and Murder and Mayhem: the London Underworld From the Eighteenth to the Twentieth Centuries, the University of New South Wales has Crime and Punishment in Historical Perspective and Newcastle has Crime and Punishment in Early Modern Europe. At the University of Tasmania there is a unit called Crime and the Law in Historical Perspective, which covers English History from Anglo-Saxon times to 1914, and Australia from 1788 to the late twentieth century. This course was once very popular with law students, but has become less so since changes have been made to the curriculum. The most impressive course taught outside Law Schools is David Philips’ Crime, Law, and Punishment: Colonial Victoria, which steeps students in the intricacies of legal/historical research. This subject used to be an undergraduate unit, but is now taught at Honours level. Given the popularity of crime shows on television, we might perhaps expect a larger number of courses on crime and criminal history. Or

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<sup>49</sup> The teaching of this unit is described in Harris, et al, “Community Without Propinquity”, pp. 1-32.

<sup>50</sup> John McLaren, ‘In the Northern Archives Something Stirred: The Discovery of Canadian Legal History’, *Australian Journal of Legal History*, vol. 7, no. 1, 2003, p. 85.

<sup>51</sup> Harris et al, “Community Without Propinquity”, p. 10.

perhaps there are too many such shows and students no longer want to spend time studying such subjects.

If we turn our attention to Law Schools, we find that legal history seems to be strong in New Zealand. At Auckland there is a course called Legal History dealing mainly with New Zealand, at Canterbury there are courses called English Legal History and New Zealand and Colonial Legal History, at Otago we find Legal History, which deals with aspects of the legal history of New Zealand and Great Britain and Victoria University of Wellington's Legal History course deals with New Zealand, the Pacific and England.

Compared with New Zealand, the scene in Australian Law Schools is arguably somewhat disappointing. Certainly some Law Schools teach courses on legal history at First Year Level, but too few teach it at upper level.<sup>52</sup> Australian Legal History units so called are taught at Adelaide, Flinders, Macquarie and Melbourne Universities, while at Western Australia the subject is called Legal History but deals with Australian legal history. The Legal History course proposed for Queensland Law School in 2007 will examine the source of Queensland and Australian law. Melbourne Law School also teaches a course called Indigenous People, History and the Law and historian David Philips is involved in it. The University of New South Wales course called Legal History deals mainly with English legal history, but interest in this subject, again arguably, seems to be on the wane in Australia.

Let us look more closely at the Australian Legal History courses taught at Adelaide, Flinders, Melbourne, and Western Australia. They were chosen because teachers from those Law Schools responded to my request for information. A broader study of all the Law Schools teaching Australian Legal History at First and Upper Levels might well offer a different analysis than the one offered in this paper.

### **Content and Time Period**

None of the courses carry a warning such as Thomas D. Russell's American Legal History course at the University of Denver, which notes that 'this course contains material that some students may find offensive. For example, the readings for this course document instances of fornication, transvestism/hermaphroditism, and bestiality as well as murder and other

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<sup>52</sup> The University of Notre Dame at Fremantle and the University of Technology at Sydney teach legal history in first year it appears from their Law School web sites for example.

violence’.<sup>53</sup> This subject matter does not rear its ugly head in the course outlines I have seen.

At Adelaide, where the teacher is interested in constitutional law more broadly, the course focuses on the nineteenth century, using the development of the Australian Constitution in the 1890s as ‘its focal point’ but students learn about the arrival of European law, the spread of European law and its impact on the Aborigines, the concept of colonisation, the emergence of Australian law, and federation and its ‘legal consequences’. At Flinders the course deals with ‘some of the key events and themes of Australian legal history’, but has ‘a strong emphasis on the period 1788-1901’. Both constitutional changes and aspects of private law are included. At Melbourne the course is ‘an overview of the social and political history of Australia’, starting in 1788 and stretching into the twentieth century. It looks, in Rosemary Hunter’s terms, at ‘the legal dimensions of historical problems’. Indigenous history is only mentioned in passing as there is a separate unit on this topic. Western Australia starts with federation and concentrates on the twentieth century. Like Melbourne, Western Australia also offers a separate course on Indigenous issues, but the topic is also well covered in the legal history course.

The most popular topics for discussion in these courses are as follows. All courses either deal with the nature and use of legal history or Federation and Australian Constitution. Melbourne, Adelaide and Flinders deal in some way with gender and sexuality—divorce, married women’s property and right to vote; homosexuality and the law; women and the Constitution, the vote and the legal profession. These core topics are not surprising, but thereafter two of the four courses cover one or more of a range of topics—the legal machinery of convict colonies; the reception of English law; land law, including the origins of the Torrens system; lawlessness, such as bushranging and on the goldfields; immigration, including the White Australia policy; defence and dissent, including the Communist party dissolution attempt and conscientious objection; Aborigines and rights; World War 1; individual Judges; secession movements in Western Australia; and republicanism. Finally, some topics only appear in one course and relate to the broad thrust of that course—God and the Constitution, citizenship, the High Court and the value of comparative research at Adelaide; colonial Courts and religion at Flinders; twentieth century labour law at Melbourne; and legal historians, war crimes, the Whitlam Dismissal, the cinema and legal history, and terrorist laws in Western Australia.

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<sup>53</sup> <http://www.law.du.edu/russell/lh/alh/>

One striking point about these courses is how little attention is paid to crime and criminals. In 1999 the Australia/Canada comparative legal history course had Crime/Sex as one of four major themes.<sup>54</sup> Perhaps an understanding has developed that this subject is best left to History Schools. Even more surprising is how little attention is paid to the development of the legal profession.

In terms of textbooks, Adelaide does not set a textbook for the course but suggests that students consult Castles, *An Australian Legal History* and Kercher, *An Unruly Child*. Flinders does not set a textbook but suggests students refer to a number of books, including Castles and Kercher and the Bennett and Castles source book. Kercher's *Unruly Child* is the suggested textbook at Melbourne and Diane Kirkby's edited collection *Sex, Power, and Justice* is also recommended as a beginning point for research essays. Western Australia sets no textbook, but notes the existence of Castles, Kercher and Parkinson, *Tradition and Change in Australian Law*. Adelaide, Flinders, and Melbourne provide essential reading compilations for students.

## Aims and Methods

At Adelaide students learn that Australia's legal history 'tells us much about the way we are, and the future directions that, as a nation, we may take'. Students learn about 'The Australian approach to Australian law' and 'The relationship between Australian history and legal history'. At Flinders students gain an understanding of 'the context within which laws were made and operated'. Students are told that legal history is concerned with 'origins, survivals and transformations' and they discover how the English common law was changed to meet Australian conditions. At Melbourne the course is mainly interested in what 'influences have shaped the law, and with the influence that law has had, in its turn, on other aspects of history'. It stresses what is 'different or distinctive about Australian law'. The aims include: 'to understand key topics and themes in a survey of Australian legal history since 1788 in the context of legal doctrine and general history' and 'to develop understanding of legal history research and an appreciation of its problems and methods at an introductory level'. The Western Australian course is the only one to use film to raise key issues (Newsfront, Evil Angels, The Castle, and Black and White). All courses are one semester electives, which cannot do justice to the subject but we have to accept that the trend is away from year long electives.

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<sup>54</sup> Harris et al, "'Community Without Propinquity'", p. 18.

## Assessment

All courses provide students with the opportunity to write research essays of varying lengths. At Melbourne students can choose to do an exam or an essay. At Western Australia there is a take home exam. At Adelaide students write a 3,000 word essay and are encouraged to select a research topic in conjunction with the co-ordinator, but set questions were provided. Students present their essay outline to the class and are expected to discuss in their essay how they dealt with 'peer input'. At Flinders students write a 2,500 word essay and can choose their own essay topic or select from a list with a South Australian bias. Students who choose an essay and not an exam at Melbourne are required to produce a research essay of 5,000 words, which was viewed as 'a substantial piece of writing'. The aim is to 'develop skills of researching and writing about a specific issue' and a research workshop is held. They could choose their own topics or choose from a list provided. A 4,000 word essay is required in Western Australia. Students can develop their own question or be given a question.

Three of the courses require students to write a case note. Adelaide requires students to write a 1,500 word case note on one or more cases selected from the Supreme Court of NSW or the Old Bailey Proceedings databases. They can also choose an early South Australian case. Flinders also requires students to write a case note on a case from the South Australian Supreme Court from 1847. It appears that students have to type up the case, which is unreported. As there were no South Australia law reports until June 1865, this is a useful contribution to knowledge. Students present their case note to the class. Western Australia requires a critical 1,000 word analysis of the Mabo case based on one of a series of questions.

## Popularity of Legal History

It is very difficult to assess the popularity of any particular course as so many variables come into play and even taking the figures over a number of years might not tell you much.<sup>55</sup> In 1999 the ANU enrolled 49 students in the comparative Australia/Canada course, which is a respectable number.<sup>56</sup> I suspect that the courses are taught because of 'the enthusiasm (and

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<sup>55</sup> M. Slatter and R. Ireland, 'Report on Legal History in the Universities and Polytechnics of the United Kingdom', *Journal of Legal History*, vol. 6, no. 2, 1985, pp. 217-18.

<sup>56</sup> Harris et al, "'Community Without Propinquity'", p. 20.

presumably advocacy) of individual law teachers' and not the pressure of 'student demand', but that is true of most if not all courses.<sup>57</sup>

Nevertheless, I asked the four teachers who responded to my request for course outlines why students are interested in legal history. Two of the four responded and for the purposes of this paper they shall remain anonymous. One thinks that the direct student engagement with primary source material such as cases and statutes is a key reason for his course's popularity. Another reason for the success of that course is that 'links are drawn between the content and other law courses', such as the Torrens System taught in Land Law. The other respondent suspected that 'in the stifling discipline of law, which narrows rather than broadens, disciplining the mind, rather than expanding it, Australian legal history offers one of the few ... opportunities to think critically and to reach back, with one last despairing hand, to the humanities (and humanity), before the tide of graduation, professional advancement, material acquisition and possible ascent up the hierarchy of exerts its irresistible pull'.

## Conclusion

In 1991 Brian Simpson, in making a case for the study of modern legal history in Britain, wrote that there was 'a general sympathy with the idea that you cannot really understand the law without attending both to its history, and to the way in which the operations of the various legal systems, and the professional culture of lawyers, interacts with what may, for the want of a better term, be called society generally'.<sup>58</sup> I have no reason to doubt that such sympathy exists in Australian Law Schools today, but the subject needs more than sympathy. We can celebrate the work of those 'few champions' to support our cause, but we need to secure a 'real sense of institutional commitment' to the value of the subject.<sup>59</sup> We need Australian Legal History courses to be taught in every law school and the question is how are we to achieve this?

First of all we need more hard data than I have presented here on the extent to which legal history in general and Australian Legal History in particular is

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<sup>57</sup> Slatter and Ireland, 'Report on Legal History', p. 221.

<sup>58</sup> A.W.B. Simpson, 'Legal Education and Legal History', *Oxford Journal of Legal Studies*, vol. 11, 1991, p. 111.

<sup>59</sup> I. Holloway and A.R. Buck, 'Why Legal History Matters', *Australian Journal of Legal History*, v. 7, no. 1, 2003, pp. 3-4.



taught. This might take the form of a survey like the one undertaken by Slatter and Ireland in Britain in 1985.<sup>60</sup> One possible way is to place syllabi on the ANZLHS web site or perhaps even develop a list of topics and readings for interested teachers to create their own course. John McLaren notes that annual workshops on legal history in the mid-1980s provided ‘a great boost to the revival of the teaching of legal history in Canadian law schools’ and as a result the subject is thriving in the early twentieth-first century.<sup>61</sup> Perhaps the ANZLHS could hold a workshop on the teaching of legal history at one of our conferences or at ALTA and give special emphasis to the 20<sup>th</sup> century, which might appear more relevant to the Deans of Law Schools (of course some enthusiasts think that legal history should not try to justify itself as ‘some kind of shifty and questionable prologue to the present-day system’).<sup>62</sup> Perhaps we could hold a workshop at the Australian Historical Association conference and stimulate more non-lawyers to develop a course for Law Schools, as the Pearce report suggested. Going further back in time, it would be good too if more web sites of unreported cases from other jurisdictions in the early nineteenth century could be added to those from NSW and VDL. The recent decision by AUSTLII to add nineteenth century published materials to its web site will help our cause.

I do not know if these proposals would have much effect, but I am sure of one thing. The spread of Australian Legal History courses is crucial to the future vitality of legal history. We have to have a critical mass of students studying the subject and must live in ‘hope that a few will catch our enthusiasm and join us in the enterprise’ of writing that history by enrolling in PhDs.<sup>63</sup> Despite the very real progress of the last twenty-five years, there is still so much to be done to overcome ‘intellectual colonialism’.

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<sup>60</sup> Slatter and Ireland, ‘Report on Legal History’.

<sup>61</sup> McLaren, ‘In the Northern Archives Something Stirred’, pp. 84-5.

<sup>62</sup> Downer, ‘Legal History’, p. 3.

<sup>63</sup> T.G. Barnes, ‘The Teaching of English Legal History in America: Past, Present, and Future’, *Journal of Legal Education*, vol. 26, no. 3, 1974, p. 330.