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## AUSTRALIAN LEGAL EDUCATION – A SHORT HISTORY<sup>1</sup>

**Abstract.** This article 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. It 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.

It argues that Australian legal education can satisfactorily meet the twin objectives of training individuals as legal practitioners, whilst providing a liberal education that facilitates the acquisition of knowledge and transferable legal skills.

**Keywords:** law teaching, Australia, liberal education, transferable legal skills.

## AUSTRALIJSKA EDUKACJA PRAWNICZA – KRÓTKA HISTORIA

**Streszczenie.** W artykule przedstawiono historię oraz rozwój australijskiej edukacji prawniczej poprzez omówienie sposobu ustanawiania uniwersyteckich szkół prawniczych oraz innych form nauczania prawa w australijskich stanach i terytoriach, zaczynając od osadnictwa europejskiego w 1788 roku, a kończąc na czasach współczesnych. Zwraca się w nim uwagę na kluczową rolę, jaką edukacja prawnicza odegrała w kształtowaniu się kultury prawniczej, tym samym przesądzając o tym, w jaki sposób działa system prawny w praktyce.

W artykule wskazuje się, że australijska edukacja prawnicza może w satysfakcjonujący sposób zmierzyć się z podwójnym celem, jakim jest kształcenie praktyków prawa, zapewniając jednocześnie edukację, która ułatwia zdobywanie wiedzy i przekazywanie umiejętności prawniczych.

**Słowa kluczowe:** nauczanie prawa, Australia, edukacja prawnicza, przekazywanie umiejętności prawniczych.

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<sup>1</sup> This article is a summary of the main conclusions of David Barker's book *A History of Australian Legal Education* (Barker 2007).

## 1. INTRODUCTION

Australian law schools are very different today to those from a century ago or even longer. The modern Australian 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 in Australia and that they will face bleak employment opportunities on graduation (a prophecy which has so far proved unfounded), law schools in Australia are still able to recruit some of the brightest year 12 (eighteen year old) students and graduates from other disciplines who see a future in the legal profession and beyond.

In this short account of both the history of Australian legal education and the current state of its development, the author has based much of his sources on his book *A History of Australian Legal Education* (Barker 2017), although of course he has also drawn on his current and past experience as a law academic for the past 50 years or so, the last 32 years being spent as a legal educator and solicitor in Australia.

## 2. EARLY DEVELOPMENT: 1788 TO 1940

The early development of legal education in New South Wales and subsequently, in the remainder of Australia, was heavily dependent on the requirements for entry into the legal profession in England and Wales. This has to be seen in relation to the colony of New South Wales having been originally settled by Europeans in 1788. The colony was initially governed by military law followed by the gradual introduction of civilian law (Neal 1991). However by the beginning of the 19<sup>th</sup> century there was already a need for some form of judicial administration and consequently, the admission and recognition of lawyers to participate in this judicial process. By the middle of the century there was also a need for legal training within the Australian colonies. This gave rise to the development of the qualifications to be attained by lawyers to enable them to practise within the courts. As a consequence there was the concurrent development of early law schools in universities, which were gradually founded in each of the colonial and State capital cities.

In 1810 the only lawyers in New South Wales were three former convicts who were subsequently supplemented by English solicitors and gradually the legal profession was built up by attorneys and barristers arriving from the United Kingdom.

Qualifications for admission were originally derived from a British statute of 1729 (2 Geo II. c. 23). 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 New South Wales practitioner, subject perhaps, to an examination as to fitness” (Martin 1986, 114).

However until legislation in 1848, anyone wishing to be admitted as a barrister in New South Wales had to have been previously admitted as a barrister or advocate in Great Britain or Ireland.

A New South Wales Barristers Admission Board was established on 18 June 1848 by the *Barristers Admissions Act 1848* (Imp) which was subsequently supplemented by a Solicitors Admission Board. Two years after the establishment of the Barristers Admission Board, the University of Sydney was incorporated in 1850. However in 1855 the University adopted by-laws which established a Faculty of Law originally consisting of a Chair in English Jurisprudence. Although the University was involved in examining students in law, it was not until 1890 that legal education was finally formalised at the University with the establishment of the University of Sydney Faculty of Law with the appointment of Pitt Cobbett to its first Chair of Law and as its Foundation Dean in 1891. He was replaced as both Dean and Law Professor by John Peden who continued in this role until 1942 (Mackinolty 1991, 57).

In other States of Australia there was the gradual introduction of law teaching, so that in the State of Victoria, the University of Melbourne was established in 1851 with law being added to the teaching programme in 1857, which at the same time resulted in the formal establishment of the University of Melbourne Law Faculty. This consisted of a 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 (Waugh 2007).

In the State of Tasmania, the University of Tasmania was established in 1890, with the Faculty of Law being established soon after in 1893. Although the Law School started with a sole lecturer, Jethro Brown, appointed as a Professor in 1896, he was replaced in 1900 by a long serving Dean, Professor Dugald Gordon McDougall who served in the post until his retirement in 1932 (Davis 1993).

In the state of South Australia soon after the foundation of the University of Adelaide in 1874, action was taken in 1877 to establish a law school but this foundered until 1882 when the University recognised the need to establish and fund a law program by the University making its first appointment of a professorial chair solely devoted to teaching law (Duncan, Leonards 1973).

This meant that by the enactment of the Federation of Australia in 1901 there were only four law schools. As for the subsequent two remaining states, despite the University of Western Australia being established in 1911 Western Australia did not found a law school until 1927, again under the aegis of a long-serving law academic Professor Frank Beasley. 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 (Russell 1980).

Queensland was the remaining colony, and then state, that suffered because of the lack of a law school. It was not until 1936 that the University of Queensland established a functioning School of Law (“Heritage”). Prior to this as in many other states students could be admitted to practise law if they held law degrees awarded by other universities outside Queensland. However most took advantage of sitting exams of the Barristers’ and Solicitors’ Boards which came under the aegis of the Supreme Court of Queensland’s Admission Board.

### **3. REFLECTIONS ON THE EARLY DEVELOPMENT OF LEGAL EDUCATION IN AUSTRALIA**

An early examination of Australian legal education at the close of the 19<sup>th</sup> century a year before the proclamation of Federation (1901), 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.

It is interesting to note the fact that so few law schools had been established in Australia prior to World War II reflects that legal education was not regarded at this time as a major factor in the development of the legal profession. At this time Australian university law schools tended to have one full-time professor, with the rest of the teaching undertaken by part-time by legal practitioners. Professor David Weisbrot, law commentator, states: “Interestingly, up until the post-war period (after World War II) there was no significant and distinct class of legal academics.” This meant that the Australian law school degrees “reflected narrow vocational concerns” (Weisbrot 1990, 122).

The other main development relate to the nature of teaching. This incorporated 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 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.

#### 4. INITIAL YEARS OF EXPANSION: SECOND WAVE AUSTRALIAN LAW SCHOOLS

Linking the traditional law schools and those who were established post-war (World War II) is the Australian National University College of Law, previously the ANU Faculty of Law. Some commentators have regarded this law school as the last of the traditional law schools whilst others have regarded it as the beginning of the Second Wave Law Schools. In reality it could be regarded as the bridge between the two legal worlds. It was established in 1960 with a strong emphasis on research, with a Legal Workshop Course being introduced in 1971 to provide a six-month qualifying course for those who wished to be admitted as legal practitioners. It has continued to expand since its foundation and has built an enviable reputation in constitutional, international and environmental law, operating eight research centres including the Centre for International and Public Law and the Australian Centre Environmental Law.

During the three decades after the establishment in 1960 of the Australian National University (ANU) Faculty of Law there was an impetus to expand other Australian law Schools. Perhaps this was because 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” (Balmford 1989, 155), which was supported by various government reports on tertiary education at this time. 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 a noticeable change during this period in law teaching in Australia. This was not only 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. From 1960 onwards there was a greater focus on learning skills incorporating a more 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. This shift in the experience of law teachers led to differences in the approach to teaching law in the law schools established in this period, which became known as Second Wave law schools. These were the first moves away from what were regarded as the forms of prevailing legal education with their emphasis on mainly acquiring knowledge as compared to intellectual training

incorporating critical analysis. This meant that there was increasing focus on life-long learning. Professor Derham, the Foundation Dean of Monash University Law School emphasised this change as “bringing our black letter law into tune with the needs of the time in arduous and exacting work calling for high scholarship and developed legal skills” (Tomasic 1978, 9).

Whilst it would be a mistake to regard each of the Second Wave law schools as established with the same objectives overall, they reflected a change in legal education, both in content and method. Certainly the new law schools of this period: Monash University, University of New South Wales, Macquarie University, University of Technology Sydney and Queensland University of Technology, introduced alternative approaches to the law curriculum with an emphasis on transferable law skills, stimulating the participation of law students, where possible incorporating the Socratic form of teaching and questioning the conventional norms of legal education with continuous class assessment. A more significant development with which the Second Wave law schools should be associated has been described by Professor Michael Coper, the former Dean of the Australian National University College of Law, as ‘The emergence of the idea of legal education as the study of law as an intellectual discipline in its own right’ (Coper 2005, 392).

### **5. AN ANVALANCHE OF LAW SCHOOLS: THIRD WAVE AUSTRALIAN LAW SCHOOLS – 1989 TO 2015**

The period of Australian legal education commencing in 1989 (Coper 2005, 388, 391), and heralding what became known as the “Third Wave” law schools or “An Avalanche of Law Schools” (Barker 2017), was the precursor to 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.

One explanation for this expansion is that it was an outcome of the Dawkins reforms, which were introduced by John Dawkins, the Federal Education Minister at that time, who abolished the binary divide between the former universities and colleges of advanced education, which allowed more flexible programs for potential students. These reforms aimed to increase undergraduate student numbers as universities were given economies of scale.

When considering the advent of so many 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 had 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 partnership; increasing calls for public accountability; more demanding clients; and the influence of new information and communication technologies – but many of the changes in legal education have been driven by other factors. (Australian Law Reform Commission 2000, 117)

Later in this report there is a statement relating to “other factors” which 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 (Australian Law Reform Commission 2000, 118).

If there was one aspect of the influence which characterises the influence of the “Third Wave” law schools it would have to be the greater emphasis on innovation teaching and assessment strategies than had occurred in the earlier law schools. Much of this can be attributed to the introduction in 1988 of the Australasian Law Teaching Clinic by the Australasian Universities Law Schools Association (AULSA), now the Australasian Law Academics Association (ALAA). These Law Teaching Clinics continued to be provided on an ongoing basis until 2003, when it was decided that because of the number of teaching courses being conducted the universities there was no further need for a specialised teaching workshop of the kind organised by the Association. It was in 1992 that there was agreement on a national curriculum for any Australian law degree. It was then that a Law Admissions Consultative Committee (LACC) chaired by Justice Priestley recommended 11 broad areas of knowledge which applicants for admission as a legal practitioner 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 (Law Admissions Consultative Committee 2002, 27–32).

## **6. CHANGING PATTERNS OF LEGAL EDUCATION: TEACHING AND LEARNING BEYOND THE LAW SCHOOLS**

It is often overlooked that an extensive part of Australian legal education is delivered outside the law schools. This has been partly due to a conscious decision to exclude law schools from involvement and partly because most law schools

consider that providing Practical Legal Training (PLT) and Continuing Legal Education (CLE) is not part of their remit as legal educators. However it should be noted that some law schools do provide PLT and/or CLE. The first such centre for PLT was the Leo Cussen Institute (subsequently renamed the Leo Cussen Centre for Law) which was established in 1972 in the centre of Melbourne, Victoria. This was followed by the founding of the College of Law in St. Leonards, Sydney, New South Wales in 1977. The College of Law is now the largest provider of PLT in Australia with a presence in most States and Territories whilst the Leo Cussen Centre for Law remains the principal provider in the State of Victoria. CLE was regarded as the least essential of the three stages of legal education and it was not until 1987 that New South Wales was the first State to make it mandatory for all solicitors to undertake a minimum amount of CLE. That New South Wales was the first jurisdiction to implement such a CLE Scheme was probably because it was also the first State or 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. Since then it is a requirement in most States and Territories, whilst similar requirements are now imposed on barrister members of various bar associations throughout Australia. Courses of instruction for CLE are provided by a cross-section of legal educators including the Leo Cussen Centre for Law, the College of Law and many of the local law societies and bar associations.

## 7. AUSTRALIAN LEGAL EDUCATION TODAY: THE EVERLASTING SAGA

In culminating this short account tracing the evolution of Australian legal education from the time of European settlement in 1788 until the present day, it has to be recognised that there is no easy resolution of the paradox created by the dichotomy between the studying of law as an intellectual pursuit as compared to training for professional practice.

These challenges have been reflected in the following comment by Mary Keyes and Richard Johnstone, law academics, who have argued that the 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 research, so that legal education aims for more than preparing students for work in legal practice. (Keyes, Johnstone 2004, 537)

Professor Michael Coper, formerly Dean of the ANU College of Law 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 ideal of legal education as training for professional practice. (Coper 2005, 392)



Yet he believes that “the two conceptions are profoundly consistent,” 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. (Coper 2005, 392)

A study of the history of Australian legal education reveals that it has shown a remarkable resilience in both retaining and enhancing its status as a major university discipline. It has achieved this whilst also being able to provide training for students to become legal practitioners, whilst at the same time ensuring that they receive a liberal education incorporating the development of intellectual and transferable skills.

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