

CONFERENCE – THE FUTURE OF AUSTRALIAN LEGAL EDUCATION
THE BOWEN REPORT – THE OVERLOOKED INFLUENCE ON AUSTRALIAN
LEGAL EDUCATION

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Abstract:

Discussions on the reports which have had a major influence on the development of Australian legal education usually focus on the Martin Committee Report, the Pearce Report and the ALRC Report 89, *Managing Justice: A Review of the Federal Justice System*. However all these are Federal Reports and often overlooked is the only non-federal report on legal education in NSW, published in 1979 and entitled ‘The Bowen Report’. Invaluable in relation to the Bowen Report is that in contrast to the other major reports it recognised that an understanding of legal education in the State required a knowledge of its historical development. It also focused on fundamental issues which, apart from the obvious one that the purpose of legal education was to train legal professionals, questioned what sort of lawyers the community would need in the future.

The Bowen Committee was probably also one of the first-appointed bodies to inquire seriously into the question as to how the growth in law schools might lead to an oversupply of law graduates and how future young lawyers should be absorbed within the legal profession.

This paper will argue that there was much to commend in the Bowen Report, particularly its approach to general concepts of legal training. In this regard the statements of the Committee about the sort of lawyers which might be needed by the community in the future, that legal education does not stop with admission, that potential lawyers need to receive a balanced view of community needs and work expectations and receive both a general education and interdisciplinary training, would resonate with today’s forward-looking legal educators.

NB. This paper incorporates material previously considered in an article: David Barker, ‘The Four Pillars of Australian Legal Education’ [2015] JIALawTA8; (2015) 8 *Journal of the Australian Law Teachers Association* and David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 193-207.

1. Introduction

The Committee of Inquiry into Legal Education in New South Wales was convened by the then NSW Attorney General Sir Kenneth McCaw at the request of the Chief Justice of NSW, Sir John Kerr in June 1974. The initial Chair was Justice RM Hope, but due to his current involvement in Commonwealth Government Inquiries, he was replaced by Sir Nigel Bowen, the Chief Judge in Equity from whom the Inquiry took his name. Whilst Sir Nigel became Chief Justice of the Federal Court of Australia in the same year, he remained as the Chair of the Inquiry until it submitted its final report in December 1979.² Sir Nigel was a good choice

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² Committee of Inquiry into Legal Education in New South Wales, *Legal Education in New South Wales* (the Bowen Report 1979) 1.

as Chair. He was a widely experienced parliamentarian and lawyer, having served in many federal governmental positions before becoming a member of the judiciary.

The Committee's terms of reference required it: 'To inquire into and report upon and make recommendations in respect of, all aspects of the system and the control of legal education and of qualifications for admission as a barrister or solicitor in New South Wales.'³

The terms of reference as interpreted by the Bowen Committee also included consideration of:

the extent of the involvement of the Supreme Court and professional associations to take part in the instruction, examination and determinations of fitness for admission to practice of prospective Barristers and Solicitors.⁴

It also incorporated: 'the manner of the determination of their minimum academic education and practical training to qualify for admission.'⁵

However the terms of reference also provided that the Committee should be excluded from: 'the determination of the curriculum of any University or School of Law, College of Advanced Education or of the College of Law.'⁶

There has subsequently been some discussion about the helpfulness of this exclusion within the terms of reference. It could be argued that becoming involved in curriculum or law program issues would have unreasonably complicated the task of the Committee. However Dr Judith Lancaster, a commentator on legal education issues, is of the view that this exclusion within the terms of reference of the Bowen Committee effectively deprived it of the capacity to consider the degree to which professional cultural control over legal academia might constitute an important source of the weaknesses the committee was charged with examining.⁷

2. Proceedings of the Bowen Report

The proceedings of the Bowen Committee were divided into two stages. The first stage, which involved the deliberations of the Committee until 1976, concerned the receipt of a substantial number of written submissions from the legal profession and the wider community.⁸ The second stage, which covered the period from 1976 until the publication of the report in 1979, was concerned with receiving further written submissions, oral evidence, additional inquiries and the establishment of sub-committees. This also incorporated a study by the University of Sydney Survey Centre together with the New South Wales Law Foundation relating to a classification of lawyers based on areas of specialisation. The latter became known as the Beed-Campbell Report, named after its two principal investigators.⁹

³ Ibid 2.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993) 32.

⁸ Bowen Report, above n 1, 2.

⁹ Terrence Beed and Ian Campbell, *Supply and Demand Factors Associated with the Legal Profession in New South Wales: A Study Commissioned by the New South Wales Committee of Inquiry into Legal Education*,

3. Development of Legal Education in New South Wales

The historical background contained in Chapter 2 of the Bowen Report is an invaluable source for any legal historian interested in the development of legal education in New South Wales. It was sourced from both a paper entitled a 'History of Legal Education and Admission to Practice in New South Wales'¹⁰ which had been presented by the Hon Justice R M Hope to a New South Wales Judges' Conference in 1975 as well as additional information supplied by J M Bennett, the author of *A History of the Supreme Court of New South Wales*, and the editor of *A History of the New South Wales Bar*.¹¹

The chapter covers all aspects of the development of the qualifications for admission to professional practice from the second Charter of Justice 1814 until the publication of the report.

4. Policies and Outcomes for Legal Education in New South Wales

Chapters 3, 4 and 5 of the Bowen Report form a natural grouping of what was described by the Bowen Committee as 'General Perspectives and Policies'. In these opening chapters of the Bowen Report the Committee endeavoured to focus on what it considered to be the fundamental issues. Apart from the obvious one that the purpose of legal training should be related to the training of graduates for entry into the legal profession, the Committee asked itself the question as to what sort of lawyers does the community need in the future? Whilst acknowledging that there was a need for future lawyers to meet the varying demands of high office such as judges, legislators or advisers to government or the need for leading barristers with a high legal competence, the Committee also recognised that there were many unmet legal needs within the community, particularly those of the poorer members of society. Within this discussion the Committee stressed that there should be 'three essential components of training prior to admission to practice.'¹² In its view these should incorporate 'a component of theoretical knowledge, a component of skills and practical knowledge and a component relating to professionalization.'¹³

The Committee was also probably one of the first appointed bodies to seriously inquire as to how the question in the growth of the number of law schools might lead to an oversupply of law graduates and how future young lawyers might be absorbed with the legal profession?¹⁴ One interesting aspect of the recommendations contained in Chapter 5 of the Bowen Report was a statement by the Committee that there should be a reiteration of the legislation relating to the power reserved by the Supreme Court of New South Wales for the admission of barrister and solicitors 'in a more appropriate way'.¹⁵ This was concerned with the rejection

¹⁰ Bowen Report, above n1, 18

¹¹ Ibid.

¹² Ibid 29.

¹³ Ibid.

¹⁴ Ibid 42.

¹⁵ Ibid 86.

of those submissions to the Committee which had proposed that the court should be divested of this power with it being transferred to the professional bodies, such as in the case of solicitors to the New South Wales Law Society. The Committee was uncompromising in its approach to this question by maintaining that:

The authority for the admission of barristers and solicitors, as regards formal admission and the determination of moral fitness, remain with the Court although certain administrative functions should as at present, remain with the Admission Boards.¹⁶

5. The Law Schools

Chapter 6 (The Law Schools) is the outcome of the Bowen Committee stating that whilst the terms of reference precluded it from inquiring into curriculum, it did not regard itself as being precluded from describing in the report some of the features of the curriculum of the law schools. Because of this chapter 6 is the largest component of the report. It embraced all university law schools that were producing, or were to produce, graduates for admission as legal practitioners in New South Wales. This included the University of Sydney as the oldest law school in New South Wales, together with the University of New South Wales (UNSW), Macquarie University (Macquarie) and the Australian National University (ANU), whose students, although located in Canberra, then enjoyed the right of admission as legal practitioners of the Supreme Court of New South Wales. It also included the New South Wales Institute of Technology (NSWIT) which was proposing to introduce a new part-time law course.¹⁷

The Committee expressed particular interest in some trends in the types of courses taken at the New South Wales law schools. Whilst juris doctor (JD) courses or postgraduate LLB courses are now being advocated as offering the opportunity for law to be taught to mature students, at the time of the report the Bowen Committee considered that this disadvantage was overcome by students undertaking combined degree course involving law and another major subject such as art, business studies or science.¹⁸

The Committee was particularly concerned that with regard to Law Degrees becoming the accepted form of qualification towards becoming a legal practitioner, there was a need for equality of opportunity for entry into university law school.¹⁹

It recognised that whilst there was little 'empirical evidence relevant to the development of clear aims for legal education and ... uncertainty and variation in the formulation of such aims, that in recent years a considerable effort had been made in common law countries to articulate the aims and values of those concerned in devising curricula and with the teaching of law.'²⁰ In this consideration of the curriculum aims of law schools the Committee stated a view that among additional curriculum aims there should be a focus on the development of intellectual quality or skills of general application incorporating the ability to reason logically

¹⁶ Ibid 86.

¹⁷ Ibid 101-102.

¹⁸ Ibid 105.

¹⁹ Ibid 111.

²⁰ Ibid 113.

and communicate ideas.²¹ There was also concern that apart from the more specific ‘legal’ skills of legal reasoning and legal research, there should be an emphasis on skills in communication and in relating to people.²² There was also an acknowledgement to the views of some commentators who considered that another object which should be included was an understanding of the role of the law in society.²³

Apart from a focus on curriculum content and development, the Committee also referred to various other aspects of law school involvement in legal education with a particular emphasis as to the development which had taken place in teaching and assessment patterns. This concerned the move adopted by most of the NSW Law Schools away from the traditional delivery of formal lectures and seminars towards small group teaching, the use of casebooks in problem solving and the increasing role of ‘continuous assessment’.²⁴

It also recognised the rapid development of computer retrieval of legal materials which had taken place in North America and considered as to how this would subsequently affect the recording of both federal statutes on computer and the subsequent availability of a Lexis type system in Australia.²⁵

6. Additional Forms of Legal Education?

It could be argued that topics contained in Chapters 7 (The Admission Boards system), 8 (Practical Legal Training) and 9 (Continuing Legal Education) were one of the principal reasons for the establishment of the Bowen Committee, as they were regarded by many as the neglected areas of legal education in New South Wales, probably because they were the forms of legal education outside the university sector. Since the formation of the Committee they have remained a constant subject of review and improvement until the present time.

7. The Admission Boards System

The Admission Boards System is unique to New South Wales being the traditional form of examination which was originally adopted when the NSW Supreme Courts was established by Charter in 1823.²⁶ Despite the view that its existence has been superseded by the creation of university law schools, the system still remains in operation today.

There was no doubt in the minds of the members of the Bowen Committee with regard to both the low standard and lack of long-term future for the Admission Board’s system. Up until 1962 there had been no provision by the Law Extension Committee of the Legal Profession Admissions Board (LPAB) which had the responsibility for the administration of the program, for any in-house lecturing or any other form of tuition. Whilst in 1962 there had been an initiation of a formal system of lecturing and tuition provided under the auspices of the Sydney University Law School, it was obvious that the Bowen Committee was concerned at the lack of co-ordination between teaching and examination within the Extension Programme.²⁷ In particular the Senate of the University of Sydney had precluded ‘lecturers

²¹ Ibid.

²² Ibid.

²³ Ibid 114.

²⁴ Ibid 118-119.

²⁵ Ibid 121.

²⁶ Ibid 6.

²⁷ Ibid 156.

and tutors of the Law Extension Committee from acting as examiners or revising examiners for the Joint Examinations Board.²⁸ This meant that contrary to normal university practice there was no coordination between teaching and examining within the Extension Course. There were two groups that posed a challenge to any decision to abolish the Extension Committee courses. The first was that of country students which the Committee believed were now better provided for by an external degree course which had been introduced by the Macquarie Law School in 1975. The other was that advanced by the State Attorney General's Department for the provision of legal education for future magistrates and court officials. In the view of the Committee there was a necessity for such a course to provide a system of legal education which taught 'analytical skills, substantive legal knowledge, basic working skills such as library and research skills, the skill of communication, familiarity with the institutional environment and an awareness of the total non-legal environment.'²⁹ In emphasising these requirements the committee considered that 'the Admission Boards system has obviously fallen short in meeting these requirements'.³⁰

8. Practical Legal Training (PLT)

PLT does not appear to have generated the same amount of tension between the PLT Providers and the Committee as that caused by the Committee and those involved in the provision of the Admission Boards system.

Until the establishment of the Bowen Committee, Articles had been the dominant form of practical legal training for solicitors in New South Wales. Their abolition (essentially) and replacement by formal training at the College of Law or the ANU Legal Workshop with subsequent restricted practice after admission to satisfy the requirement for in-service training appears to have been reasonably uncontentious. This was in contrast to other States such as Victoria, Western Australia and Queensland where the retention of articles of clerkship were seen as a fundamental part of the preparation for legal practice. This part of the Bowen Report exhibits an understanding of the various problems involved in the introduction of practical legal training, the recent developments regarding clinical legal education, and how they might be evaluated within the context of this form of education.³¹ The Bowen Committee adopted a similarly rigorous approach to the practical training of barristers noting that the Barrister Admission rules at that time did not prescribe any form of practical training.³² It also observed that while the Council of the New South Wales Bar Association had provisions for pupillage, reading requirements and practical instructions, these only applied to those who joined the New South Wales Bar Association. It therefore recommended that membership of the Bar Association should be made compulsory for practising barristers but that 'prospective barristers in general be required to undergo training adjusted to their need within the College of Law or some other approved institution for practical training as a prerequisite to admission.'³³

²⁸ Ibid 155.

²⁹ Ibid 177.

³⁰ Ibid.

³¹ Ibid 188-189.

³² Ibid 196.

³³ Ibid 199.

9. Continuing Legal Education (CLE)

At the time of the Bowen Report, the concept of Continuing Legal Education was in the early days of its development. There were two additional factors mentioned in Chapter 9 of the Bowen Report which were prophetic to the development of the future of CLE. One was the recognition of the influence of the College of Law and the Regional Law Societies of the New South Wales Law Society on the conduct of such programs,³⁴ and the other was regarding the possibility of making CLEs a compulsory requirement of the annual certification of solicitors in New South Wales.³⁵ The latter is now a compulsory requirement in most Australian jurisdictions.³⁶

10. Legal Paraprofessionals

The concept of the managing clerk or its successor, the ‘paralegal’, does not appear to have gained any status within the New South Wales legal jurisdiction, despite the view adopted by the Bowen Committee that there could be a role for paralegal professionals within New South Wales.³⁷ However, it does appear to have received some recognition within Victoria, South Australia and Western Australia.

This did not prevent the Committee canvassing the various options available for a role for paraprofessionals in New South Wales. It expressed the view that, in the event of one being established in the future, their education and training should be vested in a separate paralegal education body.³⁸

11. Council of Legal Education

Throughout the Bowen Report, the Bowen Committee had been preoccupied with the establishment of a Council of Legal Education in New South Wales. Part of this concern was based on its belief that the teaching and examining functions of legal education should be the responsibility of an institution independent of the Supreme Court. The Bowen Committee reiterated its view by recommending that ‘a new body be established to be called the Council of Legal Education to take over the functions of determining educational qualifications for admission to practice now performed by the Admission Boards and the Joint Examinations Board.’³⁹ The chapter reinforced this recommendation with a wide-sweeping review of similar legal education councils in other jurisdictions, such as the English Ormrod Committee on Legal Education, the New Zealand Council of Legal Education and the Council of Legal Education for Victoria.⁴⁰

12. Conclusions and Recommendations of the Bowen Committee

³⁴ Ibid 213.

³⁵ Ibid 214.

³⁶ Ainslie Lamb and John Littrich, *Lawyers in Australia* (Federation Press, 2007) 252.

³⁷ Bowen Report, above n 1, 217.

³⁸ Ibid 221.

³⁹ Ibid 228.

⁴⁰ Ibid.

The final and concluding Chapter 12 of the Bowen Report still maintained as its major premise a recommendation regarding the establishment of a Council of Legal Education.⁴¹ The fact that this recommendation was never adopted by the New South Wales Government might be regarded as a major failure of the Bowen Committee. However the concept of an extended form of a NSW Council of Legal Education embracing the whole of Australia in the form of a National Appraisal Council or an Australian Council of Legal Education was reconsidered by the Australian Law Reform Commission in 2000 in its ALRC Report No 89⁴². In this regard the Commission came to the conclusion that whilst:

in the medium to long term, the public interest may be better served by the establishment of a body which sets (appropriately high) national minimum standards for legal education [they argued]... that the formal auditing and accrediting process should remain at the State and Territory level...[as] admitting authorities surely should be able to trust each other to monitor effectively the standards of law schools within each jurisdiction, with automatic and reciprocal effect given to State and Territory accreditation.

Nevertheless it concluded that whilst the major stakeholders would need to work together constructively to achieve this aim, ‘until such time as this eventuates, and in order to promote conditions which might facilitate this cooperative approach’, it recommended a suite of alternative recommendations including ‘the introduction of a regime for quality assurance in Australian law schools’ and ‘the establishment of an Australian Academy of Law.’

With respect to these recommendations it should be observed that the introduction by the Council of Australian Law Deans (CALD) of *Standards for Australian Law Schools* has gone a long way to achieving this objective summarised by Michael Coper in the following terms:

It should be said immediately that the overwhelming purpose of the CALD standards project is to enhance the quality of Australian law schools in all of their diverse endeavours, and to do so by assisting all Australian law schools to strive for and to reach a clearly articulated set of standards.⁴³

There are also indications that the establishment of the Australian Academy of Law in 2007 with its ever-increasing appointment of new fellows resulting in an increasing membership of over 260 fellows, is now taking a greater interest in legal education.⁴⁴

The other recommendation which was ignored by the State Government related to the phasing out of the Admission Boards system of examinations, although it could now be accepted the concern expressed by the Bowen Committee: ‘That the Admission Boards system has seriously fallen short in meeting the requirements of a system of legal education that produces lawyers with the necessary knowledge, skills and professional techniques’⁴⁵ led to ongoing reforms to the Extension Course. These culminated in the improvements

⁴¹ Ibid 241.

⁴² Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 132-138 [2.63]-[2.77].

⁴³ Michael Coper, ‘A Brief History of the CALD Standards Project’ (2008).

⁴⁴ Australian Academy of Law, Constitution, cl. 4.1(c).

⁴⁵ Bowen, above n 1, 244.

introduced by Frank Astill who took over the Directorship of the University of Sydney Law Extension Committee in late 1997.

There is also much to commend in the Bowen Report, particularly in its approach to the general concepts of legal training. This emphasised the recognition of ‘three essential components of training prior to admission to practice – a component of theoretical knowledge, a component of skills and practical knowledge and a component of professionalization’,⁴⁶ with an acknowledgement that ‘there is no fundamental reason why these components should be dealt with exclusively by one institution in the legal education process’.⁴⁷ This reflects an enlightened approach to the development of these important aspects of legal training.

The Bowen Report also put into context the importance of admission to the legal profession being conditional on completion of an appropriate law degree (other than the New South Wales Law Extension Course). This approach has been maintained throughout the development of modern Australian tertiary education whereby legal education has shown a remarkable resilience in both retaining and enhancing its status as a major university discipline.

The development and maintenance of a high standard for practical training was also a focus for the Bowen Report to ensure that a graduate would be able to develop the capabilities required of a practising barrister or solicitor so they would be ‘equipped with the skill necessary to serve the community properly’.⁴⁸

Mention has already been made of the willingness of the Bowen Committee to discuss the challenge of supply and demand of lawyers, a factor which the earlier Martin Committee in 1964 had chosen to ignore. With respect to the issue of legal employment, the Bowen Committee was concerned that some form of planning should take account of the future demands for, and supply of, lawyers.⁴⁹ However, it rejected any attempt to impose quotas at later stages of a student’s progress through legal training, and took the view that if there was to be any restriction on the numbers of lawyers then this should be done prior to potential students enrolling in law school.⁵⁰

(Number of Words 4,142)

⁴⁶ Ibid 242.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid 247.

⁵⁰ Ibid.