

# POST–WORLD WAR II ICONS OF AUSTRALIAN LEGAL EDUCATION: PROFESSORS DAVID DERHAM, HAL WOOTTEN, DENNIS PEARCE AND TOM CAIN

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## ABSTRACT

This paper examines the reluctance of those involved in Australian legal scholarship to acknowledge the effect of particular law academic luminaries on the development of Australian legal education. Whilst there has always been a willingness on the part of the legal community to recognise the influence of Chief Justices such as Samuel Griffith, Owen Dixon, Anthony Mason and Murray Gleeson on the development of Australian jurisprudence, there has never been the same enthusiasm to embrace similar leaders within Australian legal education. This is in contrast to that of English legal education, which has not suffered from a similar reluctance; there has been no holding back on the part of English legal historians to acknowledge the part played by Sir William Blackstone, Sir Frederic Maitland and Sir Frederick Pollock in the first phase of English legal education and Sir John Baker, Professor William Twining and Professor Michael Zander in its modern phase.

In endeavouring to correct this impression, this paper attempts to discover those who have exercised a major influence on change and innovation within Australian legal education following on from World War II. In its selection of Professor Sir David Derham, acknowledged as the prime influence behind the legal reforms advocated by the Martin Report and his subsequent appointment as the Foundation Dean of the Monash University Law Faculty; Professor Hal Wootten, the pioneering Dean of the University of New South Wales Law Faculty; Professor Dennis Pearce, both Dean of The Australian National University Law Faculty and the instigator of the influential Pearce Report on modern legal education; and Professor Tom Cain, Head of the Queensland University of Technology Law School, a leader in innovation both of full-time and part-time legal education, this paper recognises their long-standing influence on modern Australian legal education.

## I INTRODUCTION

Within the discussion and writings of Australian legal historians, there has always been a reluctance to highlight the effect of particular academic luminaries on the development of Australian legal education. Whilst there has always been a willingness to acknowledge the influence of such Chief Justices as Griffith, Dixon, Mason and Gleeson on the development of Australian jurisprudence, there has never been the same enthusiasm to embrace similar leaders within Australian legal education. The English have never suffered from a similar reluctance; there has been no holding back on the part of English legal historians to acknowledge the part played by Sir William Blackstone, Sir Frederic Maitland and Sir Frederick Pollock in the first phase of English legal education, and Sir John Baker, Professor William Twining, Professor Michael Zander and even Richard Susskind<sup>1</sup> in its modern phase.

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1 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017).

Having endeavoured to correct this approach with examining the earlier role played by Professors Sir John Peden, Sir William Moore, Dugald McDougall and Frank Beasley,<sup>2</sup> I was disappointed at the lack of enthusiasm on the part of many at the 2017 Australasian Law Teachers Association Conference presentation and readers of my subsequent JALTA paper<sup>3</sup> on the topic to embrace the major influence that these earlier Australian law academics had, in my view, on the development of Australian legal education.

Nevertheless, it is important to attempt to discover those who have exercised a major influence on change and innovation within Australian legal education following on from World War II. This is to acknowledge that ‘in the wider sphere of legal education this includes those scholars whose writing shapes the curriculum and can thus influence legal thinking, including judicial decision-making, for generations to come’.<sup>4</sup> It would be acknowledged that because of its profound impact on Australia, this conflict gave rise to an expectation of change in the country’s major institutions. Whilst the immediate post-war years could be viewed as a period of reflection in the reinstatement of the traditions and values that permeated legal education prior to World War II, there were changes in attitude of those involved in legal education, particularly by returned service personnel, whether law students or academic law staff.

It might be that a change of approach was first mooted when the inaugural meeting took place of what was to become the Australian Universities Law Schools Association (subsequently renamed as the Australasian Law Teachers Association). Professor Paton, who was to become the first President of the Association, expressed its aims by stating with a sense of irony: ‘At a preliminary meeting, the world could not be remoulded, but some energetic preparatory work in the circulation of documents enabled the broad issues to be discussed.’<sup>5</sup> It has to be remembered that at this time, other than the Dean or a long-standing professor, most of the law school staff were employed part-time. It is estimated that there were only ‘from around 15 full-time teachers Australia-wide in the immediate post-World War II period’.<sup>6</sup>

## II PROFESSOR (LATER SIR) DAVID DERHAM

The first of those who might be regarded as one of the leading luminaries of modern Australian legal education is Professor David Derham. Professor Derham could be judged to have had a major influence within tertiary education in more than one way. Not only did he become Vice-Chancellor of the University of Melbourne, a position he held from 1968 to 1982, he is also chiefly remembered for the crucial role he played as Foundation Dean in the establishment of the Monash University Faculty of Law in 1963. In addition, there is an undisputed claim in John Waugh’s history of the Melbourne Law School that it was Professor Derham who was solely responsible for the drafting of the Legal Education chapter<sup>7</sup> in Volume 2 of the Martin Report, published by the Committee on the Future of Tertiary Education in Australia. The Martin Report is important in that it reviewed the spectrum of legal education that existed at the time of the Report. This incorporated the roles of faculties of law, admission to practice, practical training for lawyers, university law syllabuses and teaching, research and postgraduate work,

2 David Barker, *A History of Australian Legal Education* (Federation Press, 2016).

3 David Barker, ‘Reflections on Four Leading Early Australian Law Academics’ (2017) 10 *Journal of the Australasian Law Teachers Association* 1.

4 Email from anonymous referee to JALTA Editor, 12 October 2018.

5 George Paton, ‘Australian Universities Law School Association’ (1946) 20 *Australian Law Journal* 99.

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

7 John Waugh, *First Principles: the Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 157.

the optimum size of law schools and a comparison with American legal education.<sup>8</sup> There is also information about the qualifications of those admitted to practice in each state in 1962,<sup>9</sup> and about the total number of students enrolled in university law schools in 1954–63.<sup>10</sup>

What marks Professor Derham out from his peers at the time of the Martin Report was that he was willing to face up to the challenge that was growing with respect to legal education at this time as to whether it should be mainly concerned with the development of the intellectual demands of a university education and/or simultaneously satisfy professional demands for admission to practice.<sup>11</sup> The Report also endeavoured to deal with another ongoing problem concerning the teaching of law at tertiary level in Australia: that of the chronic underfunding of legal education:

In comparison with education provided for other recognised professions, the lawyer's education has never been expensive. In the more populous states little or no support from public moneys had been required for it. This is not the matter for congratulation that is sometimes it is thought to be. It is much more a measure of past inadequacies in the teaching and research facilities provided in comparison with the provision made for other comparable disciplines.<sup>12</sup>

One of the most impressive conclusions that may be gained from the Martin Report and the injection of Professor Derham's influence into the chapter on legal education is that it regarded itself as having a clear mandate to recommend the modernising of legal education. It is often forgotten with the passing of time in this era that in its criticisms of undergraduate teaching, the Report publicised the phrase, subsequently much quoted, that 'Law, it has been said, can be taught under a gum tree, and for much of Australia's history it might as well have been so taught'.<sup>13</sup> It went on to declare, even more strongly, its concern that teaching law be regarded merely as the dissemination of information in the form of legal principles that could be memorised for examination, with teaching methods reduced to the expository lecture and the dogmatic textbook. It then went even further, stating that if this was in fact the situation then 'since the invention of the printing press, it could be argued that only the textbook would be required'.<sup>14</sup>

In recognising the challenges faced by the conflicting demands of the legal profession in 'favour of apprenticeship and part-time training for lawyers',<sup>15</sup> the Committee on the Future of Tertiary Education in Australia stated its belief 'that the likely demands of the future are such that it is very desirable that lawyers seeking admission to independent practice should, wherever possible, have an education founded upon full-time studies at university level'.<sup>16</sup>

This statement was made on the basis that:

[Students] should have had at least three years of university education designed not so much as to train them as legal practitioners as to provide them with background intellectual training necessary for leaders in the highly complex society of the future.<sup>17</sup>

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8 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission* (the Martin Report) (Government Printer, 1964) 49–50.

9 Ibid 71–74.

10 Ibid 75–76.

11 Ibid 53.

12 Ibid 49.

13 Ibid 57.

14 Ibid.

15 Ibid 49.

16 Ibid.

17 Ibid.

It did, however, add the caveat that ‘the need for basic education and organized intellectual training must not be subordinated to the immediate practical and detailed requirements of the existing legal system’.<sup>18</sup>

It was in 1949 that he became a lecturer in Constitutional Law at the University of Melbourne, having previously been a tutor of law at Queen’s College. In 1951, he succeeded Sir George Paton as the University’s Professor of Jurisprudence, a post he held until 1964.<sup>19</sup>

The energy and innovation that Professor Derham displayed in composing the legal element of the Martin Report was replicated in his approach to establishing the law school at Monash University. The University’s Professorial Board had recommended in 1962: ‘That a Dean of the Faculty of Law be appointed as soon as possible, with the first duty of making recommendations to the Council upon the best way establishing a Faculty of Law.’<sup>20</sup> It should have been no surprise that in seeking to select a dean of high standing and eminence, Monash University appointed Professor Derham. Appointed to this new position in October 1963, Professor Derham was required to remain at the Melbourne Law Faculty until 1964, but this did not prevent him immediately developing a curriculum for the new Monash Law School. In his development of the new Monash law program, the focus was on transferable legal skills, incorporating small group teaching. The innovative first-year program led to a three-year degree titled BA (Law), which subsequently became a Bachelor of Jurisprudence. First-year students could also proceed to a Bachelor of Laws (LLB) (Pass degree), taken over four years, or an LLB (Honours) of five years. This meant that Monash students could be awarded a combined BA/LLB on the basis of four years’ study. The philosophy underlining this proposed law program was contained in a statement by Professor Derham: ‘All lawyers should be pounded with advanced law and educated.’<sup>21</sup>

Professor Derham characterised the approach and qualities of other foundation deans of this era in that he had a highly individualistic and innovative approach to teaching law, which was far removed from that of traditional law schools. The establishment of the new library at Monash was an excellent example of this approach. He sought the approval of the Monash Professorial Board for the appointment of Professor Frank Beasley as law library consultant, who was retiring from a Chair of Law that he had held at the University of Western Australia since 1927. Professor Derham informed the Board that not only did Professor Beasley have contacts with ‘Every law library in the world’, but also that ‘Few men knew more than [him] about the sources and techniques of building up a collection of law books’.<sup>22</sup> The outcome was that the Board approved the appointment of Professor Beasley to a special lectureship involving the law library.

To stock this library, Professor Derham arranged the acquisition of law libraries from two former judges of the Supreme Court of Victoria: Sir Charles Gavan Duffy, deceased, and Sir Charles Lowe, who had retired. By the end of its first year in 1964, Monash Law School possessed a substantial library of 10,000 volumes, which increased to 138,000 by 1989.<sup>23</sup>

Another aspect of Professor Derham’s approach to the changing circumstances of Monash as compared to Melbourne, the other original law school in Victoria, was the problem faced by the Law School in attracting staff and students because of its relative remoteness — 24 kilometres by road from the centre of Melbourne. This was exacerbated by the need to involve legal

18 Ibid.

19 ‘Derham, David P. (David Plumley) (1920–)’ (2009) *Trove* <<https://trove.nla.gov.au/people/807429?q=807429&c=people>> (accessed 31 October 2018).

20 Peter Bamford, ‘The Foundation of Monash Law School’ (1989) 15 *Monash University Law Review* 152.

21 Ibid 167.

22 Ibid.

23 Ibid 168.

practitioners who obviously were based near the courts, and students who needed to develop connections with the legal profession mainly situated in the central business district. Professor Derham highlighted his approach to solving the ‘Topography’ problem in his ‘Plan for a New Law School’. His remedy was:

Full-time academic members of the profession will have to be responsible for all courses conducted at Monash, and that new methods for meeting the need for close contact with actual practice will have to be devised.<sup>24</sup>

The manner in which Professor Derham was able to deal with such problems characterised him as one of the doyens of new Australian legal educationalists, an approach that could be summed up in his introduction to the first edition of *In Gremio Legis* (‘In the bosom of the Law’), the new Monash student law society publication:

The Monash Law School began in a tremendous hurry. Students were enrolled at the beginning of 1964 before even the natures of their degree course were fixed for the future. They have no place of their own in the University. They still face years of ‘camping’ in other faculties’ buildings before proper facilities can be provided for them. In such circumstances it has been very pleasing indeed to see the growth of a vigorous and ambitious law students’ society constituted by the energy and interest of the students themselves.<sup>25</sup>

The optimism shown by Derham for the future of Monash Law School was, as its subsequent history indicates, well founded.<sup>26</sup> It is a prime example of how the development of the character and reputation of a law school depends on the credentials and enthusiasm of its foundation law Dean.

It was in 1968 that Derham again succeeded Paton, this time as Vice-Chancellor of University of Melbourne — a post he held until he retired in 1982. During his time as Vice-Chancellor, he undertook a reform of the University’s administrative structure and had to deal with outbursts of student activism.<sup>27</sup> In addition, he was Deputy Chairman of the Australian Vice-Chancellors’ Committee 1972–74, becoming Chairman 1975–76.

His contributions to legal scholarship included as editor of G W Paton’s *A Textbook of Jurisprudence* and then as joint author, with F K Maher and P L Waller, of an *An Introduction to Law and Cases and Materials on Legal Processes*.<sup>28</sup>

In recognition of his contribution to the administration of tertiary education, and legal education in particular, he was appointed as a CMG in 1968 and as a KBE in 1977.<sup>29</sup>

### III PROFESSOR J H (HAL) WOOTTEN QC

There is no doubt that Professor Wootten’s major contribution to Australian legal education will always be regarded as his tenure as Foundation Dean and Professor of the University of New South Wales (UNSW) Law School. The reason for the establishment of a second law school in New South Wales was similar to that which had arisen in Victoria with regard to the founding

24 Ibid 170.

25 David Derham, ‘Introduction’ (1964) 1(1) *In Gremio Legis*.

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

27 Cecily Close, ‘Derham, Sir David Plumley (1920–1985)’ in *Australian Dictionary of Biography* (Melbourne University Press, 2007) <<http://adb.anu.edu.au/biography/derham-sir-david-plumley-12414/text22317>> (accessed 15 October 2018).

28 Ibid.

29 Ibid.

of the Monash Law School; in this case, it was the University of Sydney Law School not having the capacity to accommodate all qualified students for entrance to the law school.

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

Interestingly, one of the persons consulted was Professor David Derham, to whom Sir Philip explained that UNSW wished to appoint as the Foundation UNSW Dean of Law a 'senior member of the profession who could spend some time planning the course and the Faculty'.<sup>30</sup>

The selection process also involved wide consultation with all the holders of leading judicial positions in New South Wales. The consensus view of those consulted was that the most appropriate person for the position was J H (Hal) Wootten QC. However, it was thought that he would not accept the position because of his current financial needs with a family of four children to educate. This supposition was reinforced by the fact that in 1969 it was common knowledge that he had already turned down two offers of a judicial position.

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

It could be argued that Hal Wootten's appointment was an inspired choice of a Dean to lead a new Australian law school in the post-World War II years. Because of his background as a prominent member of the legal profession, he was most likely able to approach and make demands of the University in ways that would not have been acceptable from a conventional law academic. First, he resisted demands for the UNSW Law School to commence operating in 1970, which had been the expectation of most of those who had been involved with its formation. Second, he persuaded the Vice-Chancellor to permit him to use the year of 1970 to plan for the new Law School. These arrangements incorporated travel throughout Australia visiting other law schools and obtaining ideas on the best ways to operate a modern law school. It also offered him the chance to seek out law academics willing to accept the challenges of working in a law school that incorporated new concepts relating to legal education, and to put these into operation. The UNSW Law School's records indicate Wootten using the year's delay as a chance to appoint academic staff who supported his vision, the new Dean selecting his original academic staff from an eclectic variety of backgrounds. Wootten also extended his study tour to law schools in England, Canada and the United States, besides attending the Annual Conference of the Association of American Law Schools at San Francisco in January 1970.

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

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30 Marion Dixon, *Thirty Up: the Story of the UNSW Law School 1972–2001* (University of New South Wales, 2001) 2.

31 Ibid.

32 Ibid 3.

33 Ibid.

collection. In its first five years, the collection reached 50,000 volumes, and it would now be regarded as among the best law libraries in Australia.<sup>34</sup>

The influence of Monash Law School was seen not only in the development of the law library collection, but also in the original curriculum for the law program: Wootten devised a syllabus that envisaged a five-year combined degree in either arts/law or commerce/law. The program was divided into two semesters each year, and included among its first-year subjects legal research and writing, and incorporated an interactive approach to the teaching of all law subjects.<sup>35</sup>

Among the other innovations introduced by Wootten in the early days of the UNSW Law School was ‘discussion’;<sup>36</sup> the Dean believed this could play an important part in stimulating participation of law students, aided by the insistence on small classes. One of the foundation law academics, George Curt Garbesi, who had been recruited from Loyola University, Los Angeles, interpreted this approach as incorporating the Socratic method of law teaching, whereby the teacher involved him or herself in a dialogue with the student. In this development of an interactive method of teaching, Wootten sought the advice of Fred Katz, the Head of the UNSW Teaching and Education Research Centre (TERC).<sup>37</sup> This collaboration led to the videotaping of some of the early classes to assist staff in developing their teaching technique. At this stage of the school’s development, there was a radical atmosphere prevalent among early staff members; Garth Netheim, another of the foundation law academics, recalls some colleagues even posing the question: ‘What are classes for?’<sup>38</sup>

This approach of questioning the conventional norms of legal education is also illustrated by UNSW Law School’s introduction of continuous class assessment. A study by TERC indicated there was a wide discrepancy as to how this assessment scheme would be administered by participating academics. Nevertheless, a majority of the students responding to a survey by TERC opted for the scheme to continue.<sup>39</sup>

As the UNSW Law School enrolled more law teaching staff, differences inevitably began to arise regarding the original methods that had been employed there. As the Dean, Wootten appears to have been unaffected by these criticisms, regarding them as representing vitality within the UNSW Law School:

It is due less to change in the law than to the continual quest of active scholars and teachers to find new meanings in their studies, new ways of looking at them, and fresh ways of presenting them. Show me a law school that does not have a bristling Curriculum. Review Committee and I won’t bother to look at it.<sup>40</sup>

This relaxed attitude of the Dean towards this type of academic controversy has carried over into the current UNSW Law School. It still manifests itself in the outcome of research that indicates UNSW law students are still differently motivated than those joining more conventional law schools. The results of a 2015 TERC survey of 219 new undergraduate students indicated that at least half the students had a state high school background and that there were very few who had parents with either a tertiary education or background as lawyers. The survey also revealed that the motivating factor for most students enrolling at UNSW was their interest in law and legal work, with little emphasis on the financial rewards they might

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34 Ibid 10.

35 Ibid 14.

36 Ibid 15.

37 Ibid 17.

38 Ibid.

39 Ibid.

40 Ibid 20.

enjoy as qualified lawyers. Another factor had been the opportunity to study the combined degree course in commerce and law, a program unique at that time to UNSW.<sup>41</sup>

In the 1970s, the inclusive nature and informality of the teaching at the UNSW Law School combined to create an atmosphere of social consciousness. This contributed to the Law School quickly gaining a reputation for the promotion of social justice, which manifested itself in the establishment of numerous organisations committed to social change, such as a Prisoners Action Group, New South Wales Society of Labour Lawyers and the Feminist Legal Action Group.<sup>42</sup> It was this sense of social consciousness that could be regarded as the visionary period of enlightenment for the UNSW Law School, signalled as being brought to an end when Hal Wootten resigned as Dean on 28 June 1973. Two months later, he was appointed as a justice of the Supreme Court of New South Wales.<sup>43</sup>

#### IV PROFESSOR DENNIS PEARCE AO

There are relatively few law academics who are instantly recognisable because of their association with a report also bearing their name. Within Australian legal education only two names spring to mind: the Priestley Eleven, the subjects originally nominated by the then Consultative Committee of State and Territorial Authorities, first headed by Justice Priestley and who therefore gave his name to the list of compulsory subject areas for academic legal study that individuals have to complete in order to fulfil admission requirements;<sup>44</sup> and the Pearce Report. The latter, although it was released as long ago as March 1987, still retains a major influence on the development of Australian legal education. The Pearce Report was commissioned in 1985 and submitted in 1987. The members of the Committee were Professor Dennis Pearce, Professor of Law, The Australian National University (ANU) (Convenor); Professor Enid Campbell; Sir Isaac Isaacs, Professor of Law, Monash University; and Professor Don Harding, Professor of Law at UNSW.

As the Convenor of the Report, Professor Dennis Pearce reminds anyone who would read or quote from the Report<sup>45</sup> that it was part of a general ongoing review initiated by the Commonwealth Tertiary Education Commission (CTEC) to ensure that there was ‘a program of thorough and authoritative assessments of the work of higher education institutions measured against objectives which are acceptable in academic and social terms’.<sup>46</sup>

Additionally, the background to the review states:

It is intended that each discipline assessment will be undertaken by a small committee of people pre-eminent in their fields, who will act independently of the Commission and furnish advice to the Commission.<sup>47</sup>

The Pearce Report consisted of four volumes including 48 recommendations to the CTEC and 64 principal suggestions to law schools. Through its four volumes, it focuses in the first on the aims and issue of law schools and legal education. Volume 2 is concerned with other aspect of law schools such as research and publications, service to the community and resources. Volume

41 Ibid 23.

42 Ibid 33.

43 Ibid 39.

44 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Justice System*, Report No 89, 17 February 2000, [2.21].

45 Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (the Pearce Report) (Australian Government Publishing Service, 1987).

46 Ibid li.

47 Ibid.

3 examined practical matters with which law schools were concerned such as administration, law libraries and practical legal training, while Volume 4 was devoted to a survey of recent Australian law graduates.

Whilst over the succeeding years since its publication there have been various evaluations of the Pearce Report, most commentators would agree with the statement that it was ‘the most comprehensive and significant investigation undertaken of Australian legal education’.<sup>48</sup> This statement is supported by David Weisbrot, who commented: ‘the Pearce Report is the first important review of, and comprehensive compilation of data on, Australian legal education, and will be point of departure for all debate on legal education for some time.’<sup>49</sup>

In a document as far-reaching as the Pearce Report, it is necessary to be selective in considering those matters that are directly relevant to the development of legal education in Australia. In this respect, most matters of primary relevance to this topic in 1987 are contained in Volume 1 of the Report. Its contents had profound effect on those involved in teaching law in the tertiary sector, apart from being of major interest to the general legal community. The Pearce Report was willing to explore the challenges that had been raised at the time, and subsequently with regard to best practice in relation to teaching law, by stating that:

It sometimes seems to be suggested that there only two methods of teaching adopted in Australian law schools and that they are mutually exclusive and mutually opposed to one another. They are labelled the expository or straight lecture method and the case, discussion or Socratic method.<sup>50</sup>

The Report goes on to describe these forms of teaching objectively and in some detail, although the Pearce Committee’s preference was clearly against the expository method and in favour of casebook, discussion or Socratic teaching, or its later development into the problem method. However, it has never been recognised in any of the subsequent reports or papers that the Pearce Report was remarkably open-minded as to the teaching style adopted in Australian law schools. Although it might not be the conventional approach to current teaching methods, the statement in the Report that ‘teachers have tended to use the method with which they feel most comfortable and which they think is best suited to the subject matter with which they are dealing’<sup>51</sup> recognises the realities of the teaching situation evident in Australian law schools at that time. This view was supported by the subsequent recognition that:

Not all teachers are able to use the same techniques effectively; not all material is best dealt with in the same way; but above all we think there is considerable advantage in students being exposed to a variety of teaching methods.<sup>52</sup>

Importantly, these statements were subject to the caveat about what the Report might ‘have to say later about a review of individual teacher’s performance and resources available’.<sup>53</sup>

Volume 2 is principally concerned with research and publications. The Committee was faced with a difficulty in drawing a distinction ‘between *legal research* carried out by lawyers in assisting clients, and academic research in law’.<sup>54</sup> This required:

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48 Eugene Clark, ‘Australian Legal Education A Decade after the Pearce Report’ (1997) 8 *Legal Education Review* 214.

49 Ibid.

50 Pearce, Campbell and Harding, above n 45, 155.

51 Ibid 156.

52 Ibid 157.

53 Ibid.

54 Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Centre for Study of Higher Education, University of Melbourne, 1994) 181.

Distinguishing between *doctrinal research* or legal scholarship which started from law as a given field of knowledge (law as the subject), from *non-doctrinal research* which has its starting point outside law and looked at the social, economic, political or cultural implications of legal practices (law as the object).<sup>55</sup>

The difficulties at this time in developing a wider approach to legal research were emphasised in an article by Michael Chesterman and David Weisbrot, two leading law academics at UNSW, who stated that:

Both the recent Report on Australian law schools and the submission of the law school deans to the writers of that Report refer to the predominance of *doctrinal, black-letter* research in Australian law schools, and the submission contains a plea for more theoretical and reform-oriented research.<sup>56</sup>

The recommendations of the Pearce Report were not always successful in their outcomes on future developments in Australian legal education, as evidenced by two principal recommendations in Volume 3 of the Report. These relate to the problems that gave rise to a crisis in governance of Macquarie Law School and a statement concerning the need for any future law schools within Australia.

The problems involving the Macquarie Law School are the most memorable. As reported in Volume 3:

The disputes that have racked Macquarie Law School for some years now are of public notoriety. They have been pursued not only within the law school but also in the University and the media.<sup>57</sup>

Despite the unpromising conclusion of the Pearce Report that the Macquarie Law School should be closed, phased out or divided due to the irreconcilable differences, the Macquarie Law School did survive. However, it should be noted that an alternative recommendation that some of the law staff be transferred to another school within the university, which was originally rejected by a Macquarie Review Committee appointed in 1978, was eventually accepted as a remedy and introduced in 2000.

The other recommendation for which the Pearce Committee is still remembered is its statement that it did ‘not think that there will be need for a new law school, except perhaps in Queensland’.<sup>58</sup> However, very soon after the publication of the Report, there was (in this author’s words) ‘An Avalanche of Law Schools’.<sup>59</sup> This marked an increase in an additional 16 law schools being established between 1989 and 1997, with a further 10 in the first 15 years of the 21st century.

Where does this leave the Pearce Report, and obviously the influence of Dennis Pearce, when considering its and his place in the history of Australian legal education? No doubt at its time it was regarded as a major influence throughout Australian legal education. This was not only because it incorporated a comprehensive survey of legal education in 1987, but also because of its wide-ranging review of Australian law schools and its analysis of the many aspects of teaching and learning practised by them at this time. Many commentators have emphasised the

55 Ibid.

56 Michael Chesterman and David Weisbrot, ‘Legal Scholarship in Australia’ (1987) 50 *Modern Law Review* 709, 723.

57 Pearce, Campbell and Harding, above n 45, 944.

58 Ibid 988.

59 David Barker, ‘An Avalanche of Law Schools: 1989 to 2013’ (Paper presented at the Australasian Law Teachers Association Conference, Legal History Interest Group, Canberra, 1 October 2013) 153.

intangible benefits that flowed from the Pearce Report to legal education generally, encouraging greater cooperation between the law schools, especially through the then Committee (now Council) of Australian Law Deans, leading to the development of law as an academic discipline.

It is interesting to read Professor Pearce's own reflections on the long-term outcomes of the Report, which he recently expressed in a paper entitled 'The Past is a Different Country', presented at the Australian Academy of Law's Conference 'The Future of Australian Legal Education', and which was subsequently published in an edited book under the same title.<sup>60</sup> In this he acknowledges that there were two major developments that the Committee did not foresee and which have had a significant impact on legal education in Australia.<sup>61</sup>

The first is what he describes as the Canute-ish recommendation that no further law schools be established, and which he now recognises as wrong in that competition between law schools and choice for students is desirable.<sup>62</sup>

The other was a major development that could not have been anticipated at the time of a report written in the mid-1980s: the advent of the internet. This outcome, which he describes as 'having an impact on our recommendations for the future of law schools has been dramatic', meant that the ability to access material online not only affected the basis and form of law libraries, but also had a significant impact on courses offered and teaching methods.<sup>63</sup>

Nevertheless, if there had to be a concluding statement as to the ongoing effectiveness of the Pearce Report approximately three decades after it was published, then this could be left to the Report itself, which stated:

the committee has been most anxious in the Report to avoid any suggestion that there is one form of legal education with which all schools must comply. There is no agreement among commentators on the form of legal education and it has in fact changed markedly over the years. Nonetheless the Committee thinks that there are some minimum levels that have to be met if the degree awarded is to be recognised as a professional law degree and it has indicated here it thinks law schools fall short of this standard.

It would be remiss to consider Professor Pearce's influence on Australian legal education solely in his role as the convenor of the Pearce Report. He has been and does remain a very active legal academic at the ANU College of Law where has served as Dean for two terms — the first from 1982 to 1984 and the second from 1992 to 1993.<sup>64</sup> Among other appointments he has held have been Commonwealth Ombudsman from 1988 to 1990, and Chair of the Australian Press Council from 1997 to 2000.<sup>65</sup> He is also recognised for his expertise in Administrative Law and Statutory Interpretation in Australia, being the author of the leading text in the former and co-author in the latter subject. Although now an Emeritus Professor at ANU, in 2017 he was named the Regulatory Practice Lawyer of the year for Canberra, while in previous years he received the Canberra Lawyer of the Year award for Public Law.<sup>66</sup>

60 Kevin Lindgren, Françoise Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Lawbook Co., 2018) 49.

61 Ibid 53.

62 Ibid.

63 Ibid 53–54.

64 Australian National University, *Our People: ANU College of Law, Dennis Pearce* (19 February 2015) ANU College of Law <<http://law.anu.edu.au/staff/dennis-pearce.ao>> (accessed 31 October 2018).

65 Lindgren, Kunc and Coper above n 60, xv.

66 'ANU Law professor and alumni named best lawyers in their fields' (11 April 2017) ANU College of Law <<https://law.anu.edu.au/news-and-events/news/anu-law-professor-and-alumni-named-best-lawyers-their-fields>> (accessed 19 October 2018).

## V PROFESSOR TOM CAIN

Of the four law academics considered in this review Tom Cain is likely the least well-known to the general Australian legal community. This does not mean he was the least influential of them in affecting Australian legal education. He did, however, have an eclectic background before his final appointment as the Foundation Head of what was originally the Queensland Institute of Technology (QIT) law school before its elevation to the Queensland University of Technology (QUT). Prior to coming to Australia, he had been a partner in the Gibson and Weldon Law Firm in Chancery Lane, London, which had been the premier tutorial law college preparing law graduates for the entry examination into the English Bar. It also had another outlet in Guildford for the preparation of law students for the English Law Society Examinations. It subsequently merged with the Law Society School of Law to form the English College of Law, now the University of Law. Tom Cain had been the lead company law academic and also the joint author of the leading English textbook on company law.<sup>67</sup> He subsequently moved to Australia where he took over responsibility for administering the Law Extension Course at the University of Sydney — so he was the ideal candidate to undertake the formation of a law school that was going to have its principal mission of preparing law students, both in full-time and part-time mode of learning. Originally, Tom Cain led a small staff to undertake the teaching of the first intake of 110 full-time students, who commenced their studies at QIT at the beginning of the 1977 academic year.<sup>68</sup> In addition to accommodating students studying for what was originally designated as a BA (Law) degree (subsequently converted to an LLB) at the request of the Queensland Law Society, the Law School commenced a legal practice course in 1978 to accommodate 13 foundation students. This was provided as an alternative to articles of clerkship and laid the foundation for a future practical legal training course at the Law School.<sup>69</sup>

The practical legal training course was originally founded on the Ormrod continuum of legal education and training,<sup>70</sup> which was based on the English and Welsh criteria for legal education established in 1967 by a committee chaired by Sir Roger Ormrod, an English High Court judge.<sup>71</sup> The Law School acknowledged its ongoing influence on the QUT Practical Legal Training Course whilst recognising that ‘the original objectives of the Course were those adopted at the Australian Professional Legal Conference in Australia’.<sup>72</sup>

Considering Tom Cain’s background as the original director of the New South Wales Law Extension course, it is not surprising that QUT made early provision for the teaching of a part-time law course. As Cain stated: ‘We had a separate set of lectures and seminars, mostly in the evening, to suit the convenience of the part-time internal students, which was uncommon in 1977.’<sup>73</sup>

Apart from the part-time internal course, there was also a part-time external course, which illustrated Cain’s forward-looking attention to detail and planning. Whilst the external students were taught by the same lecturers and tutors as the internal students, their teaching was supplemented by local coordinators and tutors. The students were supplied with individual subject study guides prepared by the lecturer in charge of the course, and they were also given

67 J Charlesworth, *Company Law*, T E Cain and Enid A Marshall (eds) (Stevens, 10th ed, 1972).

68 David Gardiner, ‘The Law Faculty over Twenty Years’ (1997) 13 *Queensland University of Technology Law Journal* 16.

69 Ibid 17.

70 Allan Chay, ‘Wal’s Legacy: QUT’S Practical Legal Training course’ (1987) 13 *Queensland University of Technology Law Journal* 36.

71 United Kingdom, *Report of the Committee on Legal Education 1971*, Cmd 4595 (1971).

72 Chay, above n 70, 37.

73 Tom Cain, ‘Reflections as Foundation Dean’ (1997) 13 *Queensland University Technology Law Journal* 3, 7.

written exercises. In addition, they were supported by the establishment of basic law libraries in various parts of the state, and by a number of weekend study schools in Brisbane. First- and second-year students were assisted by telephone tutorials conducted by a tutor located in Brisbane. From 1983, a photocopying service was provided and, in 1985, a quarterly student newsletter was commenced.

Such was the success of the QIT/QUT external part-time course that the Pearce Committee commented in its report: 'QIT's efforts in its external course were commendable and we think that it should take over sole responsibility for external legal studies in Queensland.'<sup>74</sup>

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

that a Law School of a reasonable size can run a good external LLB course when the number of external students is about 15 per cent of the total number of LLB students (and the number of external and part-time internal students is not more than 35–40 per cent of the total number of students) without upsetting the balance of courses and losing staff.<sup>75</sup>

Tom Cain's influence as Foundation Head of the Law School is illustrated by the manner in which the Law School gained control over the new law library at QIT. David Gardiner, Tom Cain's successor as Dean, comments on this in his reminiscences of the early days of the Law School when describing the problems of the move by the Law School into the new law library building at QIT, stating:

We were not the sole occupier of the premise and our strata title neighbours were not necessarily ones we should have been associating with and what was more they were dominant occupants and controlled the body corporate. This was of course the University Librarian and the rest of Main Library and there was many a campaign and skirmish associated with the Law Library's operations being in conflict with those of Main Library.<sup>76</sup>

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

The Law School Library was the heart of the Law School. There were several reasons for it being part of the Law School and for the Law Librarians being members of my staff. I wanted to determine the content of the Library and the classification of books used. I also decided that we would acquire books rather than audio-visual material and that, in general, it would be a reference and not a lending library. I also decided that we would adopt the Moys classification, a feature of which is its separation of primary (statutes and law reports) and secondary (other) materials. Most of all, I wanted the Law Librarians to have a teaching as well as a librarian role and to conduct courses for the students on how to use a law library.<sup>77</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid 8.

<sup>76</sup> Gardiner, above n 68, 17.

<sup>77</sup> Cain, above n 73, 8.

Tom Cain retired as Foundation Dean of the QUT Law School in 1989, leaving behind a highly regarded law school that had been complimented by the Pearce Report on many of its practices.

## VI REVIEW

It could be argued that at any time from settlement in Australia by Europeans in 1788 to the present day, the evolution of legal education has been a gradual process and that it is a difficult if not an impossible task to name those legal academics who have had such an imposing influence as to make them stand out from their colleagues. In an earlier paper, as I have stated, I attempted to name four academics — Professors Peden, Moore, McDougall and Beasley — whom I considered had fulfilled this role. However, with effluxion of time this was probably an easier task than attempting a similar exercise with respect to those academics who have exercised an outstanding influence over the development of Australian legal education during the post-World War II era. Also to be taken into account is the subjective view of those critics who consider the non-selection of a particular law academic from their law school must reflect adversely on the ongoing influence exercised by their particular tertiary educational institution. Nevertheless, it is important to attempt a comparative assessment and to recognise the outstanding influence that has been exercised by some particular law academics. In this respect, the names of Professors Derham and Pearce are linked not only to their particular law schools, but also to the reports with which they were closely connected and which are acknowledged as having a lasting effect on the ongoing development of Australian legal education. Professor Derham is also, of course, recognised as the academic who established the Monash University Law School, which has subsequently occupied a major role in Australian legal education. Professor Hal Wootten has occupied a similar role to that of Professor Derham in that he was responsible for establishing a second university law school in New South Wales, which is also recognised as possessing a similar reputation to that of Monash Law School in Victoria for its innovative influence on the development of modern legal education. Where then does Professor Cain stand in comparison to these other three leading law academics? Close examination would indicate that he has had a similar although less spectacular influence. Despite its lack of resources when it was first established, the QUT Law School was the second university law school in Queensland. It has been recognised as having had a pioneering influence in both the development of part-time law courses and practical legal training, which was noted in the Pearce Report. Its staff have always provided leadership in innovative law teaching, which has been acknowledged by the receipt of many national teaching awards. Much of this has been due to the early leadership and inspiration given to the Law School by Professor Tom Cain, and so it could be argued that he is worthy of occupying an equal standing to that of the other three of his law academic peers of the modern era.