

Academic Legal Research and Academic Research Capacity Enhancement

Dr Terry Hutchinson*
Senior Lecturer, Faculty of Law,
Queensland University of Technology
Australia

1. Introduction

One of the main objectives of law schools beyond educating students is to produce viable legal research. The comments in this paper are basically confined to the Australian context, and to examine this topic effectively, it is necessary to briefly review the current tertiary research agenda in Australia. This paper argues that there is a need for recognition and support for an expanded legal research framework along with additional research training for legal academics. There also needs to be more effective methods of measuring and recognising quality in legal research. This method needs to be one that can engender respect in an interdisciplinary context.

2. The Australian Legal Research Context

In 2005, the Australian Commonwealth Department of Education, Science and Training released the issues paper *Research Quality Framework: Assessing the quality and impact of research in Australia* (RQF).¹ The paper raised two main points - how the quality and impact of research should be recognized and measured, and who should assess the quality and impact of research in Australia.² The change of government that occurred in the Australian federal election in November 2007 put an end to this project. The Innovation, Industry, Science and Research Minister Kim Carr announced a new system – the Excellence for Research in Australia (ERA) scheme.³

Subsequently the tertiary education sector has witnessed the release of the Bradley Report,⁴ and in December 2008, the House of Representatives Standing Committee on Industry, Science and Innovation tabled its report on the Inquiry into research training and research workforce issues in *Australian Universities: Building Australia's Research Capacity*.⁵ Recommendations from this Report included increased funding for research and training. Recommendation 11 for

* BA, LLB (UQ), DipLib (UNSW), MLP (QUT), PhD (Griffith); Senior Lecturer, Faculty of Law, Queensland University of Technology.

¹ Department of Education Science and Training, *Research Quality Framework: Assessing the quality and impact of research in Australia* (2005)

² Ibid.

³ Andrew Brennan and Jeff Malpas, 'Researchers drowning in sea of paper' *The Australian* (Sydney), 16 April 2008, 25.

⁴ Department of Education, Employment and Workplace Relations, *Review of Australian Higher Education* <<http://www.deewr.gov.au/HigherEducation/Review/Pages/default.aspx>>.

⁵ Parliament of Australia, House of Representatives, *House Standing Committee on Industry, Science and Innovation Inquiry into research training and research workforce issues in Australian universities* <<http://www.aph.gov.au/House/committee/isi/research/report.htm>>.

example states 'The Committee recommends that the Australian Government increase the funding pool for Australian Research Council and National Health and Medical Research Council grants to enable a minimum success rate for applicants of 40 per cent', and Recommendation 2 states 'The Committee recommends that the Australian Government increase funding for research and development by raising incrementally the Gross Expenditure on Research and Development as a percentage of Gross Domestic Product over a ten year period until it equals the Organisation for Economic Cooperation and Development average'.⁶ In addition, Dr Terry Cutler chaired a Review of the National Innovation System.⁷ In April 2009, Universities Australia released a study backing the Bradley Report recommendations.⁸ The Government is still considering the recommendations of these various reports. In relation to the Cutler Review and the Bradley Review of Higher Education, the Government has stated that it 'intends to take a holistic approach and will consider the recommendations of these reviews together and provide co-ordinate responses where appropriate'.⁹ And of course a complete response to both of these reviews will have to be made in the budget context. Much has changed in the period since the 2007 election!

The underlying purpose of processes such as the ERA is 'to develop the basis for an improved assessment of the quality and impact of publicly funded research and an effective process to achieve this'.¹⁰ If legal researchers cannot establish quality and impact factors as successfully as those from other disciplines, then any scarce public funds made available as a result of these various government reports, are less likely to be directed towards their projects.¹¹ Without such funding, academic legal research will not flourish. Responses to an Australasian Law Teachers Association (ALTA) survey of its 1000 legal academic members in 2007 demonstrated that 58.4% of the 221 respondents were very concerned with the then RQF and were looking for ALTA to undertake a policy role in regard to these developments.¹² Funding of research and the effects of the ERA for the discipline of law are worrying issues for Australian legal academics.

3. Need for an Expanded Legal Research Framework and Research Methodologies Training

These developments, the impetus towards competitive research grants and an environment directed towards ensuring research quality, along with a renewed

⁶ <<http://www.aph.gov.au/House/committee/isi/research/report/front.pdf>>. In 2007, of the ARC grant applications that showed Law as their primary area, only seven Linkage grants and 15 Discovery grants were funded.

⁷ Department of Innovation, Industry, Science and Research <<http://www.innovation.gov.au/innovationreview/Pages/home.aspx>>.

⁸ Economic modelling of improved funding and reform arrangements for Australian universities KPMG Econtech, March 2009 (Universities Australia-commissioned study)

<<http://www.universitiesaustralia.edu.au/documents/publications/policy/submissions/KPMG-Econtech-April-2009.pdf>>

⁹ Ibid.

¹⁰ Department of Education Science and Training, RQF Home

<http://www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/research_quality_framework/>. And now see Australian Research Council, *The Excellence in Research for Australia Initiative* <<http://www.arc.gov.au/era/default.htm>>.

¹¹ See generally T.Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065.

¹² T.Hutchinson 'The 2007 Australasian Law Teachers Association Membership Survey Report' (2008) *Spring directions in legal education UK Centre for Legal Education* 16-18.

interest in research training, have prompted a number of questions which directly affect law faculty funding, legal scholarship and legal research training including:

- What is the nature and meaning of 'legal research'?
- What is 'different' about how lawyers research?¹³

The Council of Australian Law Deans (CALD) in their Submission in Response to the Research Quality Framework Issues Paper tried to address some of the basic definitional issues raised in the earlier research reports such as the Pearce Report,¹⁴ and still considered fundamental to the main arguments. They stipulated that:

'The breadth of the idea of fundamental legal research illustrates the point about overlapping categories. Legal research today may be thought to be considerably broader than the tripartite classification of the Pearce Report, as it embraces *empirical* research (resonating with the social sciences), *historical* research (resonating with the humanities), *comparative* research (permeating all categories), research into the *institutions* and *processes* of the law, and *interdisciplinary* research (especially, though by no means exclusively, research into *law and society*). The Pearce Report did not really capture these extended elements of legal research, yet in some ways they are not so much new categories as new or newly-emphasised perspectives or methodologies. They highlight law as an intellectual endeavour rather than as a professional pursuit, though the latter is undoubtedly enriched by the former.'¹⁵

Thus the accepted methodology used by lawyer researchers in Australia has been doctrinal research. There is a growing movement to expand this methodological base. This is not a purely Australian phenomenon. Shanahan's 2006 survey of Canadian academics demonstrates that interdisciplinary research in that country has increased in the past 20 years, but legal academics are struggling with undertaking empirical methodologies.¹⁶ The issue is also being addressed in the United Kingdom for example through the Nuffield Inquiry.¹⁷ The growing empirical law movement in the United States is progressing interdisciplinary study of the legal system.¹⁸ This issue needs to be addressed

within legal education in order to enhance the research skills of academics in Australian law schools. A survey of postgraduate students who were enrolled in a

¹³ Ibid 1072.

¹⁴ Dennis Pearce, Enid Campbell and Don Harding ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) 307-8.

¹⁵ Council of Australian Law Deans, *Research Quality Framework (RQF): Responses to the Issue Paper* (2005), 5.

¹⁶ T. Shanahan 'Legal Scholarship in Ontario's English-Speaking Common Law Schools' (2006) 21 (2) *Canadian Journal of Law and Society* 25 at 36.

¹⁷ H. Genn, M. Partington & S. Wheeler, *Law in the Real World: Improving our Understanding of How Law Works: The Nuffield Inquiry on Empirical Legal Research*, November 2006, 39 <<http://www.ucl.ac.uk/laws/socio-legal/empirical/>>.

¹⁸ M. Suchman, "Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?" Summer 2006 (13)1 *Amici: Newsletter of the Sociology of Law Section of the American Sociological Association* 1

http://www.departments.bucknell.edu/soc_anthro/soclaw/textfiles/AMICI_summer06.pdf; E. Chambliss, 'When do Thoughts persuade? Some thoughts on the Market for 'Empirical Legal Studies' <<http://ssrn.com/abstract=1263369>>; US Law and Society Association <<http://www.lawandsociety.org/>>;

Journal of Empirical Legal Studies<<http://www.blackwellpublishing.com/society.asp?ref=1740-1453>>; P. Schuck, 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 *Journal of Legal Education* 323, 331-33.

designated research unit over the period 1993-2008 at Queensland University of Technology Faculty of Law have indicated that apart from an update in electronic research skills, they require further training in social science and other empirical research methodologies.¹⁹ This is a gap in our academic research training that given the government push to external competitive grants and funding based to some extent on quality measures needs to be addressed.

4. More Effective Measurements of Quantity and Quality of Legal Research

The Excellence in Research for Australia (ERA) initiative is still in its development phase, though Law is in one of the two Clusters being examined as part of a pilot project in 2009. The ERA is evaluating research according to a four-digit FoR code within each institution. The staff census date for the pilot is 31 March 2008 and the research outputs evaluated are those from the six years 1 January 2002-31 December 2007. The outcomes of the process will ultimately affect personal rewards, law school and institutional reputation and funding.²⁰ What are the risk factors for Australian legal academics in this process? Australian legal research is not covered within any of the established published citation indexes. The Australian Research Council has provided an infrastructure grant to AustLII in order for them to develop 'an automated citator for Australian law journal articles' but this will take time to develop and is by and large limited to Australian sources.²¹ The journals in which peer reviewed articles are published is important to the rating process. The ERA has adopted a journal ranking for law based around the US Washington and Lee list. This gives prominence to US rather than the Australian research sources where most Australian legal academics publish. What about the citation of legal academic work in caselaw? Will the AustLII Australian Legal Scholarship Library also cover this? In addition, legal academics publish books and for the most part this output is not highly credited within the quality process, especially if the books are tagged as texts or subsequent editions. In addition, the ERA makes HDR student loads and completions a measure of research activity and intensity.²² Australian law schools have traditionally not had a strong HDR tradition though this is changing. So there are many challenges for law schools in the current process.

5. In Conclusion

One of the main objectives of law schools beyond educating students is to produce viable legal research outcomes. This is happening. But much needs to be done to 'sell' the doctrinal research methodology, the 'bread and butter' legal research methodology, to the rest of the academic community. We need to ensure that there are excellent and pertinent quality and quantity measures which truly reflect the importance of the work that is being undertaken. In doing so, academic lawyers have to drop any remaining insularity and ensure that their members are to some extent skilled in non-doctrinal methodologies.

¹⁹ T.Hutchinson, 'LWN048 Advanced Legal Research Postgraduate Student Survey', unpublished results of a survey conducted at QUT 2008.

²⁰ C.Arup, 'Research Assessment and Legal Scholarship' (2008) 18 (1&2) *Legal Education Review* at 50.

²¹ <http://www.austlii.edu.au/austlii/research/2008/lief/>

²² Arup, *Ibid* 48.