'IN REVIEW' CELEBRATION OF SCHOLARSHIP†

THE HON SIR GERARD BRENNAN*

This evening we are gathered in celebration of years of scholarly endeavour, undertaken in one of our finest law schools. Shortly Professor Bryan Horrigan will present the works which have been published during the last triennium and which testify to the vigour of the Monash research tradition. But first I must pay my respects and record my debt to the Law School of Monash University and to several of its graduates who, as my Associates, shepherded me through my judicial years. It was Louis Waller who, identifying students of ability and industry, recommended recent graduates for appointment. All of them proved to be not only brilliant and enthusiastic lawyers but men and women who became continuing friends and whose friendship grew out of lively discussion following long hours of research. As a consumer emeritus of the scholarly work of others, I have been given this opportunity to say something about the nature and purpose of legal research — research which finds a natural home in the Law Schools of our Universities although its benefits are not confined to the halls of Academe.

Research in any discipline is an antidote to atrophy. And so it is with law. Law is a living collocation of concepts that together provide the rule of law in a changing world. And, as Chief Justice French pointed out, '[l]ike most infrastructure projects the Rule of Law requires continual maintenance, upkeep and renovation'.[1] A continuing curiosity about the law and its operation is needed to maintain the skills and utility of a lawyer, whether judge or practitioner, academic or corporate executive, government adviser or social scientist. But legal research is different from research in the physical sciences. Research in the physical sciences is directed at the discovery or verification of new truths about phenomena, ascertained by the classical scientific method of observation, hypothesis formulation, experimentation and verification or falsification. The processes of phenomenological research are observable and the outcomes are often quantifiable. Legal research is of a different kind and we need a distinct taxonomy of legal research to describe its purpose, methodology and outcomes. This difference often works to the disadvantage of legal research and, indeed, of research in the social sciences generally, perhaps because legal research does not exhibit quantifiable criteria.[2]

† This is the text of an address delivered on the occasion of the Monash University Law Faculty 'In Review' Celebration of Scholarship event in Melbourne on 17 October 2011.

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1 Chief Justice Robert French, 'Swapping Ideas: The Academy, the Judiciary and the Profession' (Speech delivered at the Australian Academy of Law 2008 Symposium Series, Melbourne, 1 December 2008) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj1Dec08.pdf>.

2 See the discussion about funding models by Jenny M Lewis and Sandy Ross, 'What Counts and What Is Valued? Research Policy across Disciplines and Countries' (Paper presented at the Australasian Political Studies Association Conference, Macquarie University, Sydney, 28–30 September 2009).

The sources of the common law, from which the contemporary law flows, owes little or nothing to statistical analysis (I use the term 'common law' as a shorthand for judge-made law so, if I may be pardoned by the Chancery lawyers, I should like to use it to include equity and, as well, judicial interpretation of statutes). History, philosophy, religion, culture, economic conditions and human experience have informed the concepts which are expressed in legal principles and rules. Phenomena belong to a different order. Normative concepts are not the stuff of databases. They belong to the realm of ideas that are not susceptible of sensory perception. Empirical research has a role to play in legal research but that role is limited.[3]

Nevertheless, legal research always has the purpose of finding some new idea or some new way of expressing or presenting a legal concept. It may be a new refinement of expression, or a new account of the origin or development of a legal concept, or a new insight into its legal or social significance. A mere restatement in familiar terms of the existing law is not legal research. That is not to deny the utility of students' texts which state existing legal rules in bald terms that equip the student with a basic understanding of current legal concepts — the concepts with which the graduate will work in the quotidian tasks of the practising lawyer. A pedagogical skill is required to compile and present current legal concepts in a way that brings understanding to the minds of fledgling lawyers and pedagogical skill assumes a sophisticated insight into the relevant subject matter. That insight can be acquired only by research, though the production of basic texts may not itself be an example of legal research. If undergraduate law courses consisted of no more than instruction in current legal concepts, there would be a strong case for remitting the teaching of law to the professional bodies which undertook the task in earlier days. But Universities have assumed the responsibility of legal education, which extends to legal and historical research, legal analysis and reasoning, legal theory and the influence of law on culture and social institutions. This wider ambit of undergraduate education is welcomed by the courts and the profession, for it provides a more profound understanding of the meaning and scope of current legal concepts than the meaning and scope to be derived merely from a bare contemporary text. Legal research is essential to the intellectual strength of a law school for a number of reasons, and the enhancing of teaching and learning is one of them.

Law consists of concepts — not phenomena — and these concepts have a history, they emerge from a culture, they are the product of human experience and wisdom which has organised them according to a broad logic, they are interrelated, they have been developed to regulate particular fields of human activity, they are both normative and adaptable, they reflect the society they serve and they are amenable to change as the society changes. The law is a complex, living body of concepts which define government and its functions and the relationships, the rights and the duties of corporations, entities and people in a living society. Research into this body of concepts is needed not only to obtain an accurate understanding

3 See the insightful comments of Goldsworthy, 'Research Grant Mania' (2008) 50 *Australian Universities Review* 17.

of the law's provisions but also to assess the function of law in society. Many a lawyer has become enchanted by the sheer intellectual adventure of research.

Legal research is of different kinds. One important category has been called 'doctrinal research' — research that analyses existing legal rules and, by reference to factors other than their current expression, clarifies, expounds or criticises their content and operation. This kind of research illuminates the meaning of legal rules by a variety of approaches, sometimes finding the origin and tracing the development of a legal rule, sometimes identifying the influences which have shaped it, sometimes noting the terms in which it has been expressed at different times and in different circumstances, sometimes reconciling it with other legal concepts. An example of this category of research appears, at the time of writing, in an article by Chief Justice Spigelman (as he then was), in the July 2011 issue of the *Australian Law Journal*, on the extrinsic evidence rule in the interpretation of contracts.[4] Not all doctrinal research is directed to the common law. In an age when statute governs ever widening fields of activity, the meaning and operation of statute law constitute an important category of doctrinal research.

Doctrinal research is much appreciated by judges and the practising profession; it reveals the true meaning of the legal rule which is to be applied as the major premiss in the judicial syllogism — that is, the syllogism in which the minor premiss is the facts of the instant case and which yields the legal consequence of those facts as the conclusion. If a rule, thus illuminated, applies precisely to the facts, there is no occasion to consider a modification (much less a rejection) of the rule, unless the consequence is demonstrably unjust or inefficient and, even then, only if it is a common law rule and the court's position in the hierarchy[5] and the doctrine of *stare decisis*[6] allow it to modify or reject the rule.

Doctrinal research and judicial decisions have a symbiotic relationship. Doctrinal research into any legal proposition must take account of the judicial decisions relevant to that proposition, for the common law grows out of judicial decisions and any proposal to modify the common law requires judicial approval. Whether research is directed at the past history of a proposition or its current content, judicial decisions are fundamental to the research. Conversely, the formation of a judgment proceeds from an accurate appreciation of the current state of the law, even where a judge proposes to reject a current rule or to apply a modified rule to the facts in the instant case. So the judge draws on doctrinal research which shows the meaning and operation of the common law in its current state and the serviceability of that law for the regulation of contemporary society. In turn, that judgment is subject to critical analysis by those engaged in doctrinal research,[7] though adverse criticism must relate not to the result of the judgment but to the process by which that result was reached. Doctrinal research comprehends all the factors that may affect the formation of a judgment. They are the factors by which

4 J J Spigelman, 'Contractual Interpretation: A Comparative Perspective' (2011) 85 *Australian Law Journal* 412.

5 See the much discussed case of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

6 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417.

7 Mark Tushnet, 'Academics as Law Makers' (2010) 1 *University of Queensland Law Journal* 19, 22.

the validity or orthodoxy of a judgment may be assessed, or by which the future path of legal development may be charted. Those factors cannot be exhaustively defined, as Cardozo's well-known analysis of the judicial process shows:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent.

Some of the factors which contribute to an accurate and complete understanding of a legal concept are familiar, others are encountered less frequently. The history of a legal rule is often critical to an appreciation of its contemporary meaning, as Holdsworth's classic *History of English Law* continually reveals to the student. Oliver Wendell Holmes observed that:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation.[8]

Philosophy and jurisprudence have played a vital, if often unacknowledged role, in legal development: witness Julius Stone's *Province and Function of Law.* Similarly, scholarly legal texts such as Fleming's *Torts* and Law Journals such as the *Monash University Law Review* have been considerable influences on legal developments.

The scholarly and sensitive legal researcher is interested not only in the scope and current operation of the law but also in the direction of its development. As a collection of norms affecting a changing society, the law itself must change to remain serviceable. In 1995 Sir Anthony Mason referred to his earlier criticism of some academic legal commentary. He said:

> Some 15 or more years ago I was critical of the quality of much academic legal commentary. It was, in my view, deficient both in analysis and in constructing a way forward. Too much of it was simply descriptive of what had been said and decided in particular cases. At the time I thought that academic lawyers, as well as professional lawyers, left the development of legal principle to the High Court, unlike United States academics who blazed a trail ahead of court decisions.[9]

8 Oliver Wendell Holmes, *The Common Law* (Little Brown, 1949) 1.

9 Geoffrey Lindell (ed), *Sir Anthony Mason — The Mason Papers* (Federation Press, 2007) 345, 350–1 ('*The Mason Papers*').

Acknowledging some improvement, he nevertheless regretted that:

> The number of articles which have the potential to influence judicial legal thinking in a significant way is relatively few. In general, articles are not written with that end in view. Their purpose is limited to providing a summary of how the law stands in Australia, by reference to Australian, New Zealand and United Kingdom decisions.

He observed that '[d]octrinal research is of greater utility to judges, practitioners and law reform agencies when it is accompanied by identification and examination of relevant policy factors'.

To chart the way in which a legal proposition will, or should, move forward, it is necessary to bear in mind the restrictions of precedent and *stare decisis*. Those restrictions give judge-made law uniformity, consistency, certainty and continuity. These are qualities which contribute to public confidence in the curial process — an essential precondition to a society under the rule of law — but rigidity must yield to the necessity of keeping the common law in a serviceable condition.

The doctrine of precedent has sometimes been misunderstood, chiefly by those who proclaim themselves to be adherents to 'strict and complete legalism' — the judicial method of which Sir Owen Dixon spoke when he was sworn in as Chief Justice in 1952.[10] Some devotees are suspicious of judicial innovation, believing that the judicial function is limited to the application of the existing law and does not extend to the development of new law. Research would be correspondingly confined.

In truth, Sir Owen Dixon accepted the judicial obligation to develop the law but the methodology on which he insisted limited the extent to which the law might respond to changed social conditions. Three years after he became Chief Justice, he observed in his celebrated paper *Concerning Judicial Method* that courts:

> proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision … conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves.[11]

Doctrinal researchers and the judiciary all aspire to identify and articulate the 'body of doctrine' available for application in the present day, yet sometimes that body of doctrine does not reveal a principle applicable to the facts of a given case. Sir Owen thought the courts might legitimately develop the law beyond its current content provided the development remained rooted in the existing body of doctrine. The courts would be acting within legitimate limits if they were:

> to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions

10 Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (Law Book, 1965) 245, 247.

11 Ibid 152, 155.

> or to decide that a category is not closed against unforseen instances which in reason might be subsumed thereunder. [12]

Perhaps Sir Owen gave a very generous interpretation to these techniques, illustrated by his paper's discussion of the development of estoppel. Nevertheless, by requiring the development to be rooted in the existing body of doctrine, Sir Owen imposed a restriction which could be accepted only in an age when social conditions and ways of thought were comparatively stable. In the modern age, new technology and radical changes in societal values have demanded development of principles and rules where there is no precedential body of doctrine or where the existing body of doctrine is based on values which have permanently changed. There were no ascertained legal principles available for application in cases regarding sterilisation of the mentally retarded,[13] or the withdrawal of life support from the brain damaged victim,[14] or pecuniary liability for the birth of a child following negligent medical treatment,[15] but the jurisdiction of the courts was invoked and decisions had to be given. Proposals to develop the common law have been advanced to deal with cases arising from *in vitro* fertilisation,[16] internet 'piggybacking'[17] and phone hacking.[18] Changes in public morality may demand changes in common law rules based on the moral standards of an earlier time, for example, the equitable rights to property of same sex couples.[19] And the common law which reflected the strict sexual *mores* of an earlier age[20] is no longer applied.[21]

Nevertheless, familiarity with the principles of the common law allows the researcher and the judge to extend 'the application of accepted principles to new cases'. Take, for example, the High Court's decision that the *locus* of the tort

12 Ibid 152, 158.

13 *Secretary of the Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's Case*').

14 *Airedale NHS Trust v Bland* [1993] AC 789.

15 *Cattanach v Melchior* (2003) 215 CLR 1.

16 See New South Wales Law Reform Commission, *Artificial Conception: In Vitro Fertilization*, Report No 58 (1998) [2.1]:

> The application of traditional legal principles to [IVF] was likely to produce results that were unexpected and often unwanted. For example, common law principles for determining paternity, maternity and legal personality were formulated long before IVF technology was developed and based on assumptions about conception and parenting which are no longer valid.

17 Rachel Anne Carter and David Makin have pleaded for an extension of the tort of conversion in order to 'recognise the importance of the Internet in modern society and the need to alter our existing legal system so that it acknowledges that technological advances are essential to the functionality of a modern world': Rachel Anne Carter and David Makin, 'Piggyback Hunting — Browsing the Internet in Australia via Unsecured Wireless Networks: Virtual Theft or Acceptable Behaviour in an Online World?' (2009) 16 *James Cook University Law Review* 20, 39–40.

18 But in *Wainwright v The Home Office* [2004] 2 AC 206, Lord Hoffman noted that 'an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian v Bush* [1993] QB 727 was held by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act'.

19 David Malcolm, 'Same Sex Couples: Equity's Response' [1996] 3(3) *Murdoch University Electronic Journal of Law*, [25] <http://www.austlii.edu.au/au/journals/MurUEJL/1996/25.html>.

20 *Pearce v Brooks* (1873) LR 1 Exch 213; *Upfill v Wright* [1911] 1 KB 506.

21 *Magill v Magill* (2006) 226 CLR 551.

of defamation for material disseminated on the internet is where the material is downloaded.[22] And note the assertion by English courts in the *Datafin* case[23] of a jurisdiction to judicially review some decisions of a non-statutory body. This was a new departure, but judicial familiarity with judicial review of the exercise of powers of a public nature led to the assertion of the new jurisdiction.[24] So far as I know the High Court has not ruled on the applicability of the *Datafin* principle to Australia,[25] but it has been applied by other courts in the Australian hierarchy.[26]

Research can suggest when the time has come for generally accepted legal rules to be discarded or varied — namely, when they appear to be incompatible with contemporary standards or the efficient operation of the legal system. Precedent has not inhibited a reformulation of the law relating to the duty of care to trespassers,[27] or the rights of a defaulting purchaser under an instalment contract,[28] or the land rights of Aborigines and Torres Strait Islanders,[29] or liability for the escape of fire,[30] or liability for rape in marriage.[31] In recent times judges have been more open about the judicial technique employed in keeping the law in a serviceable condition.[32] Some years ago, at an Annual Dinner of the *Monash University Law Review*, I spoke about the technique which is employed by the higher appellate courts in a time of rapid social change.[33] I venture to repeat what I then said:

> The reasons for judgment in the higher appellate courts increasingly look behind the legal rule to discover the informing legal principle and behind the informing legal principle to discover the basic value. Legal development then proceeds in the reverse order: provided the basic value is consistent with the enduring values of the contemporary community,

22 In *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 607, Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

23 *R v Panel of Take-overs and Mergers; Ex parte Datafin plc (Norton Opax plc intervening)* [1987] QB 815 ('*Datafin*').

24 In *R v Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853, 864, Bingham MR commented that the effect of the decision in *Datafin* was 'to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers'. Mann LJ held in *R v Lautro; Ex parte Ross* [1992] 1 All ER 422, 431–2, that where a non-statutory power may be exercised to affect the interests of a third party, an obligation to afford natural justice to the third party is a condition on a valid exercise of the power.

25 See *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

26 See the review by Kyrou J in *Ceca Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552.

27 *Hackshaw v Shaw* (1984) 155 CLR 614.

28 *Legione v Hateley* (1983) 152 CLR 406.

29 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

30 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

31 *R v L* (1991) 174 CLR 379.

32 See, eg, Sir Anthony Mason, 'Rights, Values and Legal Institutions' in *The Mason Papers*, above n 9, 80.

33 Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19(2) *Monash University Law Review* 213.

> the informing legal principle is stated in terms which are consistent with other legal principles and the legal rule is stated in terms interlocking with related legal rules. If you ask, from what does a judge discover the enduring values of the contemporary community, the answer, given by Justice Cardozo, is 'from experience and study and reflection; in brief, from life itself'. But the judge's legislative power is hedged about with restrictions. In modifying a rule or declaring a new rule, the judge is not free to innovate at pleasure. Cardozo said, in a well-known description of the judicial method, that the judge is 'to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains'.[34]

Two issues determine whether this methodology may authorise changes in the law that go beyond the Dixonian 'reason[ing] from the more fundamental of settled legal principles to new conclusions': efficiency of operation and changes in the enduring values of the community.

Sixty years ago, Lord Denning recalled instances where that had happened.[35] He referred first to the doctrine of common employment which had originated in 1843 in the age of laissez faire but which was emptied of its content by a series of judicial decisions in the following century; then, he pointed out that a third party beneficiary of a contractual promise, who had been entitled to enforce the promise in an age when 'the Canon Law and the Christian ethic' bound a promisor to keep his promise, had lost that right when the notion of individual freedom was thought to restrict the liability of a promisor to the party with whom he had contracted. Modern examples of departure from settled legal principles can be found in the abandoning of the complex law of occupiers' liability,[36] the abolition of the rule in *Rylands v Fletcher*[37] and acceptance of rape in marriage.[38]

Such changes are rare but the law must change if it is to avoid injustice. That is why doctrinal research is so critical in a time of rapid social change. Research is needed to show what is the core of a legal principle, what are the values which underpinned its development and how it operates. Doctrinal research, ranging more widely than the mere text of an earlier judgment, is needed to ensure that the law is kept in a serviceable condition for the contemporary community.

The press of litigation and the tyranny of judgment writing are not conducive to reflective doctrinal research. Such research is the Academy's invaluable contribution to the judicial process. It is for that reason that it is sometimes said that the Academy should be the ultimate court of appeal in difficult areas of the

34 Sir Gerard Brennan (Speech delivered at the Monash University Law Review Annual Dinner, Melbourne, 30 August 1992), citing Benajmin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 113–14, 141 (citations omitted).

35 Lord Alfred Denning, 'The Universities and Law Reform' (1949) 1(4) *Journal of the Society of Public Teachers of Law* 258.

36 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

37 (1968) LR 3 HL 330, abolished by *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

38 *R v L* (1991) 174 CLR 379.

law. The Academy's aspiration to acquire and expound knowledge for its own sake gives an assurance that the treatment of a legal concept will take account of the various influences that have contributed to the concept's development, its operation as an integer in the complex of related rules and its compatibility with the enduring values of the community. The research may point to the desirability of a modification of judge-made law or the need for statutory intervention.[39]

Apart from doctrinal research, which is focused on the elucidation of legal concepts, the Academy has another vital role in legal research. It must deal with the law as one of the chief normative influences on society and a reflection of societal values. There are no limits to the areas of social activity that can potentially be affected by law. Research is needed both to identify the role which the law plays in affecting social institutions, social customs, cultural values and relationships and to examine areas that may benefit by the introduction of governing law. As an example, the Australian Law Reform Commission's ('ALRC') Report *Multiculturalism and the Law* observed:

> Multiculturalism as a social policy requires a systematic examination of Australian law to consider first, whether it creates barriers to the expression of cultural identity and secondly, whether it could play a more positive role in achieving the goals of multiculturalism by promoting effective equality before the law … A further question is whether the law could be administered so that it does not have an unintended, discriminatory impact on the members of particular ethnic minority groups.[40]

Social research must embrace at least the other social sciences that affect the quality of social life. It is multi-disciplinary research, especially when law is proposed to regulate fields of technology. Thus the National Health and Medical Research Council's *Report of the Ad Hoc Committee on Rationalisation of Facilities for Organ Transplantation and Renal Dialysis* influenced the legal acceptance of death by cessation of brain function.[41] Modern technology has created new problems requiring consideration of legal regulation, for example, the patentability of genes.[42] As an example of significant multi-disciplinary research which drew on a number of allied disciplines, Justice Margaret Stone mentioned[43] Professor John Braithwaite's theory of 're-integrative shaming' which does not stigmatise an offender and disintegrate the moral bonds between the offender and the community but rather strengthens those bonds and allows the offender to be re-integrated in the community. Or, there may be a need for a modification of

39 See Sir Anthony Mason, 'Legislative and Judicial Law Making: Can We Locate an Identifiable Boundary?' in *The Mason Papers*, above n 9, 59.

40 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) [1.17].

41 See Australian Law Reform Commission, *Human Tissue Transplants*, Report No 7 (1977) 54 [120]. Similarly, the ALRC cited many learned scientific papers in Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, Report No 99 (2004).

42 Australian Law Reform Commission, *Genes and Ingenuity*, above n 41; Diane Nicol, 'On the Legality of Gene Patents' (2005) 29(3) *Melbourne University Law Review* 809.

43 Margaret Stone, 'The Academy's Contribution to the Development of Law' (2002) 25(3) *University of New South Wales Law Journal* 798.

existing legal principle to respond to the practicalities of modern life, such as the imposition of a limit on an occupant's right to airspace above his land.[44]

In an interesting paper on *The Taxonomy of Interdisciplinary Legal Research*,[45] Professor Siems instanced a number of subjects which he assigned to interdisciplinary research, including the economics of contractual remedies, the comparative effects of the common law and civil law systems on capitalism, the role and utility of legal regulation in climate change and the correlation (if any) between the death penalty and the crime rate. Of course, the practising lawyer and the sitting judge have to accept the practical results flowing from the operation of existing law. Their concern is the due application of the existing law to the case in hand, whatever the consequences may be. They may well need to consider the law as it was in order to properly define the law as it is, but they may not be equipped to determine what it ought to be nor may they be at liberty to introduce an ameliorating change to the existing law. But society is concerned with the law as it ought to be, and scholarly research is needed to identify the possible directions of development and their respective merits or otherwise. That research may well involve other disciplines and techniques such as empirical research which is not in the usual armoury of legal skills. Social research may focus on the law's impact on society, not on the validity or orthodoxy of the legal doctrines or rules which produce that impact.[46]

Legal expertise is essential to the work of an interdisciplinary research team but so is the lawyer's ability and willingness to learn from colleagues in other disciplines and to acquire a sufficient understanding of other relevant disciplines. The purpose of social research is not the same as the purpose of doctrinal research, but there may be common fields of enquiry. Thus both the doctrinal and the social researcher may need to consider the relationship between factors which have contributed to the development of the existing law in order to explain the origin and meaning of a legal rule (the objective of the doctrinal researcher) and the way in which a legal rule in turn affects or will affect corresponding factors in the contemporary milieu (an objective of the social researcher). Practising lawyers and sitting judges can participate in doctrinal research, but Law Reform Commissions and Universities are the institutions to which we must look to find assessments of the law in the social context and proposals for enhancing law's social utility.

When Professor Horrigan was considering the Academy's relationship to law reform, he proposed that:

> both … teaching and … research must be informed by a seven-pronged framework of levels of analysis that embraces the socio-ethical,

44 *Bernstein v Skyviews and General Ltd* [1978] QB 479; *Star Energy Weald Basin Ltd v Bocardo SA* [2011] 1 AC 380.

45 Mathias M Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 5.

46 See Jeremy Webber, 'Legal Research, the Law Schools and the Profession' (2004) 26 *Sydney Law Review* 565, 579.

> jurisprudential, international/comparative, regulatory, doctrinal, practical and cross-disciplinary dimensions of law.[47]

When that research is done and when the research points to a need for changes in the law, research must chart the pathway. And that presents a further challenge. Professor Horrigan asks

> whether it is possible for any lawyer or judge to have a view on what would be good or bad development in the law without an overarching, or at least working, theory of law and legal reasoning, directed towards the objectives of law reform and social justice in particular legal systems …

He cites Professor Duncan Ivison's caveat that '[b]y not talking about social justice, by failing to connect it to Australia's challenges, we are left with the idea that justice is simply a mirage — as Hayek thought — or is whatever outcomes the market generates'.[48]

Social justice is surely an objective of law which treats all persons equally. The evaluation of a legal concept according to its compatibility with social justice is a necessary aspect of social research. The Academy accepts the obligation of social research to discharge a public function, namely, to enhance the function of law as a normative influence on social life and conduct. It would frustrate the purpose of social research and invalidate the academic undertaking if the research did not evaluate the social justice of a proposed reform. Law is more than an intellectual construct; it embodies the history and the values of a people and is their staff of support as they march towards the unattainable end of perfect justice.

The research output of the Monash Law School is found in the books and papers that are celebrated this evening. They bear testimony to a culture of deep scholarship and a concern with human rights and social justice. Those have been attributes of the Law School since its foundation in 1964, characteristics of the distinguished academics who have built the School's reputation. They are attributes that create a spirit in a Law School and inject vitality into the work of both Faculty and students. Tonight's celebration is therefore a celebration of the spirit and vitality of the Monash Law School and a tribute to those who have made it so. Apart from the present members of the Faculty, that honour role includes David Derham, Bob Williams, Enid Campbell, Bob Baxt and Judge Christie Weeramantry, to name some but not all. Their stimulus to research has borne fruit, as we see this evening.

I offer my respectful congratulations to the authors and publishers of the books and papers we celebrate and my best wishes to the Law School as it enters the next period of research and the next generation of researchers.

47 Bryan Horrigan, 'Reforming Law Reform's Engagement with the Academic Arm of the Legal Profession' (2008) 3 *Australasian Law Teachers Association Law Research Series* <http://www.austlii.edu.au/au/journals/ALRS/2008/3.html>.

48 Ibid.