COUNCIL OF AUSTRALIAN LAW DEANS

STATEMENT ON THE NATURE OF LEGAL RESEARCH[1]

Summary: *Legal research is multi-faceted. It is distinctive in some respects, and part of the mainstream of the humanities and social science in others. It would be equally mistaken to think of legal research as wholly different from, or wholly the same as, other research in the humanities and social sciences. Any quality assessment needs to be sensitive to these subtleties.*

It is not at all obvious what 'legal research' comprehends, as it straddles the humanities and social sciences; has some elements in common with both and some elements that are unique; has, over time, undergone, and continues to undergo, a certain amount of development, underlining and enhancing its diversity; and, especially for those who think of law as predominantly about rules and their enforcement, is vulnerable to stereotyping.

Categories of legal research

In 1987, the Pearce Report[2] categorised legal research in three ways:

- *doctrinal* – the systematic exposition, analysis and critical evaluation of legal rules and their interrelationships;
- *theoretical* – the conceptual bases of legal rules and principles;
- *reform-oriented* – recommendations for change, based on critical examination.

These three categories remain pivotal in the concept of legal research, but would today be seen as too narrow. That criticism might have been made even in the 1980s: a leading Canadian report in 1983 (the Arthurs Report)[3] had identified a fourth category, namely, *fundamental* legal research, covering the idea of law as a social phenomenon and exploring, for example, its social, political, economic, philosophical and cultural implications and associations.[4]

Although the categories of legal research are overlapping rather than mutually exclusive – convenient rather than precise ways of thinking about legal research and indeed about law – the contrast between the thrust of the Pearce Report and the broader view of the Arthurs Report reflected a long-standing tension in legal education, in Australia and other comparable common law countries, between learning the law as training for professional practice and studying the law as an intellectual discipline in its own right. The

[1] Taken from the CALD submissions to the Department of Education, Science and Training (DEST) in relation to the Research Quality Framework (RQF), May and October 2005; for full submissions see http://www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/research_quality_framework/rqf_subs.htm and http://www.dest.gov.au/sectors/research_sector/policies_issues_reviews/key_issues/research_quality_framework/submissions_in_response_to_preferred_model_paper.htm .

[2] Dennis Pearce, Enid Campbell, & Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987) paras 9.10 - 9.15.

[3] Harry Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983).

[4] Criticised in turn by the Pearce Report for being too imprecise and for implying that this category was more important than the others.

latter has been slower to arrive in Australia than in North America, but, partly because of the explosion of new law schools in the 1990s and the concomitant growth in the number of full-time legal academics and the range and diversity of legal scholarship, it is well and truly here now. Fundamental legal research, in the 1983 Canadian sense, is now a well-established part of Australian legal scholarship.

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.

Thus, legal research may be usefully described as occurring in varying combinations of the following categories:

- doctrinal
- theoretical
- critical/reformist
- fundamental/contextual
- empirical
- historical
- comparative
- institutional
- process-oriented
- interdisciplinary

Even this is an oversimplification; the flavour of the richness and diversity of legal research in Australia today may best be sampled by actually perusing collected outputs. Two convenient snapshots are mentioned here only by way of example: the output of the Faculty of Law at the University of Melbourne in 2003,[5] and the output of a nine-year collection (1995-2003) compiled by the Faculty of Law at the Australian National University for the purpose of the ANU Quality Review in 2004.[6]

Manifestations of legal research

These two snapshots reveal that the 'categories' of legal research merge with the broader question of the forms in which the outputs occur. These range from the traditional scholarly article in a respected journal, to a submission to or working paper for a law reform commission or other public enquiry, to the production of a textbook or casebook, to commentary in newspapers and

[5] The University of Melbourne, *Research Report 2003: Faculty of Law* (University of Melbourne Office for Research, 2003).

[6] This may be viewed at http://law.anu.edu.au/ResearchReview/ .

other popular journals, to the internet posting of conference proceedings. This is referred to later in this submission in relation to 'impact'; it is mentioned here simply to underline the diverse manifestations of legal research. Moreover, legal research is a pervasive part of legal practice, largely in an applied practical problem-solving context, with an emphasis on the doctrinal, but with attention to prediction, informed by an understanding of institutions and processes. Academics are often collaborators in this kind of endeavour.

Distinctiveness of legal research

A proper understanding of the nature of legal research requires identification of the extent to which it shares the characteristics of the humanities and social sciences, and the extent to which it is distinctive. This is a challenging task, and difficult to define with precision, but is of particular importance. To the extent that legal research is a part of and on a par with research in the humanities and social sciences, it should be subjected to the same kind of quality assessment that is applicable more broadly to these disciplines. To the extent that legal research is distinctive, that too must be recognised and taken into account in the research quality framework.

To a large extent, it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to 'discovery' in the physical sciences. Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials. The very notion of 'legal reasoning' is a subtle and sophisticated jurisprudential concept, a unique blend of deduction and induction, that has engaged legal scholars for generations, and is a key to understanding the mystique of the legal system's simultaneous achievement of constancy and change, especially in the growth and development of the common law. Yet this only underlines that doctrinal research can scarcely be quarantined from broader theoretical and institutional questions. If doctrinal research is a distinctive part of legal research, that distinctiveness permeates every other aspect of legal research for which the identification, analysis and evaluation of legal doctrine is a basis, starting point, platform or underpinning.

At the same time, once legal research broadens into the study of the institutions or processes of the law, the empirical observation of human behaviour, or the use of historical methods to illuminate an understanding of the past, it has reached the familiar territory of the humanities and social sciences. Once it has reached this point, it would be a grave mistake to project the element of distinctiveness in legal research into a disjunction with the intellectual framework and apparatus of the humanities and social sciences, that is, into something that maintains legal research as unique and exclusive in all its aspects. It is the connections between law as a distinctive and autonomous concept and field of study, and the broader stream of intellectual thought, that, without detracting from the core significance of doctrinal research, have so enriched legal research in the modern era.

To emphasise the distinctiveness of legal research is not an exercise in hubris or insularity. As explained, the connections and affinity with the humanities and social sciences are vital in understanding and enriching the intellectual dimension of the discipline of law and in avoiding narrow stereotypes of law as a self-contained system of rules accessible and manipulable only by narrowly trained professionals. On the other hand, to subsume law wholly within the humanities or social sciences is to fail to recognise its genuinely distinctive elements, with the consequent risk of poor decision-making in the recognition and rewarding of quality and impact in legal research, especially in relation to innovation, future directions, and national benefit.

In truth, law falls wholly neither within the humanities nor the social sciences. Some kinds of legal research are more easily identified with the humanities: for example, legal history, legal philosophy, legal theory, jurisprudence. Other kinds of legal research are more easily identified with the social sciences: for example, empirical studies of the behaviour of players in the legal system. Much legal research involves a blend of the two: for example, the nature and application of legal reasoning. This diversity should be recognised and superficial generalisations avoided.

Consequential principles for the evaluation of legal research

Principle 1: *Any assessment of quality and impact in relation to legal research must be informed by and sensitive to the nature and diversity of legal research, thus taking into account, fairly and transparently, the extent to which legal research is distinctive and the extent to which it is part of the mainstream of the humanities and social sciences.*

Peer review by discipline experts and external endorsement by relevant end-users are clearly appropriate, so long as assessing panels are constituted having regard to this principle, especially to the diversity of the kinds of legal research. Implementation of the principle requires a law-specific panel, that is, a panel tasked to assess law, constituted predominantly by discipline, subdiscipline, and cognate experts.

Without being negative but merely endeavouring to use the mistakes of the past to inform the directions of the future, it may be usefully illustrative to mention some of the unsatisfactory outcomes of current arrangements, such as the DEST publication categories, that have been insufficiently sensitive to the nature of the discipline:

(i) The legal textbook is misunderstood. A textbook that is more than a primer for beginners is likely to go well beyond a mere compilation of existing knowledge, to reveal a creative, sophisticated, and original analysis, synthesis and reorganisation of primary materials. (Given the dynamic nature of the law and the unusually demanding imperative of having to keep up to date, this will also often be the case for subsequent editions, which should be assessed on their merits. And what is true for the textbook is even more so for its more modern counterpart, the book of cases and materials, which generally incorporates a creative assemblage of eclectic materials and original commentary.)

(ii) There has been insufficient recognition of working papers, reports, and submissions to public enquiries (see further below under impact).

(iii) There has been insufficient flexibility in relation to appropriate discipline-specific recognition of world-class, prestigious journals, if not consistent with the standard conception of 'refereed' journals (eg many of the long-established but essentially student-run American law reviews).

(iv) There has been unduly rigid attention to word-length, format and classification as a marker of intellectual contribution (eg critical reviews of *The Oxford Companion to the High Court of Australia* (OUP, 2001) underline the capacity for originality and depth of research even in the context of ideas crystallised into mini-essays of 1500 to 3000 words).

The assessment of genuinely interdisciplinary research will pose a particular challenge, not dissimilar from the problem posed by the array of sub-disciplines within law and the diversity of the kinds of research within those subdisciplines, but a challenge of an even higher order that transcends but is of particular relevance to the discipline of law.

Principle 2: *Generally speaking, the range of measures to assess quality and impact canvassed in the RQF Issues Paper is not inappropriate, so long as they are applied sensibly and in context, by informed peers, with due regard to the ways in which legal research is distinctive and, equally, the ways in which it is part of the mainstream of the humanities and social sciences.*

The range of criteria, including metric criteria as elaborated by the Allen Consulting Group (*Measuring the Impact of Publicly Funded Research* (DEST, 2005)), is not inappropriate, so long as it is applied to the discipline of law with care, and adapted, modified or supplemented as appropriate.

For example, the criterion of citation would need to be applied not just to other academic writings but also to court and tribunal judgments, transcripts of oral argument, documents of the parties constituting the written argument so far as that is on the public record, government reports, and so on. Attention would also need to be paid to the long-standing and well-recognised problem of any citation measure, that of distinguishing positive from negative citation, or in other words providing a non-quantitative evaluative context.

Another example is numbers of higher degree research (HDR) students; if this measure is to be compared across disciplines, it would need to take into account the historically low base of the discipline of law, stemming from a variety of factors including the traditional preference of top Australian graduates to gravitate towards legal practice or overseas postgraduate study; funding levels and consequent capacity to supervise HDR students; and the absence of any standard requirement or expectation that a beginning academic in law will necessarily have completed a PhD.

Again, in the case of cross-disciplinary comparisons, it needs to be acknowledged that a standard law journal article will, in many cases, be a major and comprehensive piece of work (usually by an individual rather than a large team as in the physical sciences), placing constraints on the number of articles that could reasonably be expected to be published in a year, with peer consensus about a disciplinary standard or norm the only safe guide to the utility of this measurement as an indication of quality.

Indicators of esteem – awards, prizes, invitations, appointments – are relevant measures of quality, but again not purely in metric terms. Peer assessment is necessary to identify relative prestige, as it is in relation to evaluating and ranking journals and publishers.

Principle 3: *Although analytically distinct from 'quality', 'Impact' is an appropriate and important criterion for research assessment, with both quantitative and qualitative aspects and with particular relevance to the discipline of law.*

Metrics are essentially about impact rather than quality as such, but impact is not just about metrics. In other words, attention must be paid to the quantitative and qualitative aspects of impact, rather than allow impact to be understood as an entirely quantitative concept.

From a quantitative or qualitative perspective, the growing interest in recognition of impact is appropriate and welcome, but needs to be teased out in relation to legal research. Clearly, the impact of legal research is often manifest in policy development and legal change, through adoption or reliance on the research by government, government agencies, statutory commissions, courts, tribunals, and even private bodies, though often with a substantial time lag that presents a challenge for evaluation confined to a relatively recent time period. The elevation of the importance of legal research published in submissions, working papers, and reports for parliamentary, government, law reform and international agencies is appropriate and welcome, and again has qualitative as well as quantitative aspects. But the criterion of impact has a more pervasive and more subtle application to legal research.

For example, it was explained earlier how even a legal textbook may, in appropriate cases, be much more than the compilation and re-presentation of existing knowledge, and involve original and creative analysis and synthesis of primary materials. In terms of impact, the effect of such research may be threefold. First, it may disclose new ways of thinking about legal categories and thus inform policy making in the relevant area. Secondly, it may have a direct impact on how legal decision-makers frame their decisions, and, at an earlier stage, on how lawyers conceptualise the issues and frame their advice. Thirdly, it may have an indirect effect on the shape of the law for years to come, by influencing how generations of students conceptualise, systematise and think about the law. Some of this may be measured in quantitative terms (eg citations, usage in course materials, appearances on course reading lists), but that will not be enough to capture the full hierarchy of effects.

Principle 4: *The assessment of impact, and of quality more generally, cannot be purely quantitative. It must be anchored in peer review, and be evidence-based, but must incorporate qualitative judgment.*

The table of possible research impact outputs in the RQF Issues Paper includes quantitative and qualitative measures. Of particular importance to the discipline of law are 'incorporation of research results into international/national policies, codes and/or practices', 'media presence through articles, debates, coverage', and 'expert advice/submissions/panel membership at government enquires'. Peer review could assess claims to public benefit. Serious consideration should be given to establishing a standing discipline-specific advisory panel to fine tune the quantitative measures (for example, ranking or otherwise evaluating the relevant journals) and to inject the qualitative element.

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