

1-1-2004

Character and Recognition of Legal Research in Australia, The

David Barker

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

Recommended Citation

Barker, David (2004) "Character and Recognition of Legal Research in Australia, The," *Penn State International Law Review*: Vol. 22: No. 3, Article 7.
Available at: <http://elibrary.law.psu.edu/psilr/vol22/iss3/7>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

The Character and Recognition of Legal Research in Australia*

David Barker**

I. Introduction

Australian University law schools appear to be in a state of continuing suspense regarding the status of legal research. The ability of law schools in Australia to attract good students, particularly full time postgraduate students, is always extremely problematic. The probability of attracting grants from the Australian Research Council and from other grant awarding organizations, such as the Law and Justice Foundation of New South Wales is low. This problem is compounded by the fact that not all law schools or law academics undertake a great deal of research activity.

The problem which arises for law schools is that there is a perceived dichotomy between legal and other university research. For many law academics the difficulty is that research is seen solely as keeping up-to-date with cases and legislation in one's subject, or attending and presenting papers at conferences.

II. The Department of Education, Science and Training (DEST) Approach

A major difficulty with regard to legal research within tertiary institutions is that it has allowed itself to become the captive of other disciplines. Intensified with the changes implemented by DEST, with regard to the reduction in the categorization of publications, the research quantum and subsequent payment of financial support for research infrastructure is based on a limited number of reportable categories. The fact that publications are categorized in this restrictive way mitigates

* The earlier part of this paper was originally presented at the Australasian Law Teachers Association (ALTA) Conference in the Victoria University of Wellington, New Zealand July 4-7, 1999.

** Dean, Faculty of Law, University of Technology, Sydney, Australia.

against traditional legal research, so that articles in “professional” journals and loose leaf services, chapters in *“The Laws of Australia”* and similar publications are now regarded as unacceptable for classification as research within the DEST context.

III. A Starting Point

In Volume 24 of the Journal of the Association of Law Teachers, Dr Karl Mackie described the development of a strategy for legal education research. He stated:

[W]e are working in an era where the scale of change in law, lawyering and legal education provides a significant opportunity for research endeavors to be seen as important and to have an impact on legal education policies within the various sections of the system. . . .¹

However he describes the downside as:

[W]e start from a relatively impoverished research base with a limited research culture and language, a confusion or underdevelopment of educational objectives, a tradition of institutional fragmentation and mutually-inhibiting inertia, a history of under-funding worsened by current public spending restrictions, a profession of educators which has long been criticized for its narrow approach to legal studies, an approach that seems to satisfy neither the tenets of a broad liberal education nor even the “vocationalist” aspirations of the legal profession.²

This discussion is relevant for the Australian academic legal community in that it demonstrates the need to agree on a definition of legal research within the Australian context, and then to define with some degree of clarity how Australian tertiary education could benefit from such a research mission.

IV. The Pearce Report

The starting point for the examination of this topic must be the Pearce Report, which in the Second Volume had as its Terms of Reference “the standards of . . . research of the law facilities of departments and their teaching staff.”³

1. Karl Mackie, *A Strategy for Legal Education Research*, 24 L. TCHR. 130, 135, (1990) (Special Issue).

2. *Id.*

3. DENNIS CHARLES PEARCE, ENID CAMPBELL & DON HARDING, AUSTRALIAN LAW SCHOOLS: A DISCIPLINE ASSESSMENT FOR THE COMMONWEALTH TERTIARY EDUCATION COMMISSION 136 (1987).

Taking account of the fact that the Report was published well over a decade ago (1987), it is interesting to note that the questions which were posed then continue to be asked today. Under “Nature and Forms of Legal Research,” the Report stated:

We consider it necessary to say something about the nature and forms of legal research for these reasons. First, legal academics often complain that scholars in other disciplines do not always understand what legal research is about and what its peculiarities are. Misunderstanding about distinctive features of legal research, it is alleged, can place legal academics at a disadvantage when they are seeking funds in aid of research in composition with scholars in other disciplines and also when their claims to promotion are being examined relative to those of other scholars, especially those of scientists.⁴

To those of us still involved in the debate fifteen years later, there is a familiar ring to this statement.

Emphasized in the Report were the differing views among lawyers as to that which constitutes research: “[C]orrespondingly what sorts of publications can properly be characterized as representing the fruits of research.”⁵ The Pearce Report gave rise to the first of a series of papers regarding the formulation of a policy as to the distinctive characteristics of law research. These were presented to the Committee of Deans and Heads of Schools of Law, and its successor organization the Committee of Australian Law Deans (subsequently re-titled the Council of Australian Law Deans (CALD)).

V. Nature of Law Research Statement

The first paper relating to this topic entitled “The Nature of Law Research—Statement”⁶ (Law Deans’ Statement) was prepared and presented by Professor Frank Bates of the University of Newcastle to the 1989 Meeting of the Committee of Australian Law Deans. It was developed on the basis that the Committee’s previous submission to the Pearce Committee had become outdated.

The essence of the submission was that the many reports that had been accepted by the government had identified various forms of law research and activity. These were categorized as:

1. the conventional collection and exposition of legal matter;
2. the attempt to provide an underlying theory which seeks to

4. *Id.* at 307.

5. *Id.*

6. Frank Bates, Committee of Heads of University Law Schools, Nature of Law Research—A Statement (1989) (unpublished manuscript, on file with author).

explain how particular doctrines and principles have developed or ought to be developed;

3. law reform research which involves research aimed at encouraging change in particular areas of law;

4. fundamental research which seeks to relate the law to other cultural, social and literary matters.⁷

It was emphasized that these categories were not to be regarded as mutually exclusive and were linked by the development of empirical research.⁸

A concern expressed in the statement was that the Report⁹ had attempted to draw a distinction between research and scholarship; "the former appears to refer to the discovery or creation of new entities or devices, whereas the latter seems to refer to the nature and synthesis of existing."¹⁰ It was suggested that this distinction had been developed for the purpose of arguing that research by definition appeared to refer to natural sciences and technologies and scholarship to humanities and social sciences, including law, with the "former attracting funding and various other concessions."¹¹

VI. The Role and Nature of Legal Research (At University of Technology, Sydney)

In 1994, Professor David Flint, then Dean of the University of Technology, Sydney (UTS), presented a paper to the UTS Academic Board. The purpose of the paper was to explain aspects of legal research in order to assist members of the Board involved in assessing such contributions, in the administration of research activities, and in judging applications for academic promotion in the University. This Paper subsequently formed part of a Report relating to legal research made to the Committee of Australian Law Deans at their meeting on April 1, 1998.¹²

Using the Bates Statement as its starting point, David Flint also rejected the attempt to draw a distinction between research and scholarship as having little or no relevance to law. His report examined the various activities which could constitute legal research, such as the close connection between teaching and research work in law, quoted

7. *Id.* at 1.

8. *Id.*

9. HIGHER EDUCATION: A POLICY STATEMENT, 92 (1988).

10. Bates, *supra* note 6, at 3.

11. *Id.*

12. David Flint, The Role and Nature of Legal Research (1998) (unpublished manuscript, on file with author).

from Professor Michael Chesterman:

It is however, well-recognized among academic lawyers that, at University level, law research and teaching (even undergraduate teaching) are closely and inextricably linked. It is often most appropriate for insights and discoveries made in the course of research to be fed straight into the material put before students and into published student case-books or textbooks.¹³

VII. Publication of Legal Research

The Flint Paper is invaluable in assisting the discussion as to what constitutes forms of legal research. In quoting from the Law Deans Statement to the Pearce Committee, Flint refers to the distinction that has to be made between law and other disciplines with regard to:

[T]he issue of refereed journals, to which so much importance is attracted in science and technology this statement is supported by a quotation from the Law Deans Statement to the Pearce Committee.

The process of referring and assessment is altogether more diverse, varying considerably from journal to journal, than it seems to be in other areas. There are very many journals which have considerable influence in legal circles which might not fulfill the generally required science criteria, but it would be wrong to ignore them, especially as they deal with matters relating to the practicing legal profession. Methods of quality control are difficult but no less vigorous than in other disciplines.¹⁴

Another distinction, which is drawn under the heading of Forms of Legal Research, is an explanation with regard to the perceived slow rate of publication of articles by law academics. Flint differentiates between a law teacher who typically waits until the conclusion of a project before publishing, as compared to a scientist who might produce a succession of articles relating to the same project. He emphasized this distinction with a quote from Chesterman:

Law is not a discipline where a scholar who does not produce a "steady flow of articles" should for that reason alone be viewed as under-productive. It is entirely within the traditions of legal scholarship for academic lawyers to focus their research energies almost exclusively on producing a major book, with the result that over a period of several years few, if any, articles are published. In

13. *Id.* at 7 (quoting Michael Chesterman, Promotions in Law ¶ 2 (1990) (unpublished manuscript).

14. *Id.* at 8.

contrast to some scientific disciplines, there is not an expectation that the interim results of continuing large-scale research should be put into the public domain through a continuing series of articles.¹⁵

VIII. Legal Scholarship in Australia

The Paper "*Legal Scholarship in Australia*" was originally prepared by Professor John Goldring for the Australia India Legal Conference, and was formally presented to the Committee of Australian Law Deans at their April meeting in 1998.¹⁶ Like Flint, Goldring acknowledged that Australia inherited the legal tradition of the English common law, whereby most legal scholarship in Australia has been the work of either practicing lawyers or law academics. Until recently, this work was mostly concerned with legal practice and "took the form of exposition of rules and practices employed in legal work."¹⁷

Similarly, Goldring distinguished between the practical approach towards research adopted by common law teachers and the doctrinal approach by continental European legal scholars. He also acknowledged the influence of Julius Stone who was appointed Professor of International Law and Jurisprudence at Sydney University in 1945, publishing in the following year "*The Provision and Function of Law.*" Goldring viewed this piece to be a classic of legal realism, explaining how common law reasoning techniques evolved and related to social phenomena.

There are two significant statements in Goldring's paper. First, there are changes, which Goldring recognized as having taken place in legal research, whereby legal realism "and other research influences on Australian legal scholarship have broadened it to include some theoretical and empirical studies as well as expository work. Even some work focusing on legal rules lost its exclusive positivist ethos, though positivism and an expository style still prevail."¹⁸ Second, Goldring concluded that "Legal Scholarship in Australia has accommodated and assimilated new theories and perspectives into a dominant expository tradition, rather than changing its fundamental nature."¹⁹

IX. A Conclusion and Starting Point

Any law academic seeking guidance from this sequence of reports

15. *Id.*

16. John Goldring, *Legal Scholarship in Australia* (Apr. 1998) (unpublished manuscript presented to the Committee of Australian Law Deans, on file with the author).

17. *Id.* at 1.

18. *Id.* at 4.

19. *Id.*

as to the character and recognition of legal research would be justified in expressing disappointment that there exists no common agreement as to the special nature of legal research. For assistance in reaching a conclusion reference needs to be made to Eugene Clark's review of the writings of McInnis and Marguism,²⁰ "Australian Law Schools after the 1987 Pearce Report,"²¹ in which he reports on the conclusion McInnis and Marguism drew about legal research:

[T]he Pearce Report's dualism "between research within law and research from outside law" (doctrinal versus inter-disciplinary research) is not as absolute as portrayed by Pearce. A broader epistemological framework might have enabled the mapping of relations between law and other fields of knowledge, contributing to the formation of new knowledge on the disciplinary boundaries.²²

Clark also points to the discussion of legal research issues made by McInnis and Marguism in their report which states:

[T]he five features most likely to dominate Australian Legal Research:

- (a) more emphasis will be on group and, as far as possible, inter-disciplinary and empirical research;
- (b) there will be emphasis on linkages with industry;
- (c) there will be a move away from general and uncoordinated research to institutional specialization and key research centers;
- (d) there will be an increased emphasis on the provision of research training and university-wide research infrastructure; and
- (e) law school leaders will, more than ever before, need to demonstrate the managerial skills necessary to compete and account for the expenditure of research funds.

This will require every law school to identify its research focus and direct its resources to achieving excellence in those areas.²³

20. CRAIG MCINNIS & SIMON MARGUISM, *AUSTRALIAN LAW SCHOOLS AFTER THE 1987 PEARCE REPORT* (Australian Government Publishing Service) (1994).

21. Eugene Clark, *Australian Legal Education a Decade After the Pearce Report*, 8 SYDNEY L. EDUC. REV. 121 (1997).

22. MCINNIS & MARGUISM, *supra* note 18, at 181.

23. *Id.* at 230.

X. The Future

In the future, the concern for Australian Law Deans should be that very little progress, if any, has been made with regard to both development and Government recognition of legal research. In March 2002, the newly appointed Minister for Education, Science and Training, the Hon. Dr. Brendan Nelson published the Australian Government's Higher Education Report for 2002 to 2004.²⁴ This provided an overview of the higher education sector in 2001 and included a review of the performance of higher educators in delivering student places and information on the allocation of funding in the 2002-2004 triennium.

The Report incorporates an emphasis by the Government on its policy for the improvement of Australia's knowledge base and the development of a national innovation system with a focus on the education and training system, especially with universities. This incorporated an overall grant of nearly \$1.5 billion (\$1.3 billion for research and research training) to Australian Universities—a total package of \$2.9 billion over five years.²⁵

The inherent problem for legal research is that a large amount of Government block funding for research is made via the Institutional Grants Scheme (IGS), which supports institutions' research and research training activities. This IGS funding is distributed across universities by a performance-based formula incorporating research income (60 percent) and publications (10 percent).²⁶

The difficulty is compounded within this area for legal research in that law schools seeking to obtain funding for research from their university would be mostly dependant upon gaining funding from the authorship of research publications, even though this only contributes to 10 per cent of the research quantum. As stated earlier, it is necessary for an article that is to be included within the assigned research quantum to satisfy a complex criteria. Research publications that are not refereed, and therefore unlikely to meet the criteria, include case studies and articles designed to inform practitioners on existing knowledge in a professional field.

Conference publications must meet the general definitions of research, such as having the stated key characteristics of research publications, meaning the need to be published, peer reviewed and

24. COMMONWEALTH DEP'T OF EDUC., SCI., & TRAINING, HIGHER EDUCATION—REPORT FOR THE 2002 TO 2004 TRIENNium 143 (Mar. 2002) at http://www.dest.gov.au/archive/highered/he_report/2002_2004/html/1_6.htm (last visited Mar. 30) [hereinafter TRIENNium 2002 TO 2004].

25. \$2.9 billion Australian dollars equals approximately \$2.2 billion U.S. dollars.

26. TRIENNium 2002 TO 2004, *supra* note 24, at 131.

presented at a conference, workshop or seminar of national or international significance. It is also specifically stated that the types of conference publications that are unlikely to meet the criteria include papers that appear in only a volume handed out to conference participants, a common practice at law conferences. Within the area of books to be counted as publications constituting part of the research quantum, there is a specific exclusion statement that books which are unlikely to meet the criteria include textbooks and entries in reference books.

An examination of other operating resources under the Report illustrates the difficulty that legal research has of attracting government funding. Examples of projects attracting funding within this sector are:

- Development of a Postgraduate Program for Genetic Rural Health Practitioners (Higher Education Innovation Program Grants)²⁷
- The Scope for Nursing in Australia—A Snapshot of the Challenges and Skills Needed²⁸
- New Fabrications for Processing of Novel Multilayer Materials²⁹

The reality is that neither the government nor the tertiary sector is likely to change its approach to the recognition of legal research or its consequential funding of research; therefore it is for the law schools to adapt their research to meet the requirements of the grant awarding institutions.

On a micro level this has happened within the UTS Law Faculty which has qualified for research funding under various aspects of the Government's Research Funding Policy, for example:

- Professor Michael Adams—Australian Award for University Teaching Law and Legal Studies—\$40,000 (2000)
- The Australasian Legal Information Institute (AustLII)—AustLII is jointly operated by the Faculties of Law at UTS and the University of New South Wales (UNSW). It provides free access to Australian legal material to anyone who has access to the Internet. AustLII operates one of the world's largest publicly accessible databases of legal materials on the World Wide Web.³⁰ AustLII was established by funding from the predecessor body to DEST—DETYA (The Department of Education, Training and Youth Affairs) and two host universities. It also receives

27. *Id.* at 109.

28. *Id.* at 115.

29. *Id.* at 136.

30. The AustLII website is available at www.austlii.edu.au.

funding from the Australian Research Council, the Law and Justice Foundation of New South Wales, the Australian Business Council, the Council for Aboriginal Reconciliation, Department of Foreign Affairs and Trade, Asian Development Bank, and others. The amount it received in grants was \$997,462 in 2001 and \$794,817 in 2002.

- UTS Centre for Corporate Governance—A joint initiative of the UTS Faculties of Business and Law receives an annual grant by the University of \$100,000 (2002-2004).

On the macro level there has been a realization by the Council of Australian Law Deans (CALD) that there must be a coordinated strategy by the Law Schools to refocus legal research to meet the changing needs of society and the requirements of Government.

At their meeting in Fremantle, Western Australia, on September 29, 2002, CALD had the opportunity to meet with Professor Dale Whitman, the President of the Association of American Law Schools (AALS), and Professor Carl Monk, the Executive Vice President and Executive Director of the Association. They compared the relationship between research output and funding in Australia with the position in the United States, where generally there is no budget line affected by the research productivity of the law faculty.³¹

Generally CALD agreed that legal research needed to be a standing item in the agenda for all its future meetings and that it was necessary to challenge the current policy adopted by DEST in the allocation of research funds. With regard to the specific matters contained in this policy CALD resolved the following:

(a) Definition of Research

- To express concern that there needs to be an agreed definition as to what constitutes legal research and how this may be applied to the use of the description throughout the whole of any funding papers by DEST in respect of research.
- To contrast this approach with the United Kingdom research evaluation exercise where the panels in each description define research for the purpose of that definition.

(b) Textbooks

- To express concern as to the exclusion of textbooks from the DEST categorization formula, particularly as in the view of

31. Council of Australian Law Deans; Minutes 2002/3, 9.

CALD. [The exclusion is based on a misunderstanding that such texts are not regarded as “original” nor regarded as generating new knowledge but being a description of old knowledge.]

- To recommend that there should be a panel drawn from legal experts who would be able to provide an independent review as to whether a particular textbook satisfied the requisite of originality.

(c) Journals

- To recommend essential appropriate legal journals for inclusion in the DEST Journal Register.

(d) Legal Encyclopedias

- To make the case for the recognition of the valuable contribution of many of the entries in such works.³²

XI. An Australian Academy of Law

At the meeting of the Committee of Australian Law Deans (the predecessor to the Council of Australian Law Deans) held on October 18, 1996, the author of this paper submitted a paper entitled “Study Associations, Learned Societies and the Learned Academies,” which drew attention to the fact that there were four major learned academies, none of which recognized or represented scholarly achievements in the law.³³

This concern was subsequently re-emphasized in the Australian Law Reform Commission Report No. 89 *Managing Justice*,³⁴ which stated in Chapter 2 of the report:

In the Commission’s view, there is a need for an institution which can draw together the various strands of the legal community to facilitate effective intellectual interchange of discussion and research of issues of concern, and nurture coalitions of interest. Such an institution should have a special focus on issues of professionalism

32. *Id.* at 9-10.

33. David Barker, *Study Associations, Learned Societies and the Learned Academies*, ¶ 20118 (1996) (unpublished manuscript presented to the Committee of Australian Law Deans, on file with author).

34. AUSTRALIAN LAW REFORM COMM’N; REPORT NO 89, *MANAGING JUSTICE: A REVIEW OF THE FEDERAL CIVIL JUSTICE SYSTEM* 70.

(including ethics) and professional identity, and on education and training.³⁵

The Report went on to state that:

CALD has been considering a proposal developed by Professor David Barker, Dean of Law at the University of Technology, Sydney, for the establishment of an Australian Academy of Law which “could increase co-operation between the judiciary, professional legal associations, CALD and ALTA.”

According to the proposal, the suggested membership of 300 should be “selected on the basis of professional achievement and demonstrated interest in the improvement of the law.” Ex officio membership should be granted for Chief Justices, Attorneys-General, Solicitors-General, heads of law reform commissions, the President of the Law Council, and law deans. The suggested objectives would include the following.

- To promote excellence in and encourage the advancement of legal practice in Australia.
- To promote collegiality among members of the judiciary, legal practitioners and law teachers.
- To promote excellence in legal research and the publication of contributions to legal knowledge.
- To promote the professional development of members of the legal profession.
- To promote views relating to legal reform to Government, the community and other professions.
- To promote high standards of ethical conduct within the legal profession.

The working model for the CALD proposal is the American Law Institute, which is best known for its exhaustive research and consultation work and the production of the Restatement of American Law series. While there are some features of this model which are attractive and adaptable to Australian circumstances, the proposed

35. *Id.* at 151.

membership structure (as well as the focus on codification type law reform) would not suit the imperative for a more comprehensive and collegially minded body.³⁶

At the end of this review the Commission made the following recommendation:

The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession—students, practitioners, academics and judges—in promoting high standards of learning and conduct and appropriate collegiality across the profession.³⁷

Despite this Recommendation by the Law Commission in the report that was published in January 2000, it was not until September 29, 2002, that CALD passed a Resolution that, in principle, it would institute a body to be known as the Academy of Law which it agreed would have the following objectives:

- (i) To promote the highest standard in legal education
- (ii) To promote excellence in scholarship and research in law
- (iii) To improve law and promote justice.³⁸

It was hoped that the establishment of such an Academy would provide a catalyst for the effective promotion of legal research in Australia thereby gaining additional funding from DEST.

The DEST Report, under the heading “Learned Academies,” stated that:

In the 2001-2002 financial year, a total of \$1.7 million in grants-in-aid was provided through the Education, Science and Training portfolio to support the operations of the National Academies Forum and the four Learned Academies: the Australian Academy of Science; the Academy of Social Sciences in Australia; the Australian Academy of Technological Sciences and Engineering; and the Australian Academy of the Humanities. These grants assist the

36. *Id* at 152-153 (¶¶ 2.121-2.123).

37. *Id* at 154.

38. Council of Australian Law Deans; Minutes 2002/3, 11.

Academies in promoting research and scholarship, and in pursuing activities of national interest, including the provision of independent advice to the government.

Funding is also provided to the Academies to undertake projects of benefit to research and scholarship. In 2002, the ARC has \$461 900 available to allocate to the Academies for these purposes.³⁹

It is to be hoped that the combination of a more realistic approach to legal research adopted by CALD, together with the establishment of an Australian Academy of Law, should enable Australian law schools to respond in a positive way to the challenges of playing a major part in the future of Australian research.

39. TRIENNium 2002 TO 2004, *supra* note 24.