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## ***LEGAL RECORDS IN THE COMMONWEALTH***

**William Twining and Emma Varnden Quick, eds**

**Dartmouth, Aldershot 1994**

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**I**t has become increasingly apparent that the continued existence of the primary sources for nineteenth- and twentieth-century legal history cannot be taken for granted. This material is now not only threatened by traditional enemies, both environmental (damp, fire, rodents) and human (apathy, ignorance, lack of imagination). Potent new dangers have emerged, including the aggressive cost-cutting managerialism which accompanies a heightened concern for short-run economic efficiency and rising inner-city rents. There is a seemingly ever-growing document mountain generated by the legal system, attributable at least in part to electronic information technology. At the same time, burgeoning interest in relatively recent (as distinct from medieval or early modern) law and legal institutions has encouraged heightened appreciation of the intrinsic value of such material throughout the common-law world. Various attempts have been made to tackle the problems of defining, identifying, and managing legal records, including the selective handlists of South Australian legal records produced in the late 1980s by the Australian Legal Records Inventory, and (at the other end of the spectrum) the major exercise in applied social science which underlies this absorbing, important, and timely book.

Contrary to popular - or perhaps journalistic - opinion, especially in these far-flung outposts, the Commonwealth (that is, the British Empire that was) still has some life left in it. The Commonwealth Legal Records Project, of which this book is one offshoot, was the brainchild of William Twining, Professor of Jurisprudence at University College London, and Executive Chairman (sic) of the Commonwealth Legal Education Association. Backed by a three-year major grant from the Leverhulme Foundation, and the support of the Commonwealth Foundation, the Ghanaian Government, the Association of Commonwealth Archivists and

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Record Managers and the University of London's Institute for Commonwealth Studies, Twining recruited a Canadian legal historian, together with archivists and legal academics from England, Ghana and Kenya. Their (deceptively modest) brief was to create "a point of departure for those who create, manage, appraise, preserve or use legal records".<sup>1</sup>

But what exactly are legal records? And, however defined, which legal records should be preserved, once the immediate occasion of their creation is past? These two difficult questions are explored in Twining's avowedly theoretical but by no means inaccessible or excessively abstract introductory chapter. Here Karl Llewellyn's notion of 'law-jobs' is invoked to expand the traditional narrow definition of legal records beyond those created by courts (or even courts of record). Yet it is simultaneously insisted that, generally speaking, records created by legal institutions, whether courts, tribunals, law firms, land registries, law schools, legal publishers, legal departments of corporations, trade unions, other public and private organisations, and so on, should be handled for archival purposes no differently to any other class of documents. In practice, Twining is prepared to settle for a pragmatic and less than wholly comprehensive approach, recognising the impossibility of keeping every document ever created by every legal or para-legal agency: "Seeing things in context does not preclude selection and focus".<sup>2</sup>

This splendidly incisive opening discussion is followed by a series of country case studies. The first, also by Twining, outlines how "a general study of legal records in a given country, jurisdiction, or area" might be undertaken, including possible obstacles and pitfalls.<sup>3</sup> The author explains that he has set his "hypothetical case study in a mythical jurisdiction with a view to making the presentation more concrete and provocative than would be possible with a real country".<sup>4</sup> The next chapter, the longest in the book, is contributed by three members of the team of archivists and lawyers who in the early 1990s conducted a detailed examination of current arrangements for the disposition of records generated by the full range of courts and tribunals based in Accra. Their brief also included the

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1 Roper, "Preface" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* (Dartmouth, Aldershot 1994) p ix.

2 Twining, "Legal Records in the Commonwealth: A Theoretical Perspective" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* p24.

3 Twining, "Legal Records in Xanadu: A Case Study" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* p39.

4 At p65 fn1.

Ministry of Justice, the Ghana Law Reform Commission, the Council for Law Reporting, various 'parastatal' legal institutions, three typical private law firms, and the records (relatively small in volume) generated by traditional, customary or Chiefs' Courts. The Director of the Kenyan National Archives then provides a cursory policy overview, which concludes with the perhaps unsurprising observation that "the greatest obstacle to the effective management of legal records in Kenya is the attitude of magistrates".<sup>5</sup>

Recent experience in England and Wales, however, suggests that it is the attitude of the central authorities which now poses the most serious threat, as the question has increasingly shifted from 'what can we allow to be destroyed?' to 'what needs to be kept?' How this situation came about, and its consequences for potential users of legal records, are well explained by Claire Cowling, whose broad survey is complemented by a paper from the Lord Chancellor's Departmental Record Officer, providing a cogent statement of the official record managers' perspective. Two other thematic papers complete the volume: Neil Rickman's indicates how widely unpublished data is now called upon by researchers focussing on the real-life consequences of legal rules, while Louis Knafla offers a useful account of recent changes in legal historiography and their consequences for archival policy.<sup>6</sup> Recognising the impracticality of the historian's natural desire to keep everything, Knafla argues for a balanced and coherent legal "documentation strategy",<sup>7</sup> developed through joint discussion between producers, custodians and users, as happened recently in the province of Quebec, where storage costs have been cut by two-thirds, and the savings used to improve the organisation and accessibility of documents.

Although Australia does not feature prominently in this volume, an appendix reproduces the 1990 Australian Archives Records Disposal Authority for the Human Rights and Equal Opportunities Commission, alongside nearly sixty pages of extracts illustrating current aspects of international practice in this area. It would be nice to think that we might make a slightly better showing in the second edition of a work which

5 Musembi, "The Management of Legal Records: The Kenyan Experience" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* p180.

6 Rickman, "The Use of Unpublished Data in Socio-Legal Research" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* pp197-219; Knafla, "The Perspective of the Legal Historian: Legal and Socio-Legal Research" in Twining & Varnden Quick (eds), *Legal Records in the Commonwealth* pp220-250.

7 At pp240-242.

combines intellectual distinction with practical utility, and deserves a wide audience.