

**COWEN AS LIFE-WRITER:
SIDELIGHTS FROM THE ARCHIVES**

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Biography is an unusual choice of subject for a legal academic, but for Zelman Cowen it was a recurring interest. This article considers Cowen's choice of biographical subjects before turning to the light that archival research casts on two episodes in the lives of people about whom he wrote: the appointment of Sir Isaac Isaacs as Governor-General of Australia, and Cowen's own early academic career.

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I INTRODUCTION

Zelman Cowen turned to biography during his academic career, and it remained a recurring interest for him for the rest of his life. It was, and remains, an unusual subject for a legal academic, although it is a more natural one for a Governor-General in search of subjects for interesting and uncontroversial speeches. Cowen's *Isaac Isaacs* is, for example, one of the very few full-length biographies written by former Melbourne Law School staff.¹ It is necessary to look back over a century, to the popular histories published by

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¹ See Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967) (*Isaac Isaacs (1967 ed)*); Sir Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, revised ed, 1993) (*Isaac Isaacs (1993 ed)*).

Melbourne Dean Edward Jenks after his departure in 1892,² to find an earlier comparison.

We are sometimes said to live in a golden age of biography,³ but in Australia life-writing has little place in legal academia. A J Brown's biography of Michael Kirby and Greg Taylor's of Sir Richard Hanson are recent and rare exceptions.⁴ Considered as a branch of legal history, biography is a niche within a niche. In Australia, legal biographies are less likely to be written within law schools than outside them, by lawyers, historians and other authors. Through his lives of the Australian chief justices, John Bennett dominates legal authorship of legal biography,⁵ while Pamela Burton's biography of Mary Gaudron is another example by a lawyer whose career has been outside legal academia.⁶ Recent legal biographies by historians include Mark Finnane's of Sir John Barry,⁷ Philip Ayres's of Sir Owen Dixon and Sir Ninian Stephen,⁸ and Wilfrid Prest's of Sir William Blackstone.⁹ Journalists have written other notable examples, such as Michael Pelly's biography of Murray Gleeson.¹⁰

I can only speculate about the reasons for this lack of interest within law schools. Perhaps a life story does not produce socially useful knowledge in the ways promoted by research policies. Perhaps personalising legal issues by giving them a biographical context runs counter to the abstract neutrality inherent in some conceptions of legalism. Stephen Gageler, for example, has described the idea of legalism in this way:

The law existed independently of its exposition. There was perceived to be a 'definite system of accepted knowledge or thought': 'judgments and other legal

² See, eg, Edward Jenks, *Walpole: A Study in Politics* (Methuen, 1894); Edward Jenks, *Edward Plantagenet (Edward I): The English Justinian or the Making of the Common Law* (G P Putnam's Sons, 1902).

³ Among the many who have characterised the period as a golden age is Jill Roe, 'Biography Today: A Commentary' (2012) 43 *Australian Historical Studies* 107, 118.

⁴ A J Brown, *Michael Kirby: Paradoxes & Principles* (Federation Press, 2011); Greg Taylor, *Sir Richard Hanson* (Federation Press, 2013).

⁵ See J M Bennett, *Lives of the Australian Chief Justices* (Federation Press, 2001–14).

⁶ Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010).

⁷ Mark Finnane, *J V Barry: A Life* (UNSW Press, 2007).

⁸ Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003); Philip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (Miegunyah Press, 2013).

⁹ Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford University Press, 2008).

¹⁰ Michael Pelly, *Murray Gleeson: The Smiler* (Federation Press, 2014).

writings' were merely 'evidence of its contents.' Within that system of knowledge or thought, there was no room for policy considerations and no scope for choice in judicial decision making.¹¹

I could add that there was little room for either the influence of personality or the shaping of identity through time that is central to much biography. Perhaps the lack of legal academic work on biography also owes something to the basic fact that a biography contains a great deal more about a person's life than about legal doctrine or theory.

Whatever the reasons (and there is a similar debate about the place of biography in academic history¹²), Cowen's biographical work is all the more interesting for being unusual. In this paper, I consider his choice of subjects, before turning to sidelights that archival research casts on incidents from the lives of two of his subjects: one from the life of Sir Isaac Isaacs, and the other from the early career of Cowen himself.

II COWEN'S SUBJECTS

Who, then, did Cowen write about? I have already mentioned Isaacs, who Cowen returned to several times, beginning with an entry in *The Dictionary of National Biography* in 1959.¹³ The two editions of his biography of Isaacs are accompanied by speeches, an entry in the *Australian Dictionary of Biography* and a pamphlet in Oxford University Press's *Great Australians* series.¹⁴ For the

¹¹ Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 429, 429.

¹² On the stance of practising historians towards biographers, see Wilfrid Prest, 'History and Biography, Legal and Otherwise' (2011) 32 *Adelaide Law Review* 185, 186.

¹³ Zelman Cowen, 'Isaacs, Sir Isaac Alfred (1855–1948)' in L G Wickham Legg and E T Williams (eds), *The Dictionary of National Biography 1941–1950* (Oxford University Press, 1959) 423.

¹⁴ Cowen, *Isaac Isaacs* (1967 ed), above n 1; Cowen, *Isaac Isaacs* (1993 ed), above n 1; Sir Zelman Cowen, 'Two Great Lawyers: Isaac Isaacs and Robert Garran' in M D Kirby (ed), *A Touch of Healing: Speeches by Sir Zelman Cowen 1977–1982 — Law and Society* (University of Queensland Press, 1986) vol 2, 22; Sir Zelman Cowen, *Sir Isaac Isaacs* (Melbourne University Press, 1979); Sir Zelman Cowen, 'Isaacs, Sir Isaac Alfred (1855–1948)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9, 444; Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1962).

Oxford Dictionary of National Biography, Cowen wrote about that opposite pole of the early High Court, Sir Samuel Griffith.¹⁵

Then there are Cowen's shorter biographical works: his Macrossan Lectures on Sir John Latham in 1965, and his memoir of Sir John Barry, delivered as the Turner Memorial Lecture in Hobart in 1970.¹⁶ He paid homage to the architect Robin Boyd in a public lecture in 1972, and wrote other entries for the *Australian Dictionary of Biography* on the Melbourne lawyers Maurice Ashkanasy and E G (Bill) Coppel.¹⁷ As Governor-General, he delivered a number of speeches with biographical titles, but here the life usually took second place behind discussion of broader themes. Lastly there is Cowen himself, the subject of his last and longest work of life-writing, his memoir.¹⁸

If things had turned out differently, I could have added the name of Richard O'Connor, Griffith's colleague on the High Court. Cowen began collecting material for a biography after publishing *Isaac Isaacs* in 1967, and he told Sir John Barry that work was under way. Barry approved. 'To write about O'Connor will be pleasant,' he told Cowen. 'He seems to have been the only gentleman of the first three. Barton seems to have been a clubbable snob, and Griffith was an old scoundrel.'¹⁹ But by 1969 Cowen was reporting that the book was 'in limbo' because of the pressure of other work.²⁰ He was never to complete it.

Cowen was mainly a biographer of the known world, of familiar people and places. The setting of most of his biographies was Melbourne, and particularly its legal community. He was interested in recording what he knew of prominent people, and in honouring them or rescuing them from unjustified neglect. It seemed to him, he said, that Isaacs had been 'effectively

¹⁵ Sir Zelman Cowen, 'Griffith, Sir Samuel Walker (1845–1920)' in H C G Mathew and Brian Harison (eds), *Oxford Dictionary of National Biography* (Oxford University Press, 2004) vol 23, 977.

¹⁶ Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) ch 1; Zelman Cowen, 'J V Barry: A Memoir' (1970) 3 *University of Tasmania Law Review* 237.

¹⁷ Zelman Cowen, 'Homage to Robin Boyd' (1973) 62(2) *Architecture in Australia* 53; Sir Zelman Cowen, 'Ashkanasy, Maurice (1901–1971)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13, 78; Sir Zelman Cowen, 'Coppel, Elias Godfrey (1896–1978)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13, 500.

¹⁸ Sir Zelman Cowen, *A Public Life: The Memoirs of Zelman Cowen* (Miegunyah Press, 2006).

¹⁹ Letter from Sir John Barry to Zelman Cowen, 11 October 1967, Papers of Sir John Vincent Barry, MS 2505, 1/10225–6, National Library of Australia (NLA).

²⁰ Letter from Zelman Cowen to Sir John Barry, 10 May 1969, Papers of Sir John Vincent Barry, MS 2505, 1/11350 (NLA).

forgotten'.²¹ He must have agreed with what Sir Owen Dixon wrote about Isaacs and Griffith in his preface to Max Gordon's biography of Isaacs:

The life and work of each of them deserve close and detailed study and yet, as it has seemed to me who as a young man saw both of them at work and felt the fascination of the conflict of opinion between them, nothing is more remarkable than the neglect their careers have suffered and what would almost seem the oblivion into which they have fallen.²²

There is something of the same desire to restore an undervalued reputation in Cowen's lectures on Latham, the politician who missed his chance to become Prime Minister and the Chief Justice whose judicial career was spent in the shadow of Dixon.

For Cowen, biography was not, as it is for some writers, an imaginative reconstruction of distant lives. R M Crawford's aphorism — 'The study of History is vicarious experience'²³ — was not for him. For Cowen, the starting point of biography was personal experience. He did not go in search of people he could know only at second hand. The core of much of his writing was personal knowledge.

Biography, perhaps more than most legal writing, is shaped by its sources. Writing about Isaacs, Cowen used only a few of the available archives, the most notable being Isaacs's remarkable letters to his mother, and Isaacs's notes of what Prime Minister James Scullin told him about the negotiations leading to his appointment as Governor-General. Both sources had previously been inaccessible, in private hands. Cowen was relieved to find in Isaacs's letters some traces of his inner or emotional life, which he had been struggling to penetrate.²⁴ But he principally relied on published sources. The contrast with John La Nauze's biography of Alfred Deakin, published two years before Cowen's biography of Isaacs,²⁵ is striking. Deakin and Isaacs were almost exact contemporaries and moved in the same worlds of Victorian and federal politics. Even putting aside Deakin's personal papers, which had no equivalent in the sources for Isaacs's life, La Nauze drew on a wealth of manuscript sources. Writing about Latham, Cowen made no use of Latham's personal

²¹ Cowen, *Sir Isaac Isaacs*, above n 14, 2.

²² Sir Owen Dixon, 'Foreword' in Max Gordon, *Sir Isaac Isaacs: A Life of Service* (Heinemann, 1963).

²³ R M Crawford, 'A Bit of a Rebel': *The Life and Work of George Arnold Wood* (Sydney University Press, 1975) 376.

²⁴ See Cowen, *Isaac Isaacs* (1993 ed), above n 1, xi.

²⁵ J A La Nauze, *Alfred Deakin: A Biography* (Melbourne University Press, 1965).

papers, which were already in the National Library. Admittedly their great bulk and their location in Canberra made them inaccessible.

Some of Cowen's subjects were his friends. Robin Boyd and Sir John Barry are examples. Others, such as Latham and Coppel, were people he had close contact with. Isaacs he saw and admired as a young man. They were people he knew, but not always people he liked, although he valued his connection with them. He described his feelings for Isaacs in a letter in 1963:

It is not very easy to like Isaac Isaacs, but he was a very remarkable man and one of our most distinguished Judges and should be written about. Though I cannot work up any feelings of personal affection, there is much to admire and I don't think that I am doing him an injustice.²⁶

Writing about people he knew brought the advantage of close observation, but also a reluctance to intrude on their privacy. The style of his biographies anticipates his memoirs, where vice-regal discretion casts a scrupulous but inhibiting cloak of reticence over the inside story.

It is in his study of Isaacs, where the personal link was tenuous, that he had most to say about his subject's private life and about the inner workings of government that Cowen later saw at first hand. But, even so, he left Isaacs's strange and voluminous letters to his mother to speak for themselves. Cowen was a perceptive observer rather than a historical interpreter of Isaacs's life and times. His authorial interjections were cautious and sparing: a remark here and there that a document now reads strangely; his concluding judgement that Isaacs was a great Australian. The entertaining style that hearers of his lectures relished appeared rarely in print. Cowen sometimes repeated the advice given to him as a young lecturer: 'If need be, put on a false nose, but make them laugh.'²⁷ There are no false noses in Cowen's writing, and not a great deal of laughter. There is more of the careful fairness that he showed as Governor-General.

He was not the sort of biographer to analyse personality, and Isaacs puzzled him to the end. 'I think that Sir John Barry is right when he says that in many respects Isaacs remains an enigmatic figure', Cowen wrote: 'that it is not possible really to penetrate the mystery of the man's personality; that often his attitudes can be described but not explained'.²⁸ Perhaps, having considerable charm himself, Cowen was somewhat puzzled by a person who completely

²⁶ Letter from Zelman Cowen to Eugene Rostow, 13 May 1963, Papers of Sir Zelman Cowen, MS 6736, 4/31 (NLA).

²⁷ Sir Zelman Cowen, *A Life Within a Life* (Australian Vice-Chancellors' Committee, 1991) 10.

²⁸ Cowen, *Sir Isaac Isaacs*, above n 14, 26.

lacked it. But Cowen was not alone. Barry, who also wrote about Isaacs, continued to find him enigmatic.²⁹

III ISAACS

If secret history — and archival history — were not Cowen's metier, what does more recent archival research add to his portraits? Here I turn to my two sidelights on his life-writing, on the appointment of Isaacs as Governor-General, and on Cowen's early academic career.

Part of the interest of Cowen's biography of Isaacs (as its second edition emphasised) was that it turned out to be by a future Governor-General.³⁰ Cowen had the opportunity to see at first-hand how the office worked, albeit in very different times.

The appointment of Isaacs as Governor-General in 1931 was deeply controversial, partly because he was an Australian and partly because he was chosen by the Australian government against the wishes of the King. There is now an extensive paper trail of the controversy in archives and libraries in Australia and in Britain. What would Cowen have found, if he had had inside access to these records, access he did not have when he was writing his book?

If he had been able to follow that trail, I think he would have found at least two things that would have interested and surprised him. The first is the role of Isaacs's predecessor, Lord Stonehaven, who was Governor-General from 1925 to 1931.

Stonehaven wrestled with changes in the office of Governor-General during his term. The early Governors-General were very much the representatives of the British government. They were selected by it, they handled communications between the Commonwealth and British governments, and they represented British interests. But that function declined, especially after World War I.³¹

Government representatives of Britain and its self-governing dominions, meeting at the Imperial Conference of 1926, resolved that Governors-General no longer represented the British government, but were instead representatives of the Crown, holding in the dominions 'in all essential respects the same position in relation to the administration of public affairs' as the King

²⁹ Sir John Barry, 'From Yackandandah to Yarralumla: The Enigma of Isaac Isaacs' (1967) 26 *Meanjin Quarterly* 443, 444.

³⁰ See Cowen, *Isaac Isaacs* (1993 ed), above n 1, vi–vii.

³¹ The changing role of the Governor-General is described in Christopher Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* (George Allen & Unwin, 1983).

did in Britain.³² Stonehaven believed that this change made the office of Governor-General more important. As growing dominion autonomy diminished the imperial powers of the British government, the monarch's representative became correspondingly more important as a continuing link with Britain.³³ He even argued that the Governor-General should become the sole personal representative of the monarch in Australia: 'the time has come', he wrote, 'when circumstances make it desirable to concentrate the representation of the Crown in one Governor-General instead of diffusing it among six Governors in addition to him'.³⁴ State Governors should, he thought, be supplanted by Australian-born Lieutenant-Governors.³⁵

The decision of the Imperial Conference said nothing about how Governors-General would now be chosen. King George V liked the idea, formulated before Isaacs had even been mentioned as a candidate, that the Governor-General should now be the personal selection of the monarch. Lord Willingdon, Governor-General of Canada, suggested this idea to the King in September 1929.³⁶

His assistant private secretary recorded the King's views:

the difficulty is to get the various Prime Ministers of the Dominions to surrender their prerogative of selecting a Governor General. It would be much better from every point of view if The King selected his own Representative, and the Dominions would benefit.³⁷

Stonehaven strongly agreed. He wrote that this plan was 'the only logical one and the only safe one'.³⁸

When federal Cabinet selected Isaacs, the King was horrified.³⁹ Stonehaven quickly backed him up. He wrote, with some justification, that most Australians were happy with the system as it had worked in the past and did not desire

³² United Kingdom, *Imperial Conference, 1926. Summary of Proceedings*, Cmd 2768 (1926) 16.

³³ Cunneen, above n 31, 168–70.

³⁴ Letter from Lord Stonehaven to Lord Stamfordham, 25 June 1930, Royal Archives (RA) PS/GV/L 2293/154. Documents in the Royal Archives are cited by permission of Her Majesty Queen Elizabeth II.

³⁵ Memorandum by Lord Stonehaven, 25 June 1930, RA PS/GV/L 2293/155.

³⁶ Extract of letter from Lord Willingdon to Sir Clive Wigram, 17 September 1929, RA PS/GV/L 2293/4.

³⁷ Memorandum from Sir Clive Wigram to Lord Stamfordham, 27 November 1929, RA PS/GV/L 2293/10.

³⁸ Extract of letter from Lord Stonehaven to Lord Stamfordham, 8 January 1930, RA PS/GV/L 2293/12.

³⁹ Telegram from Lord Stamfordham to Lord Stonehaven, 6 April 1930, RA PS/GV/L 2293/46.

any change.⁴⁰ He went on with an elaborate dissection of population statistics to show that Irish Catholics were behind the demand for an Australian Governor-General. He saw a continuous and sinister line from Cabinet's selection of Isaacs to the demands of the Irish Free State for greater independence, and the anti-conscription campaign of Melbourne's Archbishop Daniel Mannix during World War I. Stonehaven wrote:

To class Australia with the Irish Free State would be a gross libel on one of the most loyal communities in the world. But the fact must not be overlooked that the citizens of the Commonwealth who are either Irish Roman Catholics or the descendants of them are estimated to amount to roughly one-fifth of the population. It is believed that they invariably vote Labour. The traitor, Mannix, is their acknowledged head and an exceptionally able and determined man. Eleven out of thirteen of the Federal Ministers are Roman Catholics and the land of their origin is disclosed by their names.⁴¹

Stonehaven quoted opinions of individual Australians, but they were revealing in ways he had not intended. Cowen said nothing in his book about anti-Semitic opposition to the appointment, although he mentions anti-Semitic attacks on Isaacs in other contexts. Stonehaven shared the ingrained, casual anti-Semitism that was common in Australia and England in the 1930s. He relayed one of the anti-Semitic jibes that laced some of the criticism of Isaacs, quoting one of what he called 'the "best people" — the leaders of Society': 'if we must have an Australian at least we might have had a white man'.⁴² There were similar comments in letters to the King from the Governors of South Australia and Victoria. These stories, and the sectarian fears, found an appreciative audience in the King's private secretary, Lord Stamfordham, who hoped that Prime Minister Scullin could be persuaded 'to drop his Jew'.⁴³

I will return to Stonehaven, but first I should complete the story of Isaacs's appointment. Cowen would have been interested, as a constitutional lawyer, in the advice that finally persuaded the King to give in to Scullin. This was private advice, given outside the channels of ministerial responsibility. There are parallels with the advice that Governors-General have sometimes taken

⁴⁰ Letter from Lord Stonehaven to Lord Stamfordham, 6 May 1930, RA PS/GV/L 2293/79.

⁴¹ Letter from Lord Stonehaven to Geoffrey Dawson, 11 June 1930, Papers of John Lawrence Baird, Viscount Stonehaven, MS 2127/1/447 (NLA).

⁴² Letter from Lord Stonehaven to Lord Stamfordham, 6 May 1930, RA PS/GV/L 2293/79.

⁴³ Letter from Lord Stamfordham to Sir Alexander Hore-Ruthven, 11 August 1930, Papers of Alexander Hore-Ruthven, Earl of Gowrie, MS 2852/8/6 (NLA).

when ministerial advice is unavailable or not binding — for example, on Kevin Rudd's return as Prime Minister in 2013.⁴⁴

On the question of appointing Isaacs, the King was guided by Lord Macmillan, the newly appointed Lord of Appeal in Ordinary. Macmillan provided a detailed memorandum and even gave the King speaking notes that amounted to a script for his meeting with Scullin.

Macmillan delivered the final blow to the King's fond hopes of making a personal choice of the next Governor-General, freed from unwelcome prime ministerial advice. As he said, the King 'must act on the advice of some responsible Minister'.⁴⁵ The British Prime Minister had renounced any role in advising the King on the choice of the Governor-General. As Macmillan put it: 'His Majesty can find no Minister to advise him and accept responsibility other than the Prime Minister of Australia'.⁴⁶ If the King rejected that advice, he risked the resignation of the government and the fighting of an election on the question of the King's powers. Scullin had already threatened to resign if the King did not accept his advice, and he was also willing to fight an election on the question of whether an Australian could become Governor-General.⁴⁷

Faced with this advice, and then with its confirmation by the Imperial Conference of 1930, the King decided, before meeting Scullin, that he would have to give in. At the meeting, the King repeated his objections as a matter of form, but Scullin, backed and to some extent fenced in by the federal Cabinet decision on Isaacs, was inflexible.⁴⁸ He tendered formal advice and the appointment went through.

Isaacs was sworn in as Governor-General in January 1931, but that was not the end of the matter for Stonehaven, or for the Governor of South Australia, Sir Alexander Hore-Ruthven, another of the King's correspondents. After the defeat of Scullin's government at the federal election of 1931, Hore-Ruthven, or someone he knew, came up with a plan to remove Isaacs before the end of his five-year term. The idea was that if a member of the royal family became available as Governor-General, Isaacs would have to retire to make way. As

⁴⁴ See Anne Twomey, 'Advice to the Governor-General on the Appointment of Kevin Rudd as Prime Minister' (2013) 24 *Public Law Review* 289.

⁴⁵ Memorandum by Lord Macmillan, 8 November 1930, RA PS/GV/L 2293/305.

⁴⁶ *Ibid.*

⁴⁷ Letter from Lord Stonehaven to Lord Stamfordham, 31 May 1930, RA PS/GV/L 2293/124; Memorandum by James Scullin, undated, Papers of James Henry Scullin, MS 356 (NLA).

⁴⁸ Memorandum from Lord Stamfordham to Alexander Hardinge, 20 November 1930, RA PS/GV/L 2293/329; Memorandum by Lord Stamfordham, 29 November 1930, RA PS/GV/L 2293/338.

Hore-Ruthven told Stonehaven: 'This would offend no one's susceptibilities — but make it very hard for Ikey to stand in the way if a Royalty was waiting to come'.⁴⁹

Stonehaven was now back in London and serving as chairman of the Conservative Party. On Hore-Ruthven's suggestion, he seems to have enlisted former Prime Minister Stanley Bruce, another of the figures who hovers on the margins of the Isaacs story.⁵⁰ Bruce had reluctantly left politics after his defeat at the 1929 election, and was now Australian minister in London.

This campaign hit a brick wall when it reached the King. He refused to put any pressure on Isaacs to retire early, and for the time being Australia had to make do with a royal visit (from the King's brother, the Duke of Gloucester, in 1934) rather than a royal Governor-General.⁵¹ When Isaacs retired after the expected five-year term, his successor was Hore-Ruthven himself, raised to the peerage as Lord Gowrie.

What are we to make of Stonehaven's activities? Governors-General all have private opinions, sometimes about their successors, and many of them have been busy letter-writers. The correspondence of Sir Ronald Munro Ferguson, Governor-General from 1914 to 1920, documents his opinions on all manner of political questions.⁵² Even after Stonehaven's time, some Governors-General were involved in the appointment of their successors. The Duke of Gloucester, for example, acted as a channel of communication between Prime Minister Ben Chifley and the King, and sent his own suggestions for preventing the appointment of a second Australian-born Governor-General. Gloucester wrote in 1946: 'a successor to me must be put up by the King before they have chosen an Australian. The labour govt. is mad about Australian G.G's & Governors'.⁵³ His work was in vain. William McKell, the former Premier of New South Wales, became Governor-General in 1947 on Chifley's nomination.

What was distinctive about Stonehaven's correspondence was that he was encouraging the King not to follow advice he received from the Prime

⁴⁹ Letter from Sir Alexander Hore-Ruthven to Lord Stonehaven, 22 August 1933, Papers of John Lawrence Baird, Viscount Stonehaven, MS 2127/1/582 (NLA).

⁵⁰ Cunneen, above n 31, 187.

⁵¹ Letter from Sir Clive Wigram to Sir Alexander Hore-Ruthven, 21 November 1933, Papers of Alexander Hore-Ruthven, Earl of Gowrie, MS 2852/8/8 (NLA).

⁵² See Cunneen, above n 31, 120–42; J R Poynter, 'Munro Ferguson, Sir Ronald Craufurd, Viscount Novar of Raith (1860–1934)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1986) vol 10, 615.

⁵³ Letter from the Duke of Gloucester to Sir Godfrey Thomas, 29 September 1946, RA PS/GVI/C 286/14.

Minister. At the time, advice to the King from the Australian Prime Minister was a novelty. Until then, all constitutional advice to the King on Australian affairs had come from British ministers. As the controversy over Isaacs's appointment developed, lawyers including Victorian Chief Justice Sir William Irvine, Sir Edward Mitchell and Wilfred Fullagar even doubted the constitutional capacity of Australian ministers to give such advice.⁵⁴ At the same time, Governors-General had duties to the British government that overrode their obligations to Australian ministers. Where British ministers had overriding power — in external affairs, for instance — Governors-General had acted on their instructions. But from 1930, the Australian Prime Minister would advise the King on the appointment of the Governor-General, and Australian ministers were slowly taking over responsibility for external affairs.

Stonehaven's response to this change was to put the King in the place once occupied by the British government. For him, it was the King who above all had to be kept informed and whose wishes had to be carried out. That duty ranked far higher than anything Stonehaven owed to the Australian Prime Minister. He told Scullin nothing of what he was doing, apart from what the King or the British Prime Minister asked him to say.

The idea that the King should choose the Governor-General was short-lived, but it was emblematic of Stonehaven's idea of his responsibilities. He was expounding an extreme but recognisable version of what might be called the second phase of the office of Governor-General. In this second phase, Governors-General no longer represented the British government. They were above all personal representatives of the monarch, maintaining the Imperial connection with Britain. To Stonehaven, that function was far more important than his local constitutional duties. It is an irony of Isaacs's appointment that he, too, was deeply committed to this second role. He was 'if anything more Royalist than the King', in Geoffrey Sawer's words.⁵⁵

This role has dwindled, but what has taken its place? The Governor-General's website, for what it is worth, now places the *Constitution's* provisions front and centre in its description of the office.⁵⁶ Ceremonial and community

⁵⁴ 'Governor-General: Power of Advice — Chief Justice Explains: Ministry's Limitations — No Constitutional Provision', *The Argus* (Melbourne), 26 May 1930, 7; 'Governor-General: Method of Appointment — Validity of Recent Action: Sir Edward Mitchell's Opinion', *The Argus* (Melbourne), 12 January 1931, 9.

⁵⁵ Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (Melbourne University Press, 1963) 8.

⁵⁶ Governor-General of the Commonwealth of Australia, *Governor-General's Role* (3 September 2014) <<http://www.gg.gov.au/governor-generals-role>>.

duties are mentioned, but they come a very long second, although they are often given more prominence elsewhere. These constitutional functions have always been central to the office of Governor-General, of course, but their prominence in this self-description is foreign to the way Stonehaven saw himself, and probably to the way most others saw the office at the time.

Perhaps this emphasis on the *Constitution* owes something to the dismissal of the Whitlam government in 1975. Soon after Cowen retired as Governor-General, he wrote that the Governor-Generalship was 'associated in the public mind with political power, or at least with the possibility of such exercises of power'.⁵⁷ That was much less true in 1930 (and is probably less true today). To return to the language of duty, it might be said that Governors-General in the first phase owed their highest duty to the British government, and in the second phase to the monarch and the Imperial connection. Today they owe that duty to the *Constitution*.

IV COWEN

My second sidelight on Cowen's life-writing concerns his own early academic career. It is revealing, in a small way, about the academic world that he returned to at the end of World War II, and it puts some of his later career in a slightly different light.

When Cowen's service in the Royal Australian Navy ended in March 1945, he returned to the University of Melbourne. He had several irons in the fire. Most importantly, he was waiting for the chance to take up his Rhodes Scholarship. The operation of the Rhodes scheme was suspended during the war, and Cowen did not know when it would resume. In 1944, when he found he had time on his hands while underemployed in naval intelligence, he had enrolled in an MA in history at Melbourne, but that degree was never completed.⁵⁸ After he was demobilised, he gained a foothold in the Melbourne Law School as a part-time lecturer. And he was studying, enrolled in the subjects he needed to complete for admission to legal practice.

As if all this was not enough, Cowen decided to seek a postgraduate degree in law in Melbourne, before he left for England. In 1945 the only postgraduate law degree he could enrol for at the University of Melbourne was the Doctorate of Laws, the LL.D. The LL.M at that time was not a research degree. It was

⁵⁷ Sir Zelman Cowen, 'The Office of Governor-General' in Stephen R Graubard (ed), *Australia: The Daedalus Symposium* (Angus & Robertson, 1985) 127, 145.

⁵⁸ Student Record Card: Cowen, Zelman, Accession No 1991.0066, University of Melbourne Archives (UMA).

awarded automatically to LLB honours graduates. The PhD did not become available until 1946.⁵⁹

The LLD was an old degree. The first law degree conferred by an Australian university was an LLD, awarded by the University of Melbourne to its first law lecturer, Richard Sewell, in 1857.⁶⁰ Sewell's degree was awarded as of right, under a university statute that allowed graduates of other universities to be admitted to the same degrees at Melbourne, but the LLD was also available by examination. From 1890, it was awarded for a thesis on a topic approved by the faculty.

The LLD was a challenging degree. Candidates received no supervision, and they were given little idea of what was required of them, beyond the statement in the university regulations that they 'must submit a work[] containing an original and substantial contribution to some branch of legal knowledge'.⁶¹ The Faculty of Law later resolved that the LLD 'should continue to be treated as a degree awarded only upon proof of high qualifications of ability and research and should not be regarded as a degree based upon advanced general knowledge of a professional kind'.⁶² Nor was it to be 'regarded as the completion of ordinary academic studies' or 'associated with attainments of a distinctly professional kind ... it should be conferred only in respect of work marked by conspicuous ability as well as by care and research, and containing contributions of value to the study of Law'.⁶³ In effect, it was reserved for the cream of the cream, more like an honour than a degree.

The LLD examiners were eminent in their fields and included such luminaries as Sir William Holdsworth, Sir Ivor Jennings and H V Evatt. They seem to have taken the faculty's warnings to heart. Of the eight LLD theses submitted between 1939 and 1952, only two passed. The failures included theses submitted by two of the Melbourne Law School's independent lecturers, Percy Joske and Louis Voumard. They were the authors of the standard texts on their subjects (the law of marriage and divorce for Joske, and the sale of land

⁵⁹ The University of Melbourne, *The Melbourne University Calendar 1946* (Melbourne University Press, 1946) 309, 604.

⁶⁰ The University of Melbourne, *The Melbourne University Calendar for the Academic Year 1868–69* (Government Printer, 1868) 134. The University of Sydney, the only other Australian university at the time, conferred its first law degrees in 1864: The University of Sydney, *The Sydney University Calendar 1865* (Reading and Wellbank, 1865) 38.

⁶¹ The University of Melbourne, *The Melbourne University Calendar 1944* (Melbourne University Press, 1944) 294.

⁶² Minute Book — Law Faculty: August 1873 to March 1923, Accession No 1997.0140 Unit 1 (UMA) 385.

⁶³ *Ibid* 393.

for Voumard), but they seem to have failed because their theses were too much like textbooks or practitioners' manuals, lacking original analysis or criticism.⁶⁴

These difficulties were compounded in the 1940s by embarrassing delays and breakdowns in communication with candidates. Voumard waited six years during the war for his examiners' report.⁶⁵ One unfortunate LLD candidate, the Newcastle solicitor and author Basil Helmore, had his topic approved in 1936 and submitted his thesis in 1940. He waited four years for a response. When it came, he was told that he should revise and resubmit. He worked on his thesis for another eight years, revised his topic and resubmitted in 1952, only to be told that he had failed.⁶⁶ His efforts were better appreciated by the University of London, which awarded him a PhD in 1955.⁶⁷

Cowen, on the other hand, had an academic record second to none, and he could hope to avoid the pitfalls that these practitioners had fallen into. In March 1945, the faculty approved his LLD thesis topic. It was a timely one: 'The Defence Powers in the *Constitution* of the Commonwealth of Australia'.⁶⁸ Events moved quickly after this. In May, the end of the war in Europe brought the resumption of the Rhodes Scholarships. Cowen left for England in July. He completed the thesis in about a year, despite his heavy workload in Oxford as both student and teacher, and he submitted it sometime around April 1946.

In keeping with the lofty aims of the LLD, the faculty appointed as examiners two judges and a leading barrister, all of them with strong connections to their respective universities. They were Justice George Ligertwood of the Supreme Court of South Australia, Sir Frederick Jordan, Chief Justice of the Supreme Court of New South Wales, and P D Phillips, Melbourne barrister

⁶⁴ See Letter from Zelman Cowen to Justice Seymour Karminski, 27 March 1953, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA); Letter from J F Foster to Louis Voumard, 23 August 1946, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA).

⁶⁵ See Minute Book, Faculty of Law: 1923–1941, Accession No 1997.0140 Unit 2 (UMA) 405–6; Letter from J F Foster to Louis Voumard, 23 August 1946, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA).

⁶⁶ Minute Book, Faculty of Law: 1923–1941, Accession No 1997.0140 Unit 2 (UMA) 295, 460; Minute Book, Faculty of Law: 1942–1957, Accession No 1997.0140 Unit 3 (UMA) 291, 333; Correspondence concerning candidature of B A Helmore, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA).

⁶⁷ Warren Derkenne, 'Helmore, Basil Arthur (1897–1973)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1996) vol 14, 430, 431.

⁶⁸ Minute Book, Faculty of Law: 1942–1957, Accession No 1997.0140 Unit 3 (UMA) 179; Letter from George Paton to Zelman Cowen, 9 February 1945, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA).

and part-time lecturer at the University of Melbourne. Their reports came in relatively promptly. The thesis failed. It is the only failure in Cowen's academic record at Melbourne.⁶⁹

The examiners' reports have not survived in the university archives, but they do hold the tactful and apologetic letter sent to Cowen by the university registrar, John Foster. Jordan and Phillips seem to have written in characteristically trenchant style (Jordan's biographer describes his chilling severity, while Phillips could be both opinionated and arrogant⁷⁰). 'The examiners, having reached their decision,' Foster wrote, 'have cast their reports in what may appear a somewhat censorious vein'.⁷¹ Curiously, the examiners said the thesis might well be considered favourably for the new PhD. Whatever problems they saw in it, they evidently did not include a lack of academic analysis. But, as the registrar said, this suggestion was little use to Cowen, since PhD candidates had to be resident in Melbourne.

Cowen's reasons for beginning a higher degree just before he left for Oxford are not entirely clear. Perhaps the standing he would gain from a doctorate was appealing. He was not planning to study for a graduate degree at Oxford, but instead read for the BCL. Whatever his reasons, in using the LLD as part of the groundwork for an academic career, Cowen was going against both the recent history of the degree and the faculty's intentions for it. Of the Melbourne LLDs awarded down to 1946, when the PhD became available, none went to people who were trying to begin academic careers. The nearest parallel to Cowen in this regard is Geoffrey Sawer, who began an LLD in 1936, at a similar stage in his career, but never finished the thesis.⁷² The LLD graduates were not budding academics, but a miscellaneous group whose careers ranged from legal practice to school teaching and even, in one case, psychic research (Richard Hodgson, LLD 1878).

⁶⁹ File 1946/266 'Cowen, Z. — LLD', Accession No 1999.0014 Unit 366 (UMA); Student Record Card: Cowen, Zelman, above n 58. The Faculty of Law appointed examiners in May 1946, probably at the time of submission.

⁷⁰ J M Bennett, 'Jordan, Sir Frederick Richard (1881–1949)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1983) vol 9, 522, 523; Laurence W Maher, 'Phillips, Sir Philip David (1897–1970)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 2000) vol 15, 605, 605.

⁷¹ Letter from J F Foster to Zelman Cowen, 29 October 1946, Accession No 1999.0014 Unit 366 File No 1946/266 (UMA).

⁷² See Letter from Geoffrey Sawer to Kenneth Bailey, 24 October 1936, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA); Letter to Geoffrey Sawer, 7 November 1936, Accession No 1984.0033 Unit 1 File 'Doctoral Theses & Enquiries' (UMA). The names of LLD graduates are found in the lists of degrees awarded published in successive editions of *The Melbourne University Calendar*.

More generally, graduate study within Australia was not the path into the small world of legal academia. And small it was: at the first meeting of the Australian Universities' Law Schools Association in 1946, it was estimated that there were fewer than 16 full-time law teaching positions in Australia.⁷³ Most teaching was done by part-time lecturers, many of them rising barristers. The small group of full-time teachers either had no postgraduate qualifications (Geoffrey Sawyer was an example) or gained them overseas.

Looking back in old age, Cowen said that he was young and inexperienced, and did not realise the scale of what he had taken on in the LLD.⁷⁴ It is characteristic of him that the episode did not affect his relationship with P D Phillips, although he knew Phillips was one of his examiners. Cowen was later instrumental in maintaining Phillips's long connection with the Melbourne Law School. When Cowen applied successfully for the Oxford DCL by publication in the 1960s, he said he 'awaited the verdict of the examiners with some anxiety'. When the result arrived, his 'sense of relief was enormous'.⁷⁵ We can now better understand why.

By coincidence, two of the people whose lives Cowen wrote about, Sir John Barry and E G Coppel, were awarded Melbourne LLDs. Cowen once said to Barry: 'The LLD is a nice degree'.⁷⁶ Barry received his in 1969 for his book on the penal reformer Alexander Maconochie.⁷⁷ Cowen received his own Melbourne LLD, an honorary one, in 1973.⁷⁸

V CONCLUSION

Having said so much about what was not in Cowen's writing, I conclude by turning to one of its strengths. That brings me back to Isaacs.

Cowen was a consummate lecturer on constitutional law. His chapter on constitutional interpretation in *Isaac Isaacs* is a typically lucid exposition of doctrine. But it also reveals much about Isaacs as a person. His description of Isaacs's constitutional judgments is full of Isaacs's life and personality, as reflected in his decisions: the judge whose seemingly total recall of his vast reading made him unable to leave anything out, who was always certain that

⁷³ David Derham, 'Legal Education — A Challenge to the Profession' (1969) 43 *Australian Law Journal* 530, 530.

⁷⁴ Interview with Sir Zelman Cowen (Melbourne, 12 October 2006).

⁷⁵ Cowen, *A Public Life*, above n 18, 251.

⁷⁶ Cowen, 'J V Barry: A Memoir', above n 16, 246.

⁷⁷ The University of Melbourne, *The University of Melbourne Calendar 1970–71* (1970) 769.

⁷⁸ The University of Melbourne, *The University of Melbourne Calendar 1974: Part 2* (1974) 104.

he was right, and above all whose determination to increase federal power expressed an ideal of federation as a unifying force for social good. It is by laying out the role of their subjects in the development of the law with clarity and elegance that Cowen's biographies make their greatest mark.