

Empirical Facts: A Rationale for Expanding Lawyers' Methodological Expertise^{*}

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Legal academics focus on the study of the nature of legal rules and legal reasoning. This emphasis on rules has the potential to obscure the importance of facts in the determination of the law. Judges use general facts about the world in developing and interpreting the law in addition to the facts they use that are specific to the dispute between the parties. Practising lawyers present versions of the facts as truth in arguing their client's case in court. Facts also provide an evidence base for lawmakers to formulate policy and draft new law and rules.

'Evidence based' practice is used widely in the fields of medicine and business. This article describes the evidence-based practice paradigm. It argues that facts about society gleaned from social research form a legitimate evidence base that is important for legislative reform. An evidence-based approach seems an obvious step in formulating effective laws and providing legal solutions to social problems (Head 2010). It should be used to assist legislators in developing and ensuring well-founded public policies leading to sound legislation. However, in law reform, the evidence base is often overwhelmed by populist perceptions and political ideology. A recent legislative amendment to youth justice sentencing options provides a pertinent case study where the evidence base is being disregarded. This article argues that there would be more likelihood that 'good' law, that is law that is just and that brings about an intended outcome, would be achieved if the law is based on identified 'facts' about society and the way it operates. Secondly, it argues that empirical research and research about 'facts' in society are important factors in assisting judges in the development of authoritative jurisprudence. In doing so, this article highlights the use of the evidence base in cases in the High Court of Australia.

This article argues that there is a need for those lawyers who play a part in law reform (legislators and those involved in the law reform process) and for those who play a part in formulating policy-based common law rules (judges and practitioners) to know more about how facts are established in the social sciences. For this reason, law students need enhanced training in interdisciplinary and empirical methods in order to tap into the ever growing body of evidence from social research. Law students need empirical methodologies skills and awareness to fully prepare for legal practice and for the many influential roles law graduates have as advocates, judges, practitioners, legislators, researchers and policy makers.

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1 The paradigm of evidence-based practice and law

The modern concept of evidence-based practice originated within the health services sector. The British physician Archie Cochrane published his *Effectiveness and Efficiency: Random Reflections on Health Services* in 1972, but it was not until the 1990s that this theory of practice gained more general acceptance (Hjorland 2011). The paradigm of evidence-based practice stipulates that decisions should be based on research-based knowledge collected in a systematic way using recognized scientific standards with research overviews synthesizing knowledge from multiple primary studies (ibid.). Is this movement towards evidence-based practice affecting legal practice, public policy and law?

Within the legal academy, particularly in the United States and Canada, the last three decades have witnessed a growing trend towards the use of empirical research (Ellickson 2000; Shanahan 2006). In addition, there is a growing impetus for evidence based practice from disciplines aligned with law – the social scientists, criminologists and statisticians. In the US, there are signs that the legal academy is trying to enhance its expertise, for example the George Mason University School of Law is offering law professors special workshops in empirical methods and the Society for Empirical Legal Studies based at Cornell University encourages empirical methodological expertise amongst legal academics through its successful conferences each year. These meetings are aimed at highlighting recent empirical research on the legal profession, courts and legal practice, and at the same time, encouraging and honing empirical methodological expertise amongst legal academics, through its *Journal of Empirical Legal Studies* launched in 2004.¹ The situation within legal academia in Australia also reflects this change to a positive attitude towards empirical methods, spurred on by the growth in publicly funded interdisciplinary research emanating from universities. Studies demonstrate a gradual shift to the use of non-doctrinal methods in association with the traditional doctrinal work (Hutchinson & Duncan 2012). In addition, there is the on-going work of the Law and Society and other interdisciplinary associations in all jurisdictions.² In the UK, the tensions within the policy development arena are evident with the 2006 Nuffield Report signalling a movement towards gathering improved data and ensuring training in empirical methods within the academy (Genn, Partington & Wheeler 2006). Despite this, the Legal Services Research Centre (LSRC), an independent research division of the Legal Services Commission, which was established to inform legal aid policy and the implementation of reform through quantitative and qualitative empirical research, was closed in 2013.

The take-up of the use of the evidence base within the Australian legal profession is difficult to measure. Lawyers seem not to be embracing the new evidence-based

1 See the website at <http://www.lawschool.cornell.edu/sels>.

2 The Law and Society Association of Australia and New Zealand, <http://www.lsaanz.org>; Australian and New Zealand Society of Criminology, <http://www.anzsoc.org>; and their equivalents in the US, UK and Europe.

paradigm to the same extent as other professions. Raschlini argues that the explanation for this difference is that Law lacks the same 'uniformity of purpose' as other disciplines:

'It is often politics by other means that sorts winners and losers, rather than right and wrong, thereby clouding the normative environment. What is accepted fact in medicine and business is contestable in law. Law's political nature does not render empirical testing of widely held myths a hopeless misadventure but complicates the hope (and the value) of creating an evidence-based law' (Rachlinski 2010-2011, p. 901).

Unlike medicine where there is a clear goal of providing 'a positive outcome for the patient's health', or business, where success is judged by the 'bottom line', Rachlinski argues that Law lacks 'a unifying, organizing principle' (p. 918). However, in an argument reminiscent of Peter Ziegler's assertion of the 'non-existent legal paradigm' (Ziegler 1988, p. 569), efforts to define Law's purpose 'lead only to greater complexity' and 'conflicting purpose' (Rachlinski 2010-2011, p. 901). He refers to the 'conflicting themes' in the various areas of law, so that tort and contract law, for example, aim for efficiency, but to some degree the aim is also towards fairness for the parties involved, and criminal law needs to balance the rights of the accused 'with society's broader need to control crime' (*ibid.*). But surely, as Rachlinski suggests, the point for Law is 'to create better law-law informed by reality' (p. 910).

2 The importance of the social evidence base in developing law

Catherine Althaus, Peter Bridgman and Glyn Davis have written an influential text on policy research in Australia (Althaus, Bridgman & Davis 2007). In outlining the policy change cycle, they highlight the need for extensive research and consultation, and both in Australia and overseas, recognition has been given to the need to bridge the policy/research divide so as to establish 'mechanisms for identifying and plugging key gaps in research knowledge' in order to infuse this information into the formulation of policy (Nutley 2003, p. 20; Nutley, Powell & Davies 2013).

Accordingly, recent Australian history provides numerous examples of governments providing meaningful opportunities for the broader community of interest and non-government policy experts to engage in policy analysis and the formulation of options for reform. In 2008, the Australian left wing Labor government announced a positive stance on evidence-led policy:

'The Government will not adopt overseas models uncritically. We're interested in facts, not fads. But whether it's aged care, vocational education or disability services, Australian policy development should be informed by the best of overseas experience and analysis. In fostering a culture of policy innova-

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tion, we should trial new approaches and policy options through small-scale pilot studies. Policy innovation and evidence-based policy making is at the heart of being a reformist government' (Rudd 2008).

However, it seems that more often than not the results of this evidence, produced for example by specially established government enquiries and academic research submitted in response to departmental discussion papers, is not used within policy development. This has led some commentators to question government tactics and query whether governments are only using the inquiries and evidence-gathering processes 'as strategies – to avoid criticism, to be seen to be doing something, to delay action or to divert attention' (Fishwick & Bolitho 2010, p. 176), leading to a growing bank of information which has been labelled by John Lea as 'museums of official discourse' (Lea 2004, p. 184). It would still seem

'that many policy decisions are made in isolation from any real research, and that directions for change, based on anecdotal evidence, are imposed from the top. The community may only be involved at a very late stage through consultation processes designed to justify and legitimise' (Hutchinson 2010, p. 73).

Why is this evidence being ignored? One very influential tool working against evidence-based practice in the formulation of law is anecdote. Politicians, for example, both in Australia and overseas, benefit from highly publicized stories involving violent criminals which allow the conservative parties to rely heavily on a 'tough on crime' stance at every opportunity. One decision by a Parole Board, which in hindsight may have been unwise, can affect the rehabilitation hopes of hundreds. One widely publicized murder by a parolee in Victoria recently has prompted an overall review of the procedures and parole system in that state which will inevitably result in tighter parole requirements (Callinan 2013). Just as in the courts, difficult or unusual or exceptional cases can cause the clarity of the law to be 'obscured by exceptions and strained interpretations', so too unusual and heinous criminal acts can incite public opinion to the point where politicians pass 'bad' laws. Highly publicized incidents can result in unnecessarily harsh or unjust laws, so that for example special offences covering looting during disasters are added to the statute books despite the fact that basic stealing offences already cover all pertinent situations.³

As well as anecdote, governments have a tendency to rely on common wisdom unsupported by scientific research, public perception of what the voters believe and want in the context of a government voted in with a political mandate, cheaper short term options and simplistic solutions. Therefore, many factors other than research evidence shape the policy process including 'prevailing public opinion; political policy events such as elections; changes of ministers and gov-

3 See for example the Criminal Code (Looting in Declared Areas) Amendment Bill 2013 (Qld) following a few incidents which occurred during the Queensland floods.

ernments; fiscal constraints and budgets; institutional constraints; policy actors; political power; policy discourse; organizational cultures; agenda setting; one-off events; political economy; and new managerialism' as well as 'penal populism'; the 'politics of law and order' and 'the performance indicators of the State Plan' (Fishwick & Bolitho 2010, notes omitted). One recent study has even demonstrated that people ignore numerical facts that they have accepted in another context if the evidence is placed in a political context which conflicts with their political beliefs (Nesbit 2013).⁴ Given this research it is pertinent to ask whether law-making will change when lawyers have more empirical knowledge and skills.

Legislation is certainly enacted that conflicts with the results of social research. One example is the establishment of boot camps for youthful offenders. In Queensland, the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* commenced in January 2013. While boot camps may seem a good option to instil discipline and lead young people towards a more appropriate future path, the research demonstrates that the problems being experienced by many youthful offenders are not amenable to simplistic solutions and that these are not the actual outcomes experienced by many boot camp participants. The weight of social research evidence demonstrates that in the past boot camps for young offenders have not been effective in reducing reoffending. A meta-analysis of 32 robust research studies of militaristic boot camps concluded that 'this common and defining feature of a boot-camp is not effective in reducing post boot-camp offending' (Wison, MacKenzie & Mitchell 2008, p. 3). Similarly, a meta-review of crime reduction programs conducted in Washington State found that boot camps did not reduce recidivism among participants (Drake, Aos & Miller 2009). At the same time other more expensive diversionary programs⁵ with positive evaluations, such as court ordered youth justice conferencing, have been discontinued in order to achieve short term budgetary gains.⁶ There are long term risks involved in ignoring the evidence base in important social areas such as youth justice. These risks include increased youth detention rates, higher costs of detention, net widening, and inequitable impacts on Indigenous youth.

The evidence base of course does not have the answers to all society's difficult problems. Many of the 'wicked' social problems such as Indigenous disadvantage are not amenable to simple solutions. They require complex multi-faceted long-term adjustments to policy. But clear evidence where it exists should not be ignored and a more empirically trained legal profession should surely increase the likelihood of the evidence base being assessed more accurately, given the risks (and costs) involved where clear evidence is ignored in the process of policy formulation and legislation.

4 See also Kahan et al. 2013.

5 \$11.2 million over the next two full financial years in comparison to \$2 million for the new program. Webber 2012, p. 1; *State Budget 2012-13 Service Delivery Statement* 2012, p. 4.

6 There were 1,691 court-ordered youth conferencing referrals last year (as well as 1,246 police referred conferences). Court referred conferencing is reported as having a 98% satisfaction rate. *Childrens Court of Queensland Annual Report 2011-12*, p. 7.

3 The importance of facts in the judicial process

The heart of the lawyers' craft lies in normative reasoning – the formulation, interpretation and application of legal rules. In the common law world, appellate judges are at the pinnacle of that craft in terms of authority and skill. Those judges have the ultimate responsibility for authoritatively determining the interpretation, meaning and effect of statutory and common law texts.

But facts are also important in legal disputes. It is clearly recognized that the particular facts alleged and challenged in the matters that come to court constitute the source of, and the reason for more general rules which are determined through the judges' use of inductive and deductive reasoning. These 'adjudicative facts' are the special or particular facts that need to be established in a particular case and to which legal rules are applied.

In common law systems, the facts are contested. Factual accuracy has been described as the 'paramount' (Frankel 1975, p. 1031), 'fundamental' (Walker 1996, p. 1081), 'principal' (Koehler & Shaviro 1990, p. 247), 'necessary,' (Twining 1989, p. 72;) and 'central' (Weinstein 1966, p. 223) goal of the trial. Advocates present two versions of the facts rather than an objective truth. As a general rule, 'parties to a court proceeding must prove all facts pertinent to their case' (Uniform Evidence Law 2005, 17.1), and there are highly developed rules for determining these adjudicative facts centring on the laws of evidence, procedure and discovery (Heydon & Cross 2013). The courts have been said to exercise a gatekeeping role in keeping out 'junk science' through the use of these rules (Odgers & Richardson 1995). A more 'empirically literate' profession must surely streamline this process.

In addition to adjudicative facts, there are 'empirical facts' (sometimes called 'legislative facts' or 'social facts'). These consist of 'assertions of facts about society, the world and human behaviour' which, in principle, can be tested by 'social science or empirical methodologies' (Burns & Hutchinson 2009, p. 155-156). These facts are neither pure statements of legal principle nor are they adjudicative facts – 'They are assertions used as part of the judicial reasoning process'.⁷ Judges can formally take 'judicial notice' of 'notorious facts' and so 'relieve the parties of the burden of proving them' (Heydon & Cross 2013).⁸ Judicial notice covers matters of such common knowledge that they are rarely contentious, for example indisputable scientific, medical, cultural, and historical facts, including: the laws of physical nature; well-known social habits and usages; and notorious historical events, such as World War II; as well as matters the court may be assumed to know already by virtue of its stature and expertise, such as the validity of legislation put before it (Heydon & Cross 2013, ch. 2).

7 Ibid. See also Burns 2004, p. 215; Burns 2012, p. 317.

8 See *Evidence Act 1995* (Cth) ss 143, 144 and 145.

It can be argued that a judge's view of what is 'common knowledge' affects the interpretations of norms that a judge will find most persuasive. Indeed, views about the world may be as important to the judge's choice of the empirical facts used, as a judge's general philosophy and approach to judicial reasoning is relevant to the way they decide cases.⁹ There have only been a very small number of studies on the use of empirical facts by Australian courts (Mullane 1998; Selway 2001). There has been a limited discussion in relation to their use in the United States (Monahan & Walker 1987; Davis 1942; Davis 1955; Davis 1987). Research of current Australian, United States and United Kingdom case-law demonstrates that judges make statements of empirical facts, with or without the support of social science research, as part of their judicial reasoning. See for example *Cattanach v Melchior* (2003) 199 ALR 131 (wrongful birth), *Woods v Multi-Sport Holdings* (2002) 208 CLR 460 (extra record social scientific material), *St Helens Borough Council v Derbyshire and others* [2007] 3 All ER 81 (working lives of women) and *Stack v Dowden* [2007] 2 All ER 929 (Cohabitation),¹⁰ and *The Queen v Tang* (2008) 237 CLR 1 (slavery).¹¹ Empirical facts may be used in a wide variety of ways by judges in their reasoning. They may be used to set background context, in a rhetorical way to support arguments of legal principle, to assist in the determination or interpretation of adjudicative facts, or as arguments of policy or consequence used in the development of law (Burns 2004). Sometimes statements of empirical fact are subsumed into statements of legal or social values, for example 'statements that refer to enduring community values such as the value of human life' (Burns & Hutchinson 2009, p. 156; Burns 2004, p. 219-221).

There has been an explosion in social science research on law, the justice system, the context in which law operates, the effects law has, and the social and institutional phenomena that statute law and common law seeks to regulate.¹² Nowadays, many of the 'home truths' that might be considered 'notorious facts' are subject to sophisticated social science analysis. Therefore, if this material is available in the community to judges and clients alike, law schools need to ensure that the knowledge and skill of critiquing empirical research is not overlooked in legal training.

4 The need for enhanced training for lawyers in undertaking and critiquing the evidence base

The arguments surrounding the need for lawyers training to be broadened from purely doctrinal research methodologies so as to engage with social research more meaningfully (Curry-Sumner & Van der Schaaf 2011), have been canvassed in the

9 For example, a judge who protects consumers' ability to challenge standard form contracts might be seen as upholding the principle of consumers' rights or giving recognition to inequality of bargaining power.

10 Burns & Hutchinson 2009, p. 155-156. See also the discussion in Burns 2002, p. 234; Mullane 1998, p. 434.

11 *The Queen v Tang* (2008) 237 CLR 1; (2008) 249 ALR 200; [2008] HCA 39.

12 See the examples in Cane & Kritzer 2010.

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literature previously (Hutchinson 2008; Bradney 2010). The 2006 UK Nuffield Inquiry noted the crucial importance of empirical research to lawyers and recommended that:

xii. (...) all law departments should consider enhancing the undergraduate curriculum by offering an option on law in society, or offering options with a significant empirical content (...) This would better equip students to deal with a world in which there is an increasing demand for assembling and analysing social data and where, indeed, legal practice requires a wide range of research skills in addition to those of the doctrinal lawyer. Such students should also acquire the technical skills needed to analyse data' (Genn, Partington & Wheeler 2006, p. 7).

All law graduates would benefit from this training. In the current milieu, legal academics are frequently required to take part in interdisciplinary research teams. Interdisciplinary and multi-faceted methodologies are valued by external granting authorities such as the Australian Research Council. Higher degree research students require exposure to the array of methodologies in order to choose the most appropriate way of progressing their research questions and arguments. Even those researchers using strictly doctrinal methods need to have a facility in assessing the legal statistics and social context.

Law students need this training for legal practice. Training in empirical methods will ensure that practicing lawyers have an enhanced ability to locate, read and critically assess the published results of existing interdisciplinary research and identify obvious error. The process of evaluation involves reading and assessing reports of empirical research across the spectrum of quantitative and qualitative methodologies including for example the use of statistics, surveys, observations of habitual behaviour and interviews with key players. Such skills are required to fully assess the abilities and research presented and more knowledgeable in dealing with expert evidence.

Many law graduates never practice but instead enter government and politics. Training in empirical research methods will enable this group to become more skilled in formulating evidence based policy. In Australia for example, prior to the 2013 federal election, 29 per cent (n=66) federal parliamentarians held law degrees.¹³ Such trends provide even more reason for the law curriculum to include adequate exposure to social research methodologies.

Fulfilling a requirement for law students to graduate having achieved an enhanced knowledge of social research methods and an ability to validly critique the existing evidence base, is problematic. There are an extensive number of quantitative and qualitative social research methods. Any treatment of the vast array of methods within a law degree would necessarily be superficial. Each higher degree research student, for example, must determine a data collection method

13 This contrasts to a small .452% of the general public who are lawyers. Whitton 2013.

best suited to their research question and resources. It would be impossible to cover all the possibilities in sufficient depth within one undergraduate unit in a law degree. It may be necessary to limit the skills developed at undergraduate level to the ability to undertake one very basic quantitative method such as a survey. Is this an effective use of time?

Who will teach the methods courses within the law degree? Few Australian legal academics have dual social science and legal qualifications. There is an on-going discussion even within the social science faculty about the best means of teaching these methods effectively. In June 2012, the Higher Education Academy led with the *Social Sciences Teaching and Learning Summit: Teaching Research Methods* (Hammersley 2012; MacInnes 2012; Garner 2012). The task is not straightforward. Will law students welcome having such material being included in the curriculum? Australian law students (and legal academics) tend to come from a humanities background and favour text-based studies. Many have not completed advanced mathematics in their final years at school. Therefore empirical methods will almost certainly need to be taught by academics from other disciplines. There are resourcing (and cost) issues involved in such service teaching arrangements within the universities.

Where should these skills be included in the law degree? In most jurisdictions the law curriculum is already crowded with core units. In Australia, the core units are known colloquially as 'the Priestley Eleven', being named after the chair of the Law Admissions Consultative Committee. This committee completed a review of the requirements for admission to legal practice in Australia in 1992 and this basic list of subject requirements is still being used throughout Australia.

However, in the Australian law curriculum, the difficulties are not insurmountable, and have been canvassed elsewhere (Burns & Hutchinson 2009; Hutchinson 2008). Including empirical research skills within an established incremental skills training program is one option (Christensen & Kift 2001). Inclusion of such knowledge and skills beginning with a first year tutorial reading and critique module would be sufficient to cover basic skills in reading empirical research papers. Throughout the academic year levels, there are opportunities to examine examples of empirical research evidence when academics are establishing legal context prior to analysing the substantive law. Statistics on prison populations and recidivism are a logical context for a discussion of the rules in relation to sentencing offenders. Statistics on the incidence of divorce are relevant in a family law unit. The incidence of consumer complaints is good background to a discussion of trade practices and fair trading laws. There are case examples which highlight where the courts have accepted and used empirical research results.¹⁴

14 In *Coon and Cox* (1993) 17 Fam LR 692; (1994) FLC 92-464 an Australian family law decision, the Chief Justice of the Family Court compared the scale of the costs of maintaining children, the 'Lee Scale', to the scale more commonly used, the 'Lovering Scale'. See general discussion and examples in Hale 2013.

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Final year research units provide an additional venue to introduce non-doctrinal research methodologies. Gradually through individually supervised research project units and Masters or higher degree research, students have opportunities to be introduced to the art of writing surveys and the importance of university ethics clearance regulations. The incorporation of discussion of this material is not onerous and involves organizational emphasis and intention rather than the displacement of other substantive material.

There are other avenues. The universities already promote combined degree or dual degree courses such as Law and Justice or Law and Economics. These are available for those who have an interest in pursuing an interdisciplinary perspective. Nevertheless, it is imperative that shifts occur within the law degree curriculum so that there is more recognition of current research realities. The methodologies used in research emanating from the law faculties are expanding beyond purely doctrinal work. The number of higher degree students in law is increasing. There is a corresponding increase in the number of interdisciplinary methods being employed by both academics and students at that level (Hutchinson & Duncan, p. 13-14). The time is ripe for change.

5 Conclusion and further work required

This article has argued that facts gleaned from social research form a legitimate evidence base that should be used to assist legislators in developing and ensuring well-founded public policies and to assist judges in the development of authoritative jurisprudence. This argument is in some respects simplistic because it ignores the complexities involved in the development of a valid evidence base pertinent to any specific jurisdictional legal problem or specific legal dispute, and it also ignores the complexities involved in contested legislative reform underlaid by political reality in democratic government structures. There has not been space to fully address the larger questions concerning why politicians do not use the 'museums of official discourse' effectively within a reasoned law reform process. The assessment of this broader concern must wait for another venue. This article maintains that law graduates need enhanced facility in dealing with non-doctrinal methods so as to fully prepare for legal practice and the many influential roles lawyers have as advocates, judges, practitioners, legislators, researchers and policy makers in modern democracies such as Australia.

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