The Future of the Past – The Development of Australian Legal History[1]

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INTRODUCTION

A noteworthy development over the last two decades has been the burgeoning interest in Australia's legal history. Confronting the cultural cringe that saw Australian law as a pale derivative of English law, legal historians have shown that Australian law was more original in many ways than previously realised and that has stimulated further research. Their work has been part of a wider commitment of Australians to make our own law and not kowtow to English precedent.

Symbolic of the progress and academic credibility of Australian legal history is the publication of Bruce Kercher's article on attitudes to the law in early New South Wales in the prestigious *Modern Law Review* in 1997.[2] My paper will survey the development of Australian legal history to date, reflect on exciting new developments and outline ways in which law librarians can make an important contribution.

AUSTRALIAN LEGAL HISTORY

From the 1970s the interest in Australian history, especially social, urban, labour, and women's history, grew enormously.[3] Despite useful work by some legally-trained researchers, interest in Australian legal history seemed to lag behind until the 1980s. This section will describe how Australian legal history has consolidated itself in the last decade and a half.

This is an edited version of a paper that was presented at the 8th Asia-Pacific Specials, Health and Law Librarians Conference, Hobart, Tasmania, August 1999. The full text may be located at www.alia.org.au/conferences/strait/papers/petrow.html - Ed

[1] The title is not original. It has been used previously for different purposes, for example, by Elton, G. R. 1968, *The Future of the Past*. Cambridge University Press; Woodward, C. Vann 1989, *The Future of the Past*. New York, Oxford University Press.

[2] Kercher, B. 1997, 'Resistance to law under autocracy', *Modern Law Review*, v. 60, pp. 779-97.

[3] Osborne, G. and Mandle, W. F. (eds) 1982, *New History: Studying Australia Today*, George Allen and Unwin, Sydney; Hudson, W. and Bolton, G. (eds) 1997, *Creating Australia: Changing Australian History*, Allen and Unwin, Sydney.

Before the 1980s the small number of legal historians meant that Australian legal history lacked a solid body of published work and was in 'a state of relative conceptual and methodological backwardness'.[4] Most Australian legal history had been written by lawyers, academic or otherwise, including John Bennett, Victor Windeyer, Charles Currey, Enid Russell and Ralph Hague. They concentrated on the early colonial period, especially in New South Wales, tracing the origins of the modern legal system from a lawyer's point of view. They focused on institutions, above all on the functions and jurisdiction of the courts and the lawyers who administered and pleaded in the courts. Biographies of lawyers and judges, and histories of the New South Wales and Victorian Bar were the fruits of their labours. This early work seemed uninterested in the novelty of Australian law, explained very little about why particular laws were created and applied, and did not analyse the decisions of local courts.[5] Law schools did little to encourage research into Australian legal history. Many academic lawyers in Australia had been trained in England and, if interested in legal history at all, taught medieval legal history.[6] This meant the study of constitutional arrangements and not the social, economic, and political context of legal developments.

Much of the interest in the potentialities of legal history was generated by enthusiastic individuals at La Trobe and, with different and varied interests, later at Adelaide, Macquarie, and Griffith Universities. A key event was the first Australian Law and History Conference held at La Trobe University in May 1982. The aim of the organisers, Ian Duncanson and Christopher Tomlins, 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.[7]

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.

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[4] Prest, W. 1982, 'Law and history: present state and future prospects', *Law and History in Australia*, vol. 1, p. 42.

[5] Kercher, B. 1989, 'Legal history in Australia: forgotten independence', *Australian Historical Association Bulletin* 61, December, p. 5-8.

[6] Prest, 'Law and history', p. 36.

[7] Duncanson, I.W. and Tomlins, C.L. 1982, 'The first Australian law and history conference', *Australian Historical Association Bulletin*, 32, September p. 21.

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'.[8] 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, Anglo-centric 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 law in Australian social and economic development'.[9] Conferences were held annually thereafter and the 18th annual conference was held in Newcastle in July 1999. A wide range of papers, not just on Australian legal history, have been presented at these conferences, which 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. 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*.[10] 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'.[11] The most impressive conference so far was held jointly with the Canadian Law and Society Association in 1998. Over 125 delegates attended and 75 papers were given over four parallel sessions.[12] The attendance of Canadian, American and English legal historians indicated that Australian and New Zealand legal history is attracting world-wide interest.

An important spin-off from the annual conference was the formation of the Australian and New Zealand Law and History Society (ANZLHS) in April 1993. This had been mooted at the first conference but it took the energy and enthusiasm of Bruce Kercher to make the proposal a reality. Historians, lawyers, anthropologists, criminologists and political scientists make up a diverse membership. The aims of the society are: to hold an annual conference; to publish bulletins of information about new publications, conferences, etc; to establish a journal or year-book to publish articles about history and law; to

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[8] Duncanson and Tomlins, 'Law, history, Australia', pp. 18, 21

[9] Duncanson and Tomlins, 'The first Australian law and history conference', p. 21.

[10] Volumes 1 to 4 were published by La Trobe University and volume 5 by Adelaide University; see volumes 6 and 11 of the *Australian Journal of Law and Society*

[11] *Law and History in Australia*, vol. 2, 1984, p. 1

[12] *Australian and New Zealand Law and History Society Bulletin*, November 1998, p. 1.

underwrite publishing of other forms, such as primary source documents and a collection of essays for the centenary of Australian federation; to promote courses on law and history, exchange course materials and encourage student work; to establish a centre for the study of law and history in the South Pacific; 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.[13]

A number of these aims have been achieved. The society publishes a bulletin of news, theses and publications about twice a year, and, as we know, holds an annual conference. Student research is encouraged by a prize of $60 for the best undergraduate essay that falls within law and history. One of the members, Andrew Frazer, has been compiling a bibliography of secondary sources on Australian legal history.[14] Seeing the need for an institutional home, the society supported a proposal from Adelaide University's Adelaide Law Review Association to publish the *Australian Journal of Legal History*. Published twice a year with an international editorial board, this refereed journal contains articles predominantly on Australian legal history, with a smattering of articles on England and New Zealand. It also contains review articles and book reviews. A web page explains the work of the society and contains links to legal history sites.[15] Other legal history societies that have appeared include the Legal History Society of New South Wales and the Queensland branch of the Selden Society.[16]

In the 1980s and 1990s we find a growing body of published work on Australian legal history characterised by diversity and plurality of approaches, the traditional and the modern. An undoubted landmark was Alex Castles' textbook *An Australian Legal History*, published in 1982.[17] Concentrating on the nineteenth century, Castles' substantial textbook provides an account of English influences on the Australian legal system and skilfully deals with the court system, the reception of English case law and statutes, the work of colonial legislatures, Aboriginals and the law, and the early history of court reporting. In arguing that the Australian colonies blindly adhered to English precedents, Castles

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[13] *Law and History Newsletter*, December 1993, p. 2

[14] *Law and History Newsletter*, December 1993, p. 5

[15] www law mq edu au/scnsw/ANZLHS

[16] *Law and History Newsletter*, December 1993, p. 3.

[17] Castles, A.C. 1982, *An Australian legal history*, Law Book Company, Sydney.

underestimates the extent to which an Australian legal culture developed. His references to New South Wales legislative developments in land tenure, insolvency and mining laws indicate that local adaptations were at least possible. It is also at least possible that reproductions of English legislation might have different results when enforced in the different conditions of Australia. If Castles had extended his research beyond case law and statutes to include the administration of the law, the popular responses to that administration, and the use of the courts, he might have modified his conclusions. He refers to the influence of convict transportation, the distance from England and between centres of population, and local political and economic factors, but the social, political, and economic context in which the law operated needed greater elaboration. All pioneering works are susceptible to criticism, but undeniably Castles' textbook was of fundamental importance to the teaching of Australian legal history and in opening up potential areas for detailed research.

Upon reflection, Castles later emphasised 'the differences between local law and English law in the first part of the nineteenth century'.[18] This theme has been explored in Bruce Kercher's textbook *An Unruly Child: A History of Law in Australia*, published in 1995. Kercher adds further evidence against the contention that Australian law merely imitated English law and that local adaptations were unimportant. As Michael Kirby pithily says on the inside cover of the book, Kercher shows that 'Australia began creatively enough, became an abject copier of the English, and is now becoming creative again'.[19] Kercher explicitly draws upon the work of the leading exponents of the new legal history in America and England to place the law in its social, political, economic and intellectual contexts. He traverses such subjects as the interaction between law and society in a range of areas, the treatment of Aborigines in the courts, the impact of frontier conditions on Australian law, the social consequences of imprisonment for debt, the operation of the master and servant legislation and the rights of women. Conflict and struggle over the meaning and use of the law are very much part of Kercher's story. Importantly, he provides two chapters on Australian law in the twentieth century, an underresearched area, but this highlights a problem with the book. By summarising a wealth of published work on many subjects and his own research in a mere 205 pages of text, Kercher perhaps attempts too much and leaves the reader yearning for fuller discussions of some subjects, especially how ordinary people viewed the

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[18] Kercher, B. 'Legal history in Australia', p 6

[19] Kercher, B. 1995, *An Unruly Child: a History of Law in Australia*, Allen and Unwin, Sydney, p i.

law in the different colonies. In sum, both Castles and Kercher enjoy the pluses and minuses of pioneers researchers, but Australian legal history is deeply in their debt.

Other textbooks also incorporate 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.[20] Plenty of scope remains for research monographs on Australian law. An important contribution was Paul Finn's account of the constitutional and legal structuring of the governmental systems of the three eastern mainland colonies from the mid-1850s to 1901.[21] Kercher has produced a pioneering work on civil litigation in early New South Wales.[22] Equally impressive and perhaps more theoretically informed are the volumes by Davidson, Neal, and Byrne in the now defunct series *Studies in Australian History* published by Cambridge University Press. Davidson argues, not altogether convincingly, that the law was 'the invisible power' within the Australian State and usurped sovereignty from the people: 'the hegemony of legalism' accorded 'no place to popular wisdom or the people'.[23] By contrast, Neal and Byrne accord to the people much greater power in their relationship with the law, which was a tool to be used for their own devices. With great flair and argumentative skill, Neal examines how the British rule of law functioned in convict New South Wales and how the colonists transformed their penal colony into a free society.[24] Byrne argues that convict and free 'made their own law; they mapped their own boundaries of legality and illegality'.[25] She uses some 5190 criminal court cases to show 'the dynamic relationship

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[20] Parkinson, P. 1994, *Tradition and Change in Australian Law*, Law Book Company, Sydney; Hunter, R. and Ingleby, R. 1995, *Thinking about Law: Perspectives on the History, Philosophy, and Sociology of Law*, Allen and Unwin, St Leonards; Ellinghaus, M. P., Bradbrook, A. P. and Duggan, A. J. (eds) 1989, *The Emergence of Australian Law*, Butterworths, Sydney

[21] Finn, P. 1987, *Law and Government in Colonial Australia*, Oxford University Press, Melbourne

[22] Kercher, B. 1996, *Debt, Seduction, and Other Disasters: the Birth of Civil Litigation in Convict New South Wales*, Federation Press, Sydney

[23] Davidson, A. 1991, *The Invisible State: the Formation of the Australian State 1788-1901*, Cambridge University Press, pp. xv, 243, 239.

[24] Neal, D. 1991, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge University Press.

[25] Byrne, P. J. 1993, *Criminal Law and Colonial Subject: New South Wales 1810-1830*, Cambridge University Press, pp. 2, 9.

between people and law' and inter alia concludes that women used the courts differently from men. Biographical work on judges has also produced some fine books.[26]

Articles on legal history can now be found in most law journals but are not as common in history journals. Space considerations preclude full discussion of this fine published work but we can flag some of the more popular areas. Perhaps the most prolific area of research is the history of the criminal justice system[27] with policing being an especially popular subject, but the criminal law and crime remain relatively neglected. An important area of growth has been the relationship of Aboriginals to the law.[28] Land law and

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[26] Hocking, J. 1997, *Lionel Murphy: a Political Biography*. Cambridge University Press; Haward, M and Warden, J (eds) 1995, *An Australian Democrat: the Life, Work and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, Hobart; Galbally, A. 1995, *Redmond Barry: an Anglo-Irish Australian*, Melbourne University Press; Crockett, P.W. 1993, *Evatt: a Life*, Oxford University Press, Melbourne; Marr, D. 1992, *Barwick*, new ed, Allen and Unwin, Sydney; Joyce, R. B. 1984, *Samuel Walker Griffith*, University of Queensland Press; Rickard, J. 1984, *H B. Higgins: the Rebel as Judge*, Allen and Unwin, Sydney.

[27] For two surveys of a substantial literature, see S. Garton, 'The convict taint: Australia and New Zealand' in Emsley, C. and Knafla, L. A. (eds) 1975, *Crime History and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice in Modern History*, Greenwood Press, Westport, pp 271-90; Philips, D. and Davies, S. (eds) 1994, *A Nation of Rogues? Crime, Law, and Punishment in Colonial Australia*, Melbourne University Press; for policing see Finnane, M. 1994, *Police and Government: Histories of Policing in Australia*, Oxford University Press, Melbourne

[28] Kercher, B. 1998, 'R v. Ballard, R v Murrell, and R v Bonjon', *Australian Indigenous Law Reporter*, vol. 3(3), pp. 410-25; Harring, S. L. 1994, 'The killing time: a history of Aboriginal resistance in colonial Australia', *Ottawa Law Review*, vol. 26, pp. 385-423; Reynolds, H. 1992 *The Law of the Land*, 2nd edn, Penguin Books Australia, Ringwood; Cassidy, J. 1989, 'A reappraisal of Aboriginal policy in colonial Australia: imperial and colonial instruments and legislation recognising the special rights and status of the Australian Aboriginals', *Journal of Legal History*, vol. 10, pp. 365-79; Cassidy, J. 1988, 'The significance of the classification of a colonial acquisition: the conquered/settled distinction', *Australian Aboriginal Studies*, no. 1, pp. 2-17; McCorquodale, J. 1986, 'The legal classification of race in Australia', *Aboriginal History*, vol. 10, no. 1, pp. 7-24

property law have also attracted scholars.[29] Interesting work on women and the law has been published,[30] and related work on the family and children and delinquency has started to appear.[31] Constitutional law has always been a popular area.[32] The same could be said of trials, especially sensational ones,[33] the work of particular courts[34] and

[29] Petrow, S. 1997, 'Responses to the Torrens system in Tasmania 1862 to 1900', *Australian Property Law Journal*, vol. 5, pp. 194-212; Buck, A. R. 1996, 'Torrens title, intestate estates and the origins of Australian property law', *Australian Property Law Journal*, vol. 4, no. 2, pp. 89-98; Buck, A. R. 1994, 'Attorney-General v Brown and the development of property law in Australia', *Australian Property Law Journal*, vol. 2, no. 2, pp. 128-38; Williams, A. W. 1989 'Colonial origins of land acquisition law in New South Wales and Queensland', *Journal of Legal History*, vol. 10, no. 3, pp. 352-64; Buck, A. R. 1987' "A blot on the certificate": dower and women's property rights in colonial New South Wales' *Australian Journal of Law and Society*, vol. 4, pp. 87-102.

[30] Kirkby, D. (ed) 1995, *Sex, Power, and Justice: Historical Perspectives on Law in Australia*, Melbourne: Oxford University Press; Bavin-Mizzi, J. 1995, *Ravished: Sexual Violence in Victorian Australia*, University of New South Wales Press, Sydney.

[31] Bosworth, M. 1993, 'Child welfare and the law: "dependent", "neglected" and "delinquent" children in Western Australia, 1907-1990' in Hetherington, P. and Maddern, P. (eds), *Sexuality and Gender in History: Selected Essays*, Hetherington and Maddern, Nedlands: pp. 255-65; Snow, D. 1991, 'Family policy and orphan schools in early colonial Australia', *Journal of Interdisciplinary History*, vol. 22, no. 2, pp. 255-84; Rayner, M. 1991, 'Incest and the law in Western Australia 1829-1989' in Hetherington, P. (ed) *Incest and the community: Australian perspectives*, Centre for Western Australian History, University of Western Australia, Nedlands, pp. 31-48; Brooklyn, B. 1990, 'Nothing to lose: women and divorce in South Australia 1859-1918', *Law in Context*, vol. 8, no. 2 pp. 70-91.

[32] Kirby, M. D. 1996, 'Deakin: popular sovereignty and the true foundation of the Australian Constitution', *Deakin Law Review*, vol. 3, no. 2, pp. 129-46; Johnson, H. A. 1993, 'Historical and constitutional perspectives on cross-vesting of court jurisdiction', *Melbourne University Law Review*, vol. 19, pp. 45-91; Stokes, M. 1992, 'The constitution of Tasmania', *Public Law Review*, vol. 3, no. 2, pp. 99-112; McLeish, S. 1992, 'Making sense of religion and the constitution: a fresh start for section 116', *Monash University Law Review*, vol. 18, no. 2, pp. 207-36.

[33] Fricke, G. L. 1997, 'The Eureka trials', *Australian Law Journal*, vol. 71, pp. 59-69; Maher, L. W. 1994, 'Dissent, disloyalty, and disaffection: Australia's last Cold War sedition case', *Adelaide Law Review*, vol. 16, pp. 1-77; Winterton, G. 1992, 'The significance of the Communist Party (Australian Communist party v. Commonwealth, (1951) 83 CLR 1) case', *Melbourne University Law Review*, vol. 18, pp. 630-58.

[34] Ely, R. (ed), 1995, *Carrel Inglis Clark: the Supreme Court of Tasmania, its First Century 1824-1924*, University of Tasmania Law Press, Hobart; von Nessen, P. E. 1992, 'The use of American precedents by the High Court of Australia 1901-1987', *Adelaide Law Review*, vol. 14, no. 2, pp. 181-218; McPherson, B. H. 1989, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*, Butterworths, Sydney; Dwight, A. 1987, 'The Chinese in New South Wales law courts 1848-1854', *Journal of the Royal Australian Historical Society*, vol. 73, no. 2, pp. 75-93; Sharwood, R. L. 1986, 'The local courts on Victorian gold fields, 1855 to 1857', *Melbourne University Law Review*, vol. 15, no. 3, pp. 508-32.

industrial and labour law [35] Legal education and the development of law schools have not been neglected.[36]

Some Australian legal historians conduct research not just for its intrinsic value and interest but as a tool helping to understand current legal problems and debates, for example in corporate law.[37] We have evidence to suggest that Australian judges are not averse to making use of legal history: before the 1970s English authorities such as Pollock and Maitland and Holdsworth were often cited.[38] In the 1980s and 1990s judicial resort to history in cases such as Mabo[39] has been telling but has not always won admirers. McQueen accuses the High Court judges of being

[35] McQueen, R 1992, 'Master and servant legislation as 'social control': the role of law in labour relations on the Darling Downs 1860-1870', *Law in Context*, vol 10, pp 123-39; Quinlan M 1992, 'Making labour laws fit for the colonies: the introduction of laws regulating whalers in three Australian colonies 1835-1855', *Labour History*, no 62, pp 19-37; Macintyre, S and Mitchell, R (eds) 1989, *Foundations of Arbitration the Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Melbourne; Claydon, W 1988, 'Labour legislation in Western Australia 1892-1902: its historical and ideological perspectives', *Papers in Labour History*, no 1, pp 43-52; Smith, G F and McCallum, R C 1984, 'The legal framework for the establishment of institutional collective bargaining in Australia', *Journal of Industrial Relations*, vol 26, no 1, pp 3-24; Cashen, J 1982, 'Masters and servants in South Australia, 1837-1860', *Journal of the Royal Historical Society of South Australia*, no 10, pp 32-43

[36] Davis, R 1993, *100 Years: a Centenary History of the Faculty of Law, University of Tasmania 1893-1993*, University of Tasmania Law School, Hobart; Starr, L 1992, *Julius Stone An Intellectual Biography*, Oxford University Press, Melbourne; Castles, A C 1990, 'Law schools old and new and their impact on Australian law', *Australian Law Journal*, vol 64, no 3, pp 147-50; Spiller, P 1989, 'Henry Chapman: pioneer law lecturer at the University of Melbourne', *Melbourne University Law Review*, vol 17, no 2, pp 275-91; Martin, L 1986, 'From apprenticeship to law school: a social history of legal education in nineteenth century New South Wales', *University of New South Wales Law Journal*, vol 9, no 2, pp 111-43; Castles, A C et al (eds) 1983, *Law on North Terrace, 1883-1983*, Faculty of Law, University of Adelaide

[37] McQueen, R 1996, 'Company law as imperialism', *Australian Journal of Corporate Law*, vol 5, pp 197-213; see also McQueen, R 'Corporate law and historical methodology: a critical perspective', *Canberra Law Review* vol 3, no 1, pp 7-14

[38] Campbell, E 1968, 'Lawyers' uses of history', *University of Queensland Law Journal*, vol 6, pp 1-23 An example of historical learning is Beaudesert Shire Council v Smith (1966) 120 CLR 145

[39] Mabo v Queensland [No 2] (1992) 175 CLR 1 passim but the use of history in the Mabo case has been questioned see: Attwood, B (ed) 1996, *In the Age of Mabo History, Aborigines and Australia*, Allen and Unwin, St Leonards Less celebrated examples of the judicial use of legal history are Cheatle v The Queen (1992-93) 177 CLR 541 and Cook v Administration of Norfolk Island (1992-3) 39 FCR 297

bad historians in the *Corporations Act* case of 1990 for using the reports of the 1890s Constitutional Convention debates as if they documented facts instead of representing their author's 'ideology and dreams'.[40] In the Pavey case, High Court judges demonstrated a high level of historical erudition but some commentators doubted whether analyses of the development of 'pleading devices in contractual litigation in the sixteenth century' significantly illuminated 'the substantive law of restitution at the end of the twentieth'.[41] The consensus seems to be that 'the degree of historical analysis undertaken was unnecessary, and even unhelpful'.[42] But Gummow disagrees, arguing that the judgments did not seek to resolve the particular problem raised in Pavey. According to Gummow, Deane J. used the issue of 'recovery in a modern form of *indebitatus assumpsit*' to support, for Australian law, 'a conceptual analysis of such rights as depending on notions of restitution and unjust enrichment rather than implied contract'.[43] Whatever the merits of this particular issue, it is encouraging to see Australian judges taking a deep interest in legal history: perhaps the next step is for judges where possible to use legal historians as consultants or expert witnesses rather than just rely on their written work.[44]

CONCLUSION

To conclude I want to suggest some ways of raising still further the profile of Australian legal history. Legal history has never been a popular subject in Australian law schools. In 1982 Prest found that a quarter of law schools did not offer the subject at all.[45] Only Melbourne and Sydney taught 'unadulterated' Australian legal history courses. By 1987, the Pearce report depressingly

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[40] New South Wales v Commonwealth (1990) 169 CLR 482; McQueen, R. 1990, 'Why High Court Judges make poor historians: the Corporations Act case and early attempts to establish a national system of company regulation in Australia', *Federal Law Review*, vol. 19, pp. 245-65

[41] Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221; Ibbetson, D. 1988, ''Implied contracts and restitution: history in the High Court of Australia', *Oxford Journal of Legal Studies*, vol. 8, p. 313; for another sceptical view see Jones, G. 1988, 'Restitution: unjust enrichment as a unifying concept in Australia', *Journal of Contract Law*, vol. 1, pp. 8-14

[42] Sheahan, J. C. 1997-8, 'Use and misuse of legal history: case studies from the law of contract, tort, and restitution', *Australian Bar Review*, vol. 16, p. 296

[43] Sheahan, J. C. 1997-8, p. 296; Gummow, W. M. C. 1990 'Unjust enrichment, restitution, and proprietary remedies' in Finn, P. D. (ed.) 1990, *Essays on Restitution*, Law Book Company, Sydney, pp. 47-86

[44] American historians have been used as expert witnesses, see Farber, D. A. 1998, 'Adjudication of things past: reflections on history as evidence', *Hastings Law Journal*, vol. 49, 1009 at p. 1013

[45] Prest, 'Law and history', pp. 35-8

revealed, legal history 'as a separate subject in its own right' had 'virtually disappeared from the curricula of law schools'.[46] The Pearce report recommended that Australian legal history be taught, preferably by teachers 'versed in historical methodology'. In 1999 my own admittedly cursory examination of handbooks and web pages found only five law schools (Adelaide, Flinders, La Trobe, Macquarie, and Melbourne) offered units in Australian legal history and ANU taught a comparative Australia-Canada unit.[47] For Australian legal history to advance it is crucial that all law schools teach a unit in the area and if necessary break down disciplinary barriers by appointing non-lawyers as teachers, as the Pearce report suggested. Original research with the aim of publication must be the main form of assessment. This will build up knowledge in the area and stimulate interest.

Clearly, all areas of the law in every state (not just Victoria and New South Wales) in all periods need more detailed research, but I would urge that two areas be given special attention. One is the role of the law in shaping the Australian economy, whose relevance even the myopic dispensers of Australian Research Council money might acknowledge.[48] The second area is the work of law firms. We know little of where Australian 'lawyers have come from, who they were, where they have been trained, or how they were socialised', who their clients were, and what legal and other services they supplied, and how they were regarded.[49] One problem here is that old legal files are often destroyed or, when available, historians are denied access because of an overly sensitive attitude to client confidence.[50] Perhaps law librarians need to be proactive in this area and ensure that the files of law firms are deposited in archives.[51]

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[46] Pearce,D., Campbell, E. and Harding, D. 1987, *Australian Law Schools: a Discipline Assessment for the Commonwealth Tertiary Education Commission*, AGPS, Canberra, pp. 107-8.

[47] Some history departments teach criminal justice history but do not necessarily focus on Australia.

[48] Sugarman, D. 1981, 'Theory and practice in law and history: a prologue to the study of the relationship between law and economy from a socio-historical perspective' in Fryer, B. et al (eds), *Law, State, and Society*, Croom Helm, London, pp. 70-106.

[49] Pue, W. P. 1995, 'In pursuit of better myth: lawyers' histories and histories of lawyers', *Alberta Law Review, vol. 33, no. 4*, p. 764.

[50] Moore, P. 1995, 'Waiving history goodbye? lawyers' records and the scholar' in Knafla, L. A. and S. W. S. Binnie (eds), *Law, Society, and the State. Essays in Modern Legal History*, University of Toronto Press, pp. 514-23.

[51] Some suggest that law librarians become more active in collecting non-printed material, see Hyman, H. M. 1978, '"No Cheers for the American Law School?" a legal historian's complaint, plea, and modest proposal', *Law Library Journal*, vol. 71, pp. 227-33.

Declining budgets notwithstanding, university law librarians should certainly try to acquire nineteenth-century rare books and other Australian legal sources.[52] Castles' invaluable annotated bibliography of Australian printed materials before 1900 will provide pointers on what to look for.[53] According to American law library supremo Robert Berring, a knowledge of older books and reference tools is essential to being a great reference librarian.[54] Another traditional skill that law librarians should retain is preparing legislative histories, a skill they should impart to budding Australian legal historians.[55] With little effort, law librarians can thus contribute to the development of Australian legal history.[56] Publishers have a part to play as well. The ANZLHS should attempt to persuade a publisher to establish a series for monographs on Australian legal history and thus make theses more widely available

Perhaps the most exciting development is Bruce Kercher's project to unearth judgments of the superior courts in New South Wales from 1824 and place them on the internet.[57] These judgments, which provide valuable information on Australian life and the law, are either in manuscript form in the State Archives Office or in newspapers and thus not easily accessible. Kercher selects 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 the complexity and ambiguity of what is often simply called the law'. If, as Kercher hopes, a similar project

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[52] Few can deny the importance of rare books in law libraries, see Nissenbaum, R. J. 1984, 'Overview of the rare book collection: a workshop', *Legal Reference Services Quarterly*, vol 4, no 2, pp. 39-43

[53] Castles, A C. 1994, *Annotated Bibliography of Printed Materials on Australian Law 1788-1900*, Law Book Company, Sydney

[54] Berring, R C 1984, 'How to be a great reference librarian', *Legal Reference Services Quarterly*, vol 4, no 1, pp 17-37

[55] Margeton, S G 1993, 'Of legislative histories and librarians', *Law Library Journal*, vol. 85, pp. 81-97

[56] For words of advice to American law librarians, see Hall, K. L. 1989, 'Law librarians and the new American legal history', *Law Library Journal*, vol. 81, pp 1-11

[57] Kercher, B. 1998, '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

can be started in other States, the study of Australian legal history will ultimately be transformed and will reinforce our confidence that the legal past has a bright future.[58]

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[58] Bruce Kercher and Stefan Petrow intend to make the judgments of the Van Diemen's Land Supreme Court from 1824 available on the Internet in 2000