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A LEGAL HISTORY FOR AUSTRALIA

FOREWORD

The Hon. Michael Kirby AC CMG

Justice of the High Court of Australia (1996-2009)

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DECLINE AND FALL

When I began the study of law, undertaking a course in legal history was compulsory in every Australian law school. For me, it began in the first week on the first day of my arrival at the Sydney Law School in 1958.

Our lecturer was Dr C.H. Currey. He read from cyclostyled notes that were provided to us by the faculty office. He had his merits. However, enlivening his lectures with relevance, especially injecting local and recent stories, was not amongst them. Most of his lectures were about the slow emergence of the English common law. There were few lectures on Australia's own legal history. I was soon made to understand that we, in the South Pacific, were a branch office of an imperial legal system whose headquarters were at Westminster. There were lectures by W.V. Windeyer[1] that offered a few scattered insights into Australian legal history. However, it was not until Alex Castles published his introduction to Australian legal history in 1971 that a complete text for that topic became available.[2]

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* Justice of the High Court of Australia (1996-2009).

[1] W.J.V. Windeyer, *Lectures in Legal History*, LawBook Co. B.M. Debelle (ed) *Victor Windeyer's Legacy: Legal and Military Papers*, Federation Press, Sydney, 2019.

[2] A.C. Castles, *An Introduction to Australian Legal History*, LawBook Co, Sydney, 1971. See also A.C. Castles and John Bennett (eds) *Course Book on Australian Legal History* (1979).

Given this inauspicious introduction to the subject, probably replicated in most of the other law schools at the time, it is little wonder that legal history largely faded away. A huge flowering of law schools emerged in Australia after the 1970s. However, comparatively few evidenced a specific interest in legal history. The legal profession did not clammer for courses on the topic. The *Priestley Eleven* "core topics" quietly deleted legal history from the list. Students did not protest. Few other voices were raised to contest this trend.[3] Indifference entered the soul of Australian lawyers.

I lamented and criticised this development.[4] However, the attrition merely gathered further steam. When legal academics were tackled about the unwisdom of this trend, they ticked off the usual excuses: legal history was taught, they said, only where necessary, and then in explaining particular subjects of law; the shift from common law to statutory sources of law made history less important than it had been; law schools were now money-making hubs for universities mainly keen to attract full fee-paying foreign students whose interests lay elsewhere; and there were already too many subjects in the law curriculum. Even if there were interest, academics able to teach this specialty were thin on the ground and lacked an effective community to lobby for revival.

A few Australian law schools have continued to offer legal history to their students, usually as an elective. What was missing was a good business case for the teaching of legal history as such; a growing body of scholars with an interest in that direction; and a new textbook that could help to show

[3] W. Prest, "Legal History in Australian Law Schools" (2006) 27 *Adelaide L Rev* 267.
[4] M.D. Kirby, "Is Legal History Now Ancient History" (2009) 83 ALJ 31.

that the subject was interesting, important, relevant and useful. Without such a text that demonstrated the centrality of legal history for a modern law school the prospects of revival were poor. So this is where *A Legal History for Australia* comes in.

A PLAN FOR LEGAL HISTORY

There is no point repealing the previous arguments as to why the legal history discipline should be taught. In any case, I would not advocate a return to past techniques. The hard-nosed university administrators and law deans, in competition for students once the current pandemic has receded, are unlikely to be convinced by such arguments. What can be offered now to make legal history relevant to the practical life of the law? What arguments can be marshalled to support the bid to turn the corner and restore the teaching of legal history by a new approach? This book affords ample evidence that a strong case exists for generic instruction in legal history in Australian law schools:

* For both good and bad, our legal history is joined at the hip with the constitutional and legal stories of the British Isles, of the Empire and Commonwealth of Nations, and the United States of America. This book charts some of the most important chapters in the overall story. Without getting into excessive particularities, this new outline of the story of our legal history is provided, specially tailored to Australian needs. Unless Australian lawyers have a good hold on the main outline of English, imperial and American legal history, they will not readily see the way that any particular legal category or constitutional or statutory

text, fits into the large mosaic of Australia's history. Learning masses of legal rules, in all their particularity, will inevitably recede in the minds of law students and lawyers, unless they can anchor those rules in their historical context. Finding and applying legal rules necessitates an appreciation of their context. For the tasks of statutory and constitutional interpretation, so important to legal practice today, context is always critical. A young lawyer deprived of a background briefing on the contours of legal history will be like a surgeon who suffers from cataracts. They will see the immediate text in a blur. But they run the risk of failing to appreciate its context and purpose that add precision and sharpness to their understanding;

* Throughout this text, the reader will be reminded of the way in which history has helped to mould legal outcomes and contributed to developments that are the mark of human progress. For example, we can understand the blight of homosexual and other sexual offences when we know something of how and why they came into our legal system. Legal history teaches us to be questioners about the law. The bullying of minorities in the past, and the story of the achievement of reforms in our legal history represent an encouragement for the ongoing questioning of the present law that is the lawyer's duty. The "Me Too" movement today, is simply one of the latest examples of victims, and their supporters, standing up against injustice and oppression. Sometimes (but not always) knowledge of legal history will afford encouragement and inspiration. At the very least it will often provide an important tool that will remind the contemporary lawyer of

occasions when desirable outcomes were reached; and occasions when the 'system' failed the cause of justice;

* The many instances in this book of struggles against racial bias in our legal history, from *Somerset's* case against slavery through the early Australia denial of land rights to our First Peoples told in *Mabo,*[5] certainly helps to alert lawyers to the ongoing struggle for justice. This was the background to the High Court's decision in *Love v The Commonwealth*.[6] The "Black Lives Matter" movement in the United States requires knowledge of the long history of other racial injustices. However, this is also important for the special role of the lawyer in contemporary Australia. The *Mabo* and *Love* decisions, that are recounted here, would not have been made, or even possibly argued, without a basic knowledge of the features of racism in our own legal journey. Those who can put the instant case into a proper historical context will be better able, as judges, lawyers, administrators or otherwise to interpret and apply the law so as to point it in the right direction;

* Reading this book and understanding legal history, teaches lawyers and citizens to view the current state of the law as a project in the course of constant evolution. Every chapter demonstrates how the law continues to advance and rarely expresses a final rule: correct and complete for all time. The important constitutional decision of the High

[5] *Mabo v Queensland [No.2]* (1992) 175 CLR 1.
[6] (2020) 94 ALJR 198.

Court of Australia in the *Communist Party case*, one of the greatest and wisest decisions of the Court, saw Justice Dixon invoking the lessons of legal history. He warned: "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected."[7] Such knowledge is important in every branch of the law. But it is crucial in public law where liberty is at stake. And where key features of our constitution are at risk, as in the accurate application of the appropriations power[8] or the limits upon the power to make laws;[9]

* As the many stories told in this book illustrate, legal history is also a story about people and their encounters with the law. It should not be a dull chronicle of ancient happenings of little contemporary relevance. One of the special features of this new venture into legal history is the way key actors are introduced. Some are judges. Some are parliamentarians. Some are prisoners. Some are First Nations People who have challenged long-standing rules, like Eddie Mabo, Faith Bandler and advocates like Ron Castan who brought the *Mabo* challenge, when most other lawyers at the time, would have written it off as doomed to fail. This text personifies its lessons by identifying those who have played important roles on our legal story, from the

[7] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.
[8] *Combet v The Commonwealth* (2005) 224 CLR 494; *Pape v The Commonwealth* (2009) 238 CLR 1; *Williams v The Commonwealth* (2012) 248 CLR 156.
[9] *White v Director of Military Prosecutions* (2007) 231 CLR 570; *Thomas v Mowbray* (2008) 233 CLR 307 at 442 [386]. *R v Private Cowen* (2020) 94 ALJR 849 at 876 [117], per Nettle J

judges who declared that women were not “persons” to Sir Henry Parkes, the famous Australian colonial Premier, uxorious and thrice married, who still found time to dream of federation whilst looking after 17 children, 3 of them born “out of wedlock”. Proving that even politicians are sometimes human.

History will also teach that the future of the legal discipline will increasingly be written against the background of international law. The reconciliation of the time honoured and sometimes dishonoured, history of our legal tradition with the growing body of international private law and the increasing relevance of international human rights law to our law should be known by every lawyer today.[10] This is not heresy. It is part of the reality of the legal discipline, which now operates in the world of the internet, cell phones, climate change, nuclear proliferation, refugees, terrorism and global pandemics such as COVID-19.

Lawyers are, or should be, more than mere technicians familiar with a jumble of complex rules crowding their brains. They must have a concept of the practical world in which the law operates and fits together. But also of the noble aspirations of justice, human rights, the rule of law, peace and security that lie at its heart’s core. Legal history helps the lawyer of today to escape the mistakes of the past by appreciating the journey that has been taken, to which contemporary lawyers must add their skills and experience.

[10] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [62] per McHugh J; at 626 [184], per Kirby J (diss).

Most lawyers do not become judges. Many do not become advocates. Some do not become solicitors, attorneys or proctors. A number go off into public administration. Still more enter business, the prosecution service, publication and education. Doubtless a few grow wine. A handful go to prison. Courses in law and legal studies need to cater for the variety of occupational groups now attracted to the study of law. It would be a scandal to let them loose on society without a general knowledge of the history of how their discipline emerged and became one of the foundations of the freedoms and governance of the English-speaking nations across the world.

I congratulate those who conceived A *Legal History for Australia*. I hope that it will encourage the journey back to a stronger awareness of our legal history; because the present and the future do not exist disjoined from the past. Let the words ring out to judges, scholars, lawyers and students alike. The study of legal history is fruitful, fascinating and fun.

I congratulate Dr Sarah McKibbin, Associate Professor Marcus Harmes and Dr Libby Connors for writing this book. I thank Dean Reid Mortensen for his support for the course on Legal History at the University of Southern Queensland. I applaud USQ for its initiatives, including the organisation of conferences and discussions of relevant topics. Leading judges, scholars and lawyers throughout the Australia and beyond are watching these initiatives with admiration and great expectations. Truly, they are historic.

Sydney,
24 May 2021