

The Forbes Flyer

The newsletter of the Francis Forbes Society for Australian Legal History

Autumn 2009

History reports itself

Sir Robert Torrens was a conflicted soul with an enduring legacy. The system which bears his name has, since its introduction in 1858 into the colony of South Australia “become pervasive around the Commonwealth of Nations and very common around the globe. In the United States, only Iowa has all its land under the Torrens system; other states with a limited implementation include Minnesota, Massachusetts, Colorado, Georgia, Hawaii, New York, North Carolina, Ohio, and Washington.”¹

Professor Rosemary Croucher’s provocative exploration of this legacy formed the subject matter of the 2008 Forbes Lecture. One thing of particular interest was the news that around about May 1859, Torrens in a campaign speech at Kapunda was saying of the haphazard land registration system “The harrowing tales of ‘Bleak House’ were realized here”. I say “particularly” because the last instalment of Dickens’s novel had only appeared in September 1853. This may be one of the earliest uses of the metaphor. Professor Croucher adds that her subject’s sister elder sister revelled in the name “Jane Austen Torrens”!

In just a few years, we will be celebrating – if that be the word – the commencement of the war to end all wars. The issue concludes with an update by Tony Cunneen of his research into the Australian legal profession and the Great War. Don’t forget, some of Tony’s work in this area is available on the Society’s homepage.

David Ash

Editor

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Diary note – the 2009 Forbes Lecture

Associate Professor Mark Lunney of the University of New England will deliver the 2009 Forbes Lecture on 5 November 2009 in the common room of the New South Wales Bar Association. The theme is “Federation and Beyond: What the History of Australian Tort Law Can Tell Us”. Whilst some work has been done on the development of private law in the colonial period, little study has been undertaken of the post-Federation period. As Bruce Kercher has noted, it has traditionally been assumed that Australian law simply followed English law.

This lecture will evaluate the traditional view by considering three leading cases in Australian tort law from three different periods - *Balmain New Ferry Co Ltd v Robertson* (1906), *Australian Knitting Mills Ltd v Grant* (1933) and *Hargrave v Goldman* (1963). It reveals that Australian courts were confronted with novel legal issues that could not be resolved by mere reference to English authority. Moreover, an analysis of the historical context of the cases reveals peculiarly Australian contexts to these decisions and demonstrates the contribution that studies of the history of tort law can make to wider Australian history.

The 2009 Australian Legal History Essay Competition – The topic

The question for the 2009 Australian Legal History Essay Competition is:

Who owns this land, anyway? ... Discuss whether Australian history has any lessons for us, today, about the meaning or significance of 'land ownership'. Do so by reference to one or more of: (a) Australia as a 'settled' or 'conquered' territory, and Aboriginal Land Rights; (b) the land titles system (known as the 'Torrens System') devised by Robert Richard Torrens; and/or (c) debate about whether Australia should, as a modern sovereign nation, be a republic.

Details of the competition are on the Society's site.

The 2008 Forbes Lecture

For those interested in the topic for the competition above and for those interested generally in the most famous antipodean contribution to law reform, on 6 November 2008 Professor Rosalind Croucher, a Commissioner of the Australian Law Reform Commission, delivered the 2008 Forbes Lecture (entitled "150 Years of Torrens – Too Much, Too Little, Too Soon") in the Common Room of the NSW Bar Association. She was introduced by Anna Katzmann SC, President of the Association.

Professor Croucher's paper has now been published as an article in the *Australian Bar Review*, with the citation (2009) 31 Aust Bar Rev 245. Enquiries in relation to the publication may be directed to the Product Manager, LexisNexis, Locked Bag 2222, Chatswood Delivery Centre, Chatswood, NSW, 2067.

The 2008 Australian Legal History Essay Competition – The awards ceremony

The awards ceremony for the 2008 Australian Legal History Essay Competition promoted by the Society was held in the Friends Room of the Mitchell Wing in the State Library of NSW. The Society was delighted to be able to call upon Sir Gerard Brennan to deliver the awards and to address the gathering, and to have as one of the guests the High Court's newest member, the Honourable Justice Virginia Bell.

The three winners are:

- Adam Arnold of the University of NSW (Academic Supervisor: Jeni Engel)
- Sarah Dorn of the University of Melbourne (Academic Supervisor: Dr Linda Haller)
- Ben Nam of St Pius X College, Chatswood, NSW (Supervising Teacher: Georgia Wilson)

Mr Arnold's paper has now been published as an essay (entitled "Legal professional privilege, advocacy and the limits of a guilty secret") in the *Australian Bar Review*, with the citation (2009) 31 Aust Bar Rev 352. Enquiries in relation to the publication may be directed to the Product Manager, LexisNexis, Locked Bag 2222, Chatswood Delivery Centre, Chatswood, NSW, 2067.

Congratulations to each winner. A report of the gathering with photos, is available on the Society's homepage, as are the details of this year's competition.

Below is "A thought for today", a short paragraph which appeared in the society's printed program for the ceremony:

An appreciation of Australian Legal History is at least as important as whether or not Australia has a "charter of rights" or constitutional reform in the same direction. Important as a charter of rights or constitutional reform might be, no charter or constitution can come to much unless read and understood in the context of the broad themes, and particular facts, of Australia's unique legal history – with all that might be good or bad in that history.

Advance notice

The Society proudly announces that *The Kercher Reports* (edited by Bruce Kercher and Brent Salter) will be published in May 2009 by the Forbes Society in conjunction with Macquarie University and Federation Press. The Reports will provide an edited version of 18th and 19th century NSW case law presently found on the website of the Division of Law of Macquarie University (www.law.mq.edu.au/scnsw).

They will be published as the second volume in the *NSW Select Cases* series of law reports, the first volume in which was *Dowling's Select Cases* (2005). This project has been supported by funding from the Public Purpose Fund and the Council of Law Reporting for NSW. A research program for the preparation of a third volume in the *NSW Select Cases* series is presently being pursued by Brent Salter (of Macquarie University) and Dr Lisa Ford (of the University of NSW) in conjunction with Professor Kercher and Professor Andrew Buck of Macquarie University.

Speeches of a Chief Justice

Between editing Sir James Dowling's cases with Bruce Kercher and publishing his "Capital Punishment Database" (at research.forbessociety.org.au/) and generally running a busy life, Tim Castle has found time to compile a collection of the speeches of one of our most erudite jurists, NSW Chief Justice Jim Spigelman. A review will appear in the next issue of the *Flyer*. Meanwhile, for those wishing to purchase or merely to sample, information is available at www.cs2n.com.au/contact.html.

The legal community in World War One

Members will be familiar with the work of Tony Cunneen BA, MA, Dip Ed into the involvement with the Australian legal profession in the Great War. At the end of 2008, the Society was delighted to award Tony with a grant to assist with his scholarship.

Tony sets out below a précis of where his research currently stands. As is so often the case with our legal history, there is a wealth of untapped material requiring patience and passion and which, when got out, can challenge long-held perceptions.

Please note in particular Tony's contact details at the foot of the précis. If you have something by way of material or by way of comment, do not hesitate to pass it on.

Introduction and scope of the research

The focus of the research project is to explore and explain the role of the legal profession and their families in World War One. The experiences and influences of lawyers in World War One have received minimal attention.

There are brief references to lawyers in the armed forces peppered throughout the *Official Histories*², but these appear in passing rather than an attempt to explain the role of the profession in the conflict. The bulk of the information is in Ernest Scott's *Australia During the War* but is subsidiary to broader topics. There is ample room for expansion on what has been written.

World War One is a worthwhile study in its own right. The conflict is often presented as a defining moment in Australia's history – as was enthusiastically articulated by the legal profession at the time. Early postcolonial legal families felt a powerful affinity with the British Empire. Many had close relatives in Great Britain. All levels of the legal community were overtly involved in supporting the Empire in the war.³

The war intruded into lawyers' professional lives, while

they in turn were active participants in the conflict. Lawyers' social, religious and educational networks facilitated their involvement. These networks have not been well examined. The judiciary took on a practical role by being active in promoting recruiting into the armed forces and the promulgation of charitable causes.

The research process

The initial research intention was to portray the military activity of the legal profession in the war. This plan expanded as various themes emerged – some quite unexpectedly.

These themes included: the prominent role of the profession in the officer class; the profession's active promulgation of charities; support for political causes such as The Universal Service League; the energetic public activity of female members of legal families; the establishment of the Australian system of military justice; the activities of official visitors in internment camps as well as war related royal commissions and legal cases.

These extensive areas of research uncovered a wealth of material that challenged existing opinions about the supposedly limited extent to which the profession was involved in the war.⁴

There is a limited amount of material published on the social profile and dynamics of the legal profession in general.⁵ In fact, there is occasional reference in the literature on legal history to the belief that the lawyers' lives are of little interest or relevance to their professional work. This appears to be too dismissive of the period 1914 to 1919, when lawyers were involved in a multiplicity of legal and other matters.

The example of Mr Justice Heydon may suffice to cause a reassessment of claims that social circumstances of judges did not impinge on professional lives. Mr Justice Heydon's dyspeptic remarks in the Court of Industrial Arbitration of New South Wales address a concatenation of legal, personal, political and patriotic issues which he saw appropriate to mention as he refused an application to reinstate certain unions which had been deregistered during the industrial unrest in 1917.

Mr Justice Heydon managed to include reference to the "great German offensive" of March 1918 in his judgment. In addition he invited a comparison between what he saw as intransigent Union activism and the way "they must have grumbled in the trenches. But the Germans got nothing out of it: no indeed, never!"⁶

This romanticised feeling about the men in the trenches may have been influenced by constant worry caused by

his son, George, having been on active service overseas since 1915. Dr George Heydon had been twice wounded in action. He had also been awarded the Military Cross for treating patients under enemy fire at Pozieres in 1916. There are a number of letters on file where Mr Justice Heydon enquired after his son's well being in the thick shadow of war.

Mr Justice Heydon's concerns would surely have been exacerbated by news of the fate of relatives of his fellow judges. By the time Justice Heydon delivered his judgment Mr Justice Street had one son and two nephews killed in action. Mr Justice Ferguson and Mr Justice Simpson had lost a son each. Three High Court Justices, Gavan Duffy, Higgins and Rich had also lost one son each⁷.

In addition to such personal loss, they, and other judges, were involved in all manner of war related activities, from collecting donations for soldiers' comforts funds to visiting internment camps as "Prisoners' Friends". The developing field of judicial biography would find rich material in the personal and professional lives of these men, and others such as Mr Justice Pring, whose comments and sentences in the case involving the Industrial Workers of the World in 1916 created much controversy.⁸

Sources

Legal history as a modern discipline is evolving from pioneering work of Professor Alex Castles⁹. World War One provides a useful opportunity to examine the protracted, public involvement of the profession in a significant cause. In a sometimes combative legal community there are multiple examples of cooperation and the obvious manifestation of shared values.

Mr Justice Ferguson's collected letters¹⁰ clearly indicate the extent to which lawyers looked out for one another at home and overseas. He wrote and collected scores of letters to and from lawyers on active service. This extensive collection is worth a study in its own right.

There is a substantial amount of primary source material available from legal professionals useful to the researcher interested in World War One. These include the individual War Service Records of over 350 lawyers who served in the armed forces, as well as letters, diaries, speeches, newspaper articles, judgments and Royal Commission Reports.

These primary sources add a strong contextual understanding to legal decisions and processes. Lawyers proved to be some of the most perceptive and articulate observers and recorders of wartime experiences. These sources have not as yet been collated, let alone examined in a coherent way. There is ample opportunity to research

how the New South Wales legal profession functioned during the war.

In addition to their usual legal activities lawyers were active in a great variety of roles. The Prime Minister, William Morris Hughes, and Commonwealth Solicitor General, Robert Randolph Garran, were Sydney barristers. There were judges, barristers and solicitors active in Royal Commissions, charitable funds, military command, enlistment campaigns, courts martial and in journalism, reporting from the Front.

Women in the war

One of the most fascinating aspects of the topic is the extent to which it allows for research into the lives of women. Diane Kirkby wrote of the need to include research into "Judges' wives and daughters – the private life in judicial biography"¹¹. The period of World War One provides an excellent opportunity to research the often silent roles of the wives and daughters of the legal fraternity.

There is a wealth of original sources available on their activities. Legal families treated support for the war as a shared enterprise. The wives and daughters of legal families were represented far out of proportion to their numbers in a variety of charitable organisations.

The female members of the Langer Owen, Simpson, Hughes, Cullen, Ferguson, Sly and Consett Stephen families were all involved in a variety of enterprises. One feminist writer at the time, Elsie Horder, mentioned the belief that the work of women in the Red Cross "had entirely demolished the anti-feminist arguments against our usefulness."¹² Many women hoped that their war related activities would be a platform to greater community involvement after the conflict.

Effect of the war on the legal profession

It is difficult to quantify the effect of war service on the legal profession. Since the research is in the early stages it would be premature to speculate. There are some brief references in the legal history literature. John Gava writing in the *Melbourne University Law Review* (2002) mentions that the war service of Justices Windeyer and Fullagar contributed to the fact that these men were neither "fools" nor "naïve", clearly implying that their experiences had contributed favorably their characters, and that this made them better judges.

On the other hand Sir Owen Dixon did not to join up in World War I because he had to support his family through his practice¹³. His "failure" to enlist did not hamper his career or reputation¹⁴. War experience was not the only means for preferment and the decision not to

go was not necessarily the cause of opprobrium.

It is possible that the war fostered informal social and professional connections, which could bring about lucrative contracts or give one person the confidence to face another in courtroom confrontations. Hector Clayton had a successful military career which reinforced his connections with other lawyers. He then went on to have a long and successful career as a solicitor.

Percy Valentine Storkey was awarded the Victoria Cross for an attack on Hangard Wood, near Villers-Bretonneux. His award was unusual, but his later success was not uncommon. He was later a judge of the New South Wales District Court from 1939 to 1955. A detailed biographical note appears in the latest issue of *Bar News*, the journal of the NSW Bar.¹⁵

In addition to researching the subsequent careers of lawyers, it would be worthwhile investigating the effects of wartime legislation and specific cases on legal matters.¹⁶

A modern sensitivity to the effects of trauma on individuals leads one to suspect that lawyers were not immune from post war personal demons. Sir Vernon Treatt wrote of the Sydney University Law School that returning to student life “was a difficult job for those so recently from the battlefield.” He makes light hearted reference to the fact that “a heavy tome, artfully dropped on the floor of the library to imitate the bursting of a shell, would occasion quick, nervous and physical reaction on the part of some returned soldiers...”¹⁷

Younger law students, in the innocence of youth, overlooked the horrors which led to such edginess. The clumsy contemporary urging of men to just “get on with it” after returning home meant that there were probably individuals who covered up their anguish by whatever means: alcohol; moodiness; work; family or irascibility.

While it is possible to read too much into what may have happened to people after the war, it is equally dangerous to be totally dismissive. At a personal level, the grief of those touched by a war-related loss was permanent. The mother of James Blackwood, a particularly talented and prosperous young law student, was known around her suburb of Beecroft in Sydney as a quiet, sombre woman who wore black and never got over the death of her son.

Conclusion

There is great pathos within the stories of legal families in World War One. While the anti-conscriptionist orators were railing against the upper classes avoiding their duty, the sons of some of the most prominent legal families in the state were falling in action. Lawyers’ wives and daughters were working long hours organising support for the troops.

Sir Laurence Street AC, KCMG, QC was moved more than he expected when he made his personal pilgrimage to Gallipoli and stood beside the grave of his uncle who was killed in action. For him, and many others, the Great War remains poignant despite the passage of time. Occasionally some personal connection reaches out from our daily lives to tug at our hearts, or pique our interest. The legal profession was well involved in the conflict in many ways. It’s a story that should be told.

The author welcomes comments and advice on this topic. He may be contacted at acunneen@bigpond.net.au; T 02 9484 2928 (H); 02 9414 4324 (W).

Autumn Quarters¹⁸

In autumn 1808

On 3 May 1808, the subject matter for Goya’s great tragic work occurs.

In autumn 1858

On 6 April 1858, US President Buchanan proclaims that the Mormons of the Utah Territory are in a state of rebellion.

In autumn 1908

On 8 March 1908, the Commons rejects the women’s suffrage bill.

In autumn 1958

From 30 April 1958, women are permitted to sit in the Lords with the enactment of the Life Peerages Act.

Endnotes

1. en.wikipedia.org/wiki/Torrens_title (24/03/2009).
2. Bean CEW (1921) *Official History of Australia in the War of 1914-18* Vol. 1-12 Sydney: Angus and Robertson.
3. Ian Holloway and Andrew Buck, “Why Legal History Matters” in *Australian Journal of Legal History* (2003) Vol 7, pp 1-4. They wrote about the importance of Australia’s connection with the English judicial system. The movement away from this reliance was in its infancy in World War One. As part of the ongoing reassessment of the Australian national character it is important to understand its antecedents.
4. There were repeated allegations in anti-conscription rhetoric of the more prosperous classes such as the legal profession avoiding front line duty in the war.

5. There were repeated allegations in anti-conscription rhetoric of the more prosperous classes such as the legal profession avoiding front line duty in the war.
6. Diane Kirkby wrote that "Popular culture and high legal culture (are) two sides of a same coin or mutually informative practices." In *Law(yer)'s History, Conversationally Speaking in Australian Journal of Legal History* (2003) Vol 7, pp 47-52.
7. In re The Australian Society of Engineers and Others (NSW Court of Industrial Arbitration, Heydon J. 21 May 1918. Private papers of the Heydon family held in Hunters Hill Historical Society Archive.
8. Three sons of Mr Justice Richard O'Connor, who had died in 1912, also served in the war and two were killed in action. Wilfred Barton, the son of Justice Sir Edmund Barton served in the British army.
9. See Philip Girard "Judging Lives: Judicial Biography from Hales to Holmes" for an account of the need for judicial biographies: *In Australian Journal of Legal History* (2003) Vol 7, pp 87-106.
10. Annesley, Athaide "Alex Castles on the Recognition of Australian Legal History 1955-1963" in *Australian Journal of Legal History* Vol 7, 2003, pp 107-155.
11. Sir David Gilbert Ferguson Papers, State Library of NSW, MLMSS 2858.
12. Diane Kirkby "Law(yer)'s History, Conversationally Speaking" in *Australian Journal of Legal History* (2003) Vol 7, p 49.
13. Elsie Horder. *Women and the War in The NSW Red Cross Record I*, 11 Feb 1915. 47.
14. Phillip Ayres, *Owen Dixon*, The Miegunyah Press. Victoria 2003.
15. Robert Gordon Menzies, later twice Prime Minister of Australia did not enlist either, although this was on occasion used against him politically. His two older brothers enlisted and served overseas while Robert completed his studies at law. He read with Owen Dixon in 1918.
16. "His Honour Judge Storkey VC", *Bar News* Summer 2008-2009, www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0809/BarNews_summer0809_web.pdf.
17. A useful starting point is Geoffrey Sawer *Australian Federal Politics and Law 1901-1929* and *Australian Federal Politics and Law 1901-1929* Melbourne University Press 1956 and 1963 respectively.
18. Hon Vernon Treatt MLA "The Law School and the War", in *The Hon Thomas Rainford Bavin, KCMG The Jubilee Book of the law School of the University of Sydney 1890-1940*, Sydney 1940, pp 133-134.
19. Usually, the *Flyer* draws the references from timelines.ws/.



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