THE JOURNEY OF AUTHORISED LAW REPORTS: FROM THE 'MISTS OF ANTIQUITY' TO THE THIRD MILLENNIUM

Michelle Bendall, Law Librarian, Deakin University[1]
michelle.bendall@deakin.edu.au

As long as Australia retains a common law legal system, authorised law reports will always provide a significant contribution as an enabler of access to justice. This article will provide a brief historical journey of how authorised law reporting evolved in England and then transplanted into common law jurisdictions such as Victoria, Australia. The article will conclude with a forecast as to what role authorised law reports will continue to contribute in the online domain of access to judicial precedents in the present day and into the future.

How did we get here? (Or – the perennial law student question – "why do I have to cite an authorised law report format?")

A question often asked of librarians and academics teaching legal research is, "why should authorised law reports be cited over any other format?" Most often our response is to bring to the enquirer's attention rule 2.2.2 of the *Australian Guide to Legal Citation*, 4th edition, '[t]he authorised version of the report should always be used where available'.[2] The reactive logical response from the enquirer then becomes the assumption that "assignment instructions state that the *AGLC4* referencing style must be used, so I'll do it for the assignment, but what about when I graduate?" That is when the closest available court Practice Note is then brought in as reinforcement for the "not just for law studies but for one's entire legal career" instruction. For example, the Supreme Court of Victoria Practice Note GEN-3 "Citation and Authorities" states both that when cases are provided as precedents in litigation, citations must first comply with the AGLC referencing style and if a case is reported in an authorised law report then that format must be cited.[3] So, as a starting point, I hope we all can accept the current proposition that if the referencing and court guidelines demand that if a case is reported in an authorised law report then there must be something very significant about the value of authorised law reports in this current age. Let us now follow the journey of how authorised law reports gained this lofty status in the legal precedent hierarchy.

The journey from Year Books to the Incorporated Council of Law Reporting for England and Wales

Daniel Hoadley succinctly explains that: 'Law reporting is almost as ancient as the common law itself and has been absolutely essential to its development. Without law reporters and their reports,

1 BA(Legal Studies) (LaTrobe) Grad Dip Inf Serv (RMIT). With thanks to Dr Paul McDonough (Cardiff University) for his constructive feedback on an early draft of this article.
2 *Australian Guide to Legal Citation* (Melbourne University Press, 4th ed, 2018) r 2.2.2. ('*AGLC4*').
3 'Practice Note SC GEN 3 – Authorities and Legislation', *Supreme Court of Victoria* (Practice Note, 30 January 2017) [4.1], [5.1] <https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/practice-note-sc-gen-3-authorities-and-legislation-0>.

English common law would never have developed'.[4] He then goes on to state that '[I]t is all well and good having access to the raw haystacks of judicial materials, so long as there operates a parallel system of making the highly polished needles of law-changing authority stand out'.[5]

It is well documented that law reports in the UK started with the Year Books around the reign of Edward I.[6] Following on from this period were early Nominate Reports. These were compiled by individuals (most often lawyers) and it was often contentious as to whether they were accurate records of judicial precedents. Issues of Norman French jargon translations, reputations of the reporter and difficulties in deciphering handwritten notes from dead compilers demonstrated that these law reports were not always as highly regarded as legal historians may have thought.[7] It was not really until *Plowden's Reports* (1550-1580) and *Coke's Reports* (1572-1616) that these highly regarded compilers started to focus on the principles of the law of judicial precedents instead of general facts.[8] The concerns over the quality of the nominate law reports led to establishment of The Incorporated Council of Law Reporting for England and Wales ('ICLR') in 1865. The Council is a not-for-profit organisation and is the authorised publisher of the official series of The Law Reports for the Superior and Appellate Courts of England and Wales.[9]

The old colonial ways: Adoption in the Colony (State) of Victoria, Australia 1870–1967

In my home jurisdiction of Victoria, Australia, the authorised law reports for the Supreme Court of Victoria and the Court of the Appeal of Victoria are the *Victorian Reports*. This report series was approximately first published as the *Webb, A'Beckett and Williams Victorian Reports* in 1870, later to become the *Victorian Law Reports in 1875*, and finally the *Victorian Reports* in 1955.

The first editor of law reports in Victoria was George Henry Frederick Webb. It is no surprise that he was called the 'Father of Law Reporting in Victoria'.[10] Prior to becoming a barrister, he was a government shorthand writer and transcribed the two *Eureka Stockade Treason Trials* in 1855.[11] He also contributed to the *Wyatt and Webb* law report series and the *Wyatt, Webb and A'Beckett* law report series which predate the *Victorian Reports*.[12] Webb was later appointed a Supreme Court

4 Daniel Hoadley, 'The Curious Case of the Judgment Enhancers' in Paul Magrath (ed), *The Law Reports 1865-2015 Anniversary Edition* (The Incorporated Council of Law Reporting for England and Wales, 2015) 17.

5 Ibid.

6 See Van Vechten Veeder, 'English Reports 1292-1865' (1901) 15(1) *Harvard Law Review* 1; and Guy Holborn, 'The Old Law Reporters' in Paul Magrath (ed), *The Law Reports 1865-2015 Anniversary Edition* (The Incorporated Council of Law Reporting for England and Wales, 2015) 29.

7 Justice PW Young and AA Gomez, 'The Status of Law Reports Produced in EnglandPrior to 1865' (2013) 87(12) *Australian Law Journal* 844, 845.

8 Ibid 847.

9 'About', *Incorporated Council of Law Reporting for England and Wales* (Web Page) <https://www.iclr.co.uk/about/>.

10 Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (FW Cheshire 1968) 141.

11 Supreme Court of Victoria, *State Trials: Queen v Hayes, Queen v Joseph; Proceedings on the Trials of these Informations in the Supreme Court of the Colony of Victoria* (John Ferres, Government Printer, 1855). See also 'Treason Trials', (Web Page, 14 May 2019) <http://www.eurekapedia.org/Treason_Trials>.

12 Dean (n 10) 141.

judge in 1886. The *Victorian Reports* has had a distinguished history of engaging eminent barristers as editors and as headnote compilers.

To linger in the past for a moment longer, in 1967, law reporting in Victoria became more formalised with the introduction of the *Council of Law Reporting in Victoria Act 1967* (Vic). In the Attorney-General's second reading speech to the Bill, he acknowledged that the Council of Law Reporting in Victoria was already in existence, but that 'the origin of this council and its original constitution appear to have become shrouded in the *mists of antiquity* and little appears to be known of them'.[13] The legislative framers' intention of the 1967 Act was to incorporate the Council (similar to the recent initiatives in England and New Zealand) and provide the Council power over the publishing of 'judicial decisions in any court in Victoria'.[14] This current power enables the Council to provide licenses for the publishing of judgments to commercial legal publishers and free legal information websites. During further debate on the Bill on 20 September 1967, Mr Turnbull noted that '[I]t has always been the practice of lawyers to have law reports … the common law is based to a great extent on precedents'.[15] The Bill was debated more extensively in the Legislative Council with The Hon. M.A. Clarke stating 'a multiplicity of law reports leads to considerable confusion when authorities are quoted … If there is only one set of reports in Victoria this will be a great asset'.[16] This statement is a reflection on why the ICLR was developed in England and it is still relevant today with the proliferation of the citation of unreported judgments as precedent authorities.

Open access provision of judgments: circa 1992 into the Third Millennium

Around the 1990s, Australian courts started distributing electronic formats of unreported judgments to legal publishers, free-access websites and even publishing judgments on their own court websites or library catalogues. It soon became the practice, of at least the superior courts, to make all unreported judgments (with some exceptions) available in unreported electronic form. In 1992 the Australian Institute of Judicial Administration published the *Guide to Uniform Production of Judgments*. This report was revised and updated in 1999 ('*AIJA Report*').[17] The Guide set forward a standard format for written unreported judgments. The Guide acknowledged the format style set out by the High Court of Australia 'display[ed] world leadership in this area'.[18] The Guide stressed the importance of the uniformity of the technical structure of judgment document templates

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 September 1967, 116 (GO Reid, Attorney-General) [emphasis added].
14 *Council of Law Reporting in Victoria 1967* (Vic), Preamble and s 10.
15 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1967, 309 (Mr Turbull). [side note for grammar nerds – have a look at the suggestion of the placement of a comma by Mr Mitchell during the debate on the Bill on 20 September 1967, 309]
16 Victoria, *Parliamentary Debates*, Legislative Council, 31 October 1967, 1426 (MA Clarke).
17 LT Olsson, *Guide to Uniform Production of Judgments* (Australian Institute of Judicial Administration, 2nd ed, 1999).
18 Ibid 9.

across all Australian courts to assist with the accurate electronic publishing of judgments.[19] The High Court of Australia also led the way in providing medium neutral citations to judgments and the Guide provided a proposed court designation abbreviations list.[20] The purpose of providing court-designated medium neutral citations was to enable the judgment to be easily identified regardless of whether it was being referenced from an unreported judgment format or from a law report format.

I have noticed three recommendations about the preparations of coversheets to judgments in the *AIJA Report* which have not been consistently adopted across all Australian courts. The Guide recommended that the coversheet of a judgment contain a headnote or at least catchwords which extracts the *ratio decidendi*.[21] It should include a note up of authorities cited and how they have been applied.[22] It should also note legislation which has been 'discussed or applied'.[23] The main focus of the Guide was to acknowledge that researchers will be relying on computer retrieval databases to locate relevant cases and emphasised '[a]bove all else BE CONSISTENT, or the computer may not find all relevant references'.[24] If courts do not follow these consistent guidelines when writing the original judgment, it causes difficulties for a researcher, searching in unedited full-text databases, to accurately locate relevant authorities which have judicially considered a section of legislation or applied or distinguished a previous judgment.

The role of editors as 'curators' and 'judgment enhancers' in the Third Millennium

The current editor of the *Victoria Reports* describes the benefits of authorised law reports as being the curating of precedents.[25] Daniel Hoadley of ICLR goes further to illustrate that law reporters are "judgment enhancers" by the outputs of the quality of the headnotes that they write. He provides an excellent example of the law reporter who wrote the headnote for the complex judgment in *R (Pinochet Ugarte) v Bow Street Magistrates' Court (No. 3)* [2000] 1 AC 147. 'The law reporter's effort, in drafting precise and accurate headnotes, make the contents of judgments intellectually accessible. Without those headnotes, readers, regardless of their seniority and experience, have to wade into the text of the judgments utterly unaided'.[26]

It is not just the fact that a case has been selected for a law report that makes it a useful precedent. The time taken by an editor to write an instructive headnote for that judgment provides more clarity on the legal principles decided in the judgment. It is a considerable intellectual skill

19 Ibid 11.
20 Ibid 27.
21 Ibid 3.
22 Ibid.
23 Ibid 6.
24 Ibid 21.
25 Peter Willis, 'A Plethora of Sources: the Origins and Ends of Authorised Law Reporting in Australia & NZ' (Paper presented at the *Does Law's History Matter? The Politics of our Disciplinary Practices*, 38th Annual Conference of the Australian and New Zealand Law and History Society Annual Conference 11-14 December 2019).
26 Hoadley, (n 4) 23-24.

to closely analyse the annual flow of judgments from a court and then to carefully select and curate the judgments of the most precedential value. It would take quite an advanced automated search engine (even with the best algorithms) to replicate this curator's intellectual skill.

Common law precedents and statutory interpretation

In March 1886 an anonymous Victorian lawyer wrote in *The Herald* newspaper lamenting that the *Victorian Law Reports* were not reporting enough common law precedents, but that 70% of the cases in the latest volume were on the "construction of statutes", and then reinforced the law reporting principles laid down by Lord Justice Lindley.[27] What are these Lindley Principles readers of legal history are so often are reminded of? The principles were developed by Nathaniel Lindley, QC in 1863 and are still used as guidelines for law reporting by at least the law reporters of the ICLR, the *Queensland Reports*[28] and the *Victorian Reports*.[29]

Nathaniel Lindley Principles (1863)

1. All cases which introduce, or appear to introduce, a new principle or a new rule.
2. All cases which materially modify an existing principle or rule.
3. All cases which settle, or materially tend to settle, a question upon which the law is doubtful.
4. All cases which for any reason are peculiarly instructive.[30]

The *ICLR Guide to Reportability* takes these Principles one step further by adding: '[i]f the judgment involves the construction of a statute it is very likely to be reportable'.[31] There appears to be an evolution in the expectation that judges are often required to interpret sections of legislation as well as reviewing the modern application of pre-existing common law principles.[32]

Research challenges for the experienced legal professional, law student and self-represented litigant

Authorised law reports are relied upon to provide precedents of judicial consideration of legislation. I am still not yet convinced that an automated database, even ones running complex algorithms, can categorically state whether a judge has interpreted a provision of legislation.

27 'Law Gossip and Notes', *Herald,* (Melbourne 19 March 1886) 4. I refer to this note just to illustrate the early adoption of the *Lindley Principles* in Australian law reporting practices.

28 'Reporting Process', *Queensland Reports* (Web Page), <https://www.queenslandreports.com.au/reports/reporting-process/>.

29 'About the Victorian Reports', *Victorian Reports* (Web Page), <https://victorianreports.com.au/about/victorian-reports>.

30 Extract from a Paper on Legal Reports by Nathaniel Lindley (1863) (webpage) <https://www.iclr.co.uk/knowledge/guides/the-iclr-guide-to-reportability/>, also discussed in Nathaniel Lindley, 'History of the Law Reports' (1885) 1(2) *Law Quarterly Review* 137.

31 'The ICLR Guide to Reportability' (Web Page) <https://www.iclr.co.uk/knowledge/guides/the-iclr-guide-to-reportability/>.

32 For example the recent High Court decision of *Love v Commonwealth of Australia* [2020] HCA 3, where the Court had to decide whether a person of Aboriginal Australian descent could be considered an 'alien' for the purposes of s 51(xix) of the *Australian Constitution*.

It is essential for researchers to know whether a judge merely mentioned a provision of an Act or whether the judge actually defined what that provision means.[33] The High Court of Australia along with federal and state appellate courts are always investigating the historical provenance of legislation to understand the original intention of legislative drafters which will then lead to a defining judicial interpretation of a provision. At other times, a case may be litigated under a straightforward provision which needs no interpretation as the original framer's intention was quite clear. How is a researcher or a self-represented litigant able to work this out if they have simply undertaken a keyword search in a full-text database? Even law students, who learn the IRAC method,[34] cannot expect catchwords provided on unreported judgments to follow a similar IRAC formula in a way that an automated algorithm system will detect it. Lord Neurberger of Abbotsbury has raised concerns that the 'welter of available case law leads to an increased risk of lawyers, whether advising or advocating, losing sight of the wood for the trees'.[35] He continues on to emphasise the importance of educating law students on 'how to find, understand and deploy the bewildering array of source materials',[36] which is an 'essential part of the technique of law, and the understanding of precedent is an essential part of the substance'.[37]

Justice Cameron Macaulay, of the Supreme Court of Victoria, has picked up the challenge of authorised law reporting in this modern age of free online access to judgments. 'Free online databases have brought a highly accessible but largely unfiltered and non-selective torrent of decisions from all levels of judicial hierarchy across almost every conceivable subject field'.[38] His Honour goes on to note the limitations of keyword searching in full-text databases and that a search engine 'returns results by reference to words and language but not by principle'.[39] His Honour also reinforced an ongoing concern raised by Terry Hutchinson 'that lawyers are tending to 'fact-match' rather than ascertain and apply principles of facts'.[40]

In 2017, Terry Hutchinson published research which involved interviewing judges, publishers, academics and librarians, with a focus on 'the extent on which technology is changing the way lawyers locate and process the law'.[41] Hutchinson predicts that future law students will need 'less instruction in how to '*find* the law and more instruction in *assessing* and *evaluating* the sources they

33 I have an example which I regularly demonstrate in legal research classes. Take the case of *Cajkusic v Commissioner of Taxation* [2006] FCAFC 164; 155 FCR 430. You are most welcome to compare it in more than one well-known Australian case citator and tell me whether the Federal Court judges judicially defined section 6-5 of the *Income Tax Assessment Act* 1997 (Cth), or whether the provision was just mentioned in passing? (Answers on a postcard please).

34 **I**ssue, **R**ule, **A**pplication, **C**onclusion. See also, Kenneth Yin & Anibeth Desierto, *Legal Problem Solving and Syllogistic Analysis: A Guide for Foundation Law Students*, (LexisNexis Butterworths, 2016) 5.

35 Lord Neuberger of Abbotsbury, 'Law Reporting and the Doctrine of Precedent: The Past, the Present and the Future' in Simon Hetherington (ed), *Halsbury's Laws of England Centenary Essays 2007* (Lexis Nexis Butterworths 2007) 78.

36 Ibid 79.

37 Ibid.

38 Justice Cameron Macaulay, 'Authorised Law Reporting: Up to the Challenge' (2018) 163 *Victorian Bar News* 50.

39 Ibid 51.

40 Ibid.

41 Terry Hutchinson, 'Legal Research in the Fourth Industrial Revolution' (2017) 43(2) *Monash University Law Review* 567.

find'.[42] He reflects that we are in a time of technology transition and that '[w]hat we do is not linear, and arguably difficult to replicate in an algorithm – it's "much more complex than that"'.[43]

Richard Susskind has discussed at length the usefulness of technology for court processes and has put forward some excellent examples of how artificial intelligence databases can improve access to justice in his recent book *Online Courts and the Future of Justice*. He does admit that '[C]ase law is harder to handle, of course, because the *ratio decidendi* of a case can rarely be formulated as some simple canonical rule, so that what is represented is necessarily a concise interpretation rather than a literal translation of the law'.[44]

During my current role in instructing law students on legal research, and my previous years in a court library assisting self-represented litigants to research judicial precedents to support their arguments, I know how overwhelming it can be for someone, with limited legal research experience, to sort through the masses of downloaded judgments based on keyword searching, when an index to an authorised law report can succinctly list all relevant precedents, on a topic or legislation judicially considered. The evolution over the last 25 years of free-access websites containing full text unreported and historical reported judgments does improve access to justice, in the sense of wider access to judicial decisions. The difficulty lies in sorting out which are the best judgments to utilise as precedents in litigation and a litigant who is overwhelmed by a plethora of judgments, would find this a barrier to access to justice. If authorised law reports were to cease to exist, then I would predict the increase in the reliance of textbooks. When a law student undertaking a clerkship is asked to quickly retrieve the leading case on a certain point of law, if there is no senior lawyer about to ask for advice, then a textbook or law report would be the logical place to start. Research does not have to end with a law report, but it is certainly the best place to start and then once a good precedent is located, the student can move on to the free databases to search for the most recent applications of that precedent.

Parallel citations of judgments

Returning to the *AIJA Report* one last time, there was a recommendation to provide parallel citations to judgments. This involved providing both the medium neutral citation to a judgment as well as a law report citation, if the case was subsequently reported in a law report series.[45] It does not appear to be common practice in Australia to do this. As stated earlier, rule 2.2.2 of the *Australian Guide to Legal Citation* clearly states that if a case is reported in an authorised law report, then only that citation should be provided.[46] The Supreme Court of South Australia and the Victorian Law Reform Commission have a practice of providing parallel citations to both the medium neutral citation and the authorised law report citation of a judgment.[47] The VLRC acknowledges the importance of citing authorised versions of cases, but also understands that

42 Ibid 588.
43 Ibid 591 (quote from interviewee included).
44 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 160.
45 *AIJA Report*, (n 17) 20.
46 AGLC4, (n 2) rule 2.2.2.
47 Gemma Walsh, *Citation: Authorised vs Medium Neutral* (Victorian Law Reform Commission, 2019) 2.)

the readers of their reports may not always have access to authorised law reports.[48] A practice of providing parallel citations and free searchable indexes to authorised law reports would increase access to justice for legal researchers and self-represented litigants.

An Australian Council of Law Reporting?

In an editorial in the *Australian Law Journal* in 2010, Justice P.W. Young lamented the increase in the citation of unreported judgments,[49] stating '[i]t is almost a perennial topic discussed at judicial conferences as to whether there should be some limit placed on the citation in court of unreported cases'.[50] He went on to hope that '[i]n the ideal world, there would be a system of authorised law reporting by expert editors with experience in all branches of the law who would selectively report only cases of principle with perhaps a supplement of notes from other cases with significant dicta or observations on incidental matters'.[51] The future of law reporting was also discussed at length during a panel session at the *Joint ALLA-NZLLA Conference* held in Melbourne in 2010.[52] One of the panellists was Justice Raymond Finkelstein, who argued strongly in support the evaluative and filtering process of authorised law reports.[53]

Since 2013 there have been calls for a national council of law reporting in Australia. Justice Stephen Rares as Chair of the Consultative Council of Australian Law Reporting has put forward a proposal for a national website of authorised Australian law reports. At the time this received the support of Justice Geoff Lindsey, stating that '[i]f there is to be such a website it needs to accommodate a full measure of autonomy in each Australian jurisdiction's administration of law reporting. Modern technology, in which each jurisdiction's reports can be made available in website 'links' may facilitate this in ways not possible in the age of print'.[54] With the *Victorian Reports*[55] offering pay-per-view service and the *Queensland Reports*[56] offering free access to registered users, there is potential for a national coordinated system of authorised law reports similar to ICLR Online. In 2018, Daniel Hoadley offered ICLR's support for such a joint venture.[57] The future for authorised law reports does not depend on which commercial publisher provides access; it depends on court appointed editors to curate the best precedents and the legal experts who write the clear headnotes. If the courts were to collaborate to take up the centralisation of one authorised law reporting body, it would improve access to justice for legal researchers, whether they be experienced lawyers, law students or self-represented litigants. The *Queensland Reports* is a perfect model which could be adopted nationally.

48 Ibid.
49 Justice PW Young, 'Law Reporting' (2010) 84(10) *Australian Law Journal* 667.
50 Ibid.
51 Ibid 668.
52 Dorothy Shea, 'The Future of Law Reporting: A Report on the Panel Session Held During the Joint ALLA-NZLLA Conference in Melbourne 2010' (2011) 19(1) *Australian Law Librarian* 18.
53 Ibid 19.
54 Justice Geoff Lindsey, 'A National Website for Authorised Law Reports?' (2013) 87(12) *Australian Law Journal* 807, 808.
55 *Victorian Reports*, (Website), <https://victorianreports.com.au>.
56 *Queensland Reports*, (Website), <https://www.queenslandreports.com.au>.
57 Daniel Hoadley, 'ICLR: How Common Law Jurisdictions Remain Linked through their Shared (and Reported) History', ALLA Blog (June 2018), <http://alla.asn.au/blog/iclr-june-2018/>.