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The modern history of law reporting

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Introduction

Australia, like the United States, Canada and New Zealand, belongs to the common-law family of legal systems. This means that the law is derived from principles developed by decisions of the English courts and adapted to local conditions, except where the principles have been modified by legislation. Even where legislation applies it must be interpreted by the courts, and decisions on these interpretations are legally authoritative. For lawyers, access to reliable reports of court decisions is essential in order to decide whether a legal principle applies to a dispute on which they have been asked to advise. Nowadays it is easy for the lawyer or law student to find reports of cases by using an online database. Online service providers such as Austlii (Australasian Legal Information Institute) operate on the basis that unless there is a good reason to the contrary (for example, where there are significant privacy concerns), every decision of superior courts, as well as of lower courts and tribunals of which records are maintained, should be reported. In practice, online databases inevitably contain both gold and dross: decisions of legal and practical importance, as well as decisions that are likely to be of no interest to anyone except the parties themselves. Gold cannot be easily separated in this area from dross: one lawyer's idea of worthless dross may well be another's notion of precious gold dust. Comprehensive national databases do not select decisions on the basis of their legal significance. All decisions to which the provider has access are reported. It is left to the user to make a selection of cases relevant to him or her, using the sophisticated search tools developed by the provider.

We take comprehensive databases so much for granted that we are apt to forget how recently they appeared on the scene. Twenty years ago lawyers and students relied on reports of decisions selected by the law reporters or their editors. Publication of law reports was an explicitly selective activity; the emphasis was on identifying and publishing the gold and suppressing the dross among the thousands of decisions handed down every year. Law reporters and legal editors played a significant role in deciding which cases were published. An unpublished decision was often difficult to retrieve if a lawyer or judge who knew about the case had second thoughts about its relevance. The claim that the development of the law depends on what is not reported, as well as on what is reported, is not much of an exaggeration. This is a point that can be illustrated by reference to the history of law reporting in England, with reference to reports held in the Law Rare Books Collection in the Law Library at the University of Melbourne.

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Law reporting before 1865

Before 1865, law reporting in England and the Australian colonies was left to private enterprise.[1] Any barrister could set up in business as a law reporter. His success would depend on his commercial shrewdness and on the profession's assessment of his reliability as a reporter. A few, such as Plowden in the 16th century and Burrow in the 18th century, set standards of accuracy that have been rarely equalled since. These reports are still cited today. But other reports enjoyed a dubious reputation. It was said, for example, that Espinasse (who reported English decisions between 1793 and 1807) heard only half of what went on in court and reported the other half.

Reporters would not necessarily publish all the decisions of which they had made a report. John Campbell (later a chief justice and lord chancellor) published law reports between 1808 and 1816 in order to

supplement his meagre earnings in his early years at the bar. He regularly placed some of the decisions with which he disagreed in a bottom drawer marked ‘Bad Law’.

Large-scale legal publishing began in the mid-19th century. Commercial publishers who were already bringing out newspapers and professional journals employed teams of literate but needy barristers to prepare reports. Series of reports such as the *Law Journal* reports, the *Law Times* reports and the *Jurist* were launched in the 1840s and 1850s. They supplemented the work of the existing private reporters who usually operated as one-man enterprises. By the mid-19th century the result of this proliferation of law reports was chaos, as the growing army of law reporters scrambled to publish every morsel that fell from the lips of the higher judiciary.

Since courts would only recognise reports prepared by barristers, there was a demand for barristers to record and edit the cases. Even though the work was poorly paid it was much sought after by young barristers, who had to bear heavy pupillage fees and rent in their early years at the bar. Several prominent judges of the era began their professional lives as law reporters. Lord Blackburn, for example, reported sale of goods cases decided in the common-law courts. The decisions he reported formed the basis of a successful book he wrote on the law of sales, and the book in turn helped to boost his reputation as a leading commercial lawyer.

By the 1860s the market in law reports was sated. Many decisions were reported in four or more reports. The reports were not always consistent and contradictory versions of judgements were sometimes published by different series of law reports. Most judges delivered oral judgements and the reporters rarely possessed a reliable shorthand. Corrections often had to be made. The *Law Review* for February 1848 sets out a long list of cases cited from the published reports of the preceding year, in which the judges disclaimed as incorrect reports of what they were supposed to have said or done.

A further drawback to the system

was that the cost of subscribing to all these series of reports was prohibitive. A leading chancery barrister of the 1860s, W.T.S. Daniel, estimated that the annual cost of all the series of reports was about £45 (about $5,200 in contemporary value).

It was Daniel who revolutionised the system of law reporting. A reform-minded barrister, he was also an active member of the Association for the Promotion of Social Science. In 1863 he wrote an open letter to the solicitor-general, Sir Roundell Palmer (later appointed chancellor as Lord Selborne), on 'the present system of law reporting: its evils and the remedy'. Following the custom of the day the letter was no scribbled note; it consisted of 66 pages of closely argued text. Daniel

Lock & Whitfield (photographers), Portrait of Nathaniel Lindley (Baron Lindley), c. 1860s, albumen carte-de-visite photograph.

identified four defects of the law reporting system: expense, prolixity, delay and irregularity in publication, and inaccuracy. The defects were attributed by Daniel to the fact that the reports were prepared 'under the lash of competition'. Treating law reports as an object of commerce, insisted Daniel, led to 'an increase in quantity, to the deterioration of the article to be consumed, and at the same time to an increase in the cost'.

The open letter persuaded Selborne to requisition a meeting of the bar to discuss the state of law reporting in England. The meeting voted to establish a committee, of which Daniel was a member, to hear submissions on the desirability of establishing an official, or authorised, system of law reporting.

Some submissions argued that law reporting should be a government responsibility. But this was rejected on the grounds that there was no justification for imposing on taxpayers the burden of paying for law reports. Other submissions proposed that only official law reports should be received and recognised by the courts. This submission was

also rejected, on the grounds that it was wrong for the courts to promote and protect monopoly. The rejection proved to be prescient, for reasons described below.

The introduction of authorised law reporting in 1865

The solution recommended by the bar committee and adopted by the legal profession was to establish a system of authorised law reporting administered by the profession. A Council of Law Reporting, later incorporated by royal charter, including representatives of the bar and the solicitors' branch of the profession, oversaw the reporting of cases and the publication of cases. The cases were reported by barristers, initially consisting of many of the old private reporters, who were paid by the council. The reports were authorised in the sense that the judge or judges hearing the reported case checked and confirmed the accuracy of the judgements they had delivered. The structure of a representative council overseeing the publication of law reports was adopted in other common-law countries. For example, Victoria adopted the system of authorised reporting in 1876.

The Law Review and Quarterly Journal of British and Foreign Jurisprudence, vol. 7, issue 2, February 1848, pp. 230–1. Law Rare Books Collection, Law Library, University of Melbourne. The editors of *The Law Review* compiled the list of mis-reported judgements from 1847. Some cases were included in the list because their facts were incorrectly reported and other cases were listed because the judgement was mis-recorded