2021 ALAA Conference

Boldly Academic: Defining, Supporting and Celebrating Legal Scholarship

WHAT IS THE VALUE OF THE LEGAL ACADEMY AND TO WHOM?

THE UNIVERSITY OF SYDNEY AND UNIVERSITY OF TECHNOLOGY SYDNEY

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I. INTRODUCTION

1 In 2016, in response to the Australian Research Council's (ARC) *Engagement and Impact Assessment Consultation Paper*[2], the Council of Australian Law Deans (CALD) provided a brief overview of the nature of legal research in order to contextualise its response to the consultation paper. That overview stated:[3]

> Australian Law Schools support diversity in legal research, which encompasses diversity in methodology and aims, in sub-discipline, and in the intended audiences and potential impact of legal research. We recognise that some fields lend themselves more to *intellectual engagement and conversation with practitioners or policy-makers*, others to intellectual engagement and conversation with a national or international legal academic audience, others to intellectual engagement and conversation with a national or international interdisciplinary audience.

2 In responding to the questions relating to what definition of "engagement" and "impact" should be used for the purposes of assessment, CALD offered:[4]

> *Engagement* describes the interaction between researchers and research organisations and their large communities/industries/professions for the exchange of knowledge, understanding and resources for the development of the professional discipline.

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[2] Australian Government, "Engagement and Impact Assessment Consultation Paper" (Australian Research Council, Canberra, 2016).

[3] Council of Australian Law Deans, "CALD Response to the ARC's Engagement and Impact Assessment Consultation Paper" (23 June 2016). http://www.arc.gov.au/sites/default/files/filedepot/Public/ARC/consultation_papers/ARC_Engagement_and_Impact_Consultation_Paper.pdf

[4] Ibid

> *Impact* should be measured against the following definition:
>
> An effect on, change, benefit or influence within the following spheres:
>
> (1) Public discourse including in the context of policy development and law reform;
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> (2) The legal system including the executive, the legislature, the judiciary, the legal profession and legal education;
>
> (3) The political law making system; and
>
> (4) The economy, society, culture, public policy or services, health, the environment or quality of life.

3 Notably, CALD also observed that:[5]

> the ability to demonstrate a direct causal link between legal research and such changes will be difficult in many cases, hence the contribution of legal research and/or researchers to the debate or reasoning process leading to such developments should constitute impact.

4 In the *Engagement and Impact Assessment 2018-19 National Report*, the ARC defined the terms, unsurprisingly, in a more generic manner: [6]

> Research *engagement* is the interaction between researchers and research end-users outside of academia, for the mutually beneficial transfer of knowledge, technologies, methods or resources.
>
> Research *impact* is the contribution that research makes to the economy, society, environment or culture, beyond the contribution to academic research.

5 I will focus my remarks on the intellectual engagement and conversation between the legal academy and practitioners or policy-makers whereby the academy has, and seeks to have, an impact on public discourse. In particular, I will discuss the academy's influence on the legal system, including the legislature, the executive, the judiciary, the broader legal profession, and legal education. In this regard, I today focus on the specific type of scholarship where the academy's audience is not reflexive, but rather the agents of public policy.[7]

II. LEGAL RESEARCH WITHIN THE ACADEMY

6 Legal academic research today is very different from the type of academic research to which I, and I expect some of you, were exposed at law school and in the early stages of our careers. The

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[5] Ibid.

[6] Australian Government, *Engagement and Impact Assessment 2018-19 National Report* (Australian Research Council, Canberra, 2019).

[7] Stapleton, "Taking the Judges Seriously" (Clarendon Law Lectures, University of Oxford, May 2018) at 3:55-4:11 accessed at <https://ox.cloud.panopto.eu/Panopto/Pages/Viewer.aspx?id=c43ce0fc-7623-47ec-a1e8-a8cf0099a581>

Hon. Judge Richard A. Posner suggests that this is the result of the legal academy and the bench coming increasingly from different backgrounds.[8] Legal academics now have higher degrees by research, become academics at a younger age (often without time in practice), and increasingly come from other fields and therefore focus on specialised, interdisciplinary research.[9]

7 I do not disagree with Posner, but suggest that a further reason for the changes in the way legal academic research is conducted is the pressure for research funding. Our universities, together with those in the UK and Canada, are driven by the need to increase external funding as a measure to drive improvements in university rankings. This has led to much legal research becoming very much more socio-legal in focus; because one needs a study that requires funding in order to obtain funding and funding decisions are made by committees that overwhelmingly comprise researchers from other disciplines who are more accustomed to empirical research. By contrast, doctrinal black-letter legal research is usually done by solitary scholars who are paid an academic salary to research in any event and who do not need additional funding, or not much, in order to conduct quantitative or qualitative research. (I leave to one side the question of teaching buyouts which may be good for the individual researcher but less so for students who rightly expect to be taught by the leading academics within their Law Schools).

8 As academic promotion and university rankings are increasingly judged, at least in part, by the quantity of external funding an individual researcher or research cluster is able to access, doctrinal research, of the type that results in the leading legal texts on topics of black-letter law, is no longer fashionable. Legal academics are no longer rewarded or recognised for producing learned textbooks that might be useful for practitioners. The texts that are published in relative significant numbers are often those directed at undergraduates. Such books are of course a very important tool for the teaching of undergraduates, but they are not usually of much assistance to the legal profession. The funding pressures on the academy may have the effect of limiting the kind of research and writing which is useful to judges and professional lawyers, diverting academic resources away from doctrinal law. That may or may not be a matter of concern to the Academy. I suggest that is of concern to the broader legal profession.

9 I also do not suggest that there is not significant value in the legal monographs published by members of the legal academy. Their value to broad public discourse across civil society, and particularly to informing those tasked with policy reform should not be understated. Indeed,

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[8] Richard A Posner, 'The Judiciary and the Academy: A Fraught Relationship' (2010) 29(1) *University of Queensland Law Journal* 13, 15.
[9] Ibid.

the book to be launched at the next session, Andrew Lynch and Gabrielle Appleby's work *The Judge, the Judiciary and the Court*, is an invaluable resource for the Australian Law Reform Commission (ALRC) in its current inquiry into judicial impartiality.

10 It is however worth considering more closely *how* legal scholarship is valued, within the broader academy. The last round of the ERA for Australian funding is telling. An analysis of research outputs as a whole (506,000) reveals that books account for 1% of outputs, book chapters 10%, journal articles 74%, conference papers 13%, and non-traditional research outputs 2%.[10]

11 For the 2 digit FOR-code for Law and Legal Studies in 2018-2019, the outputs totalled 11460. That represents approximately 2% of the academy's total outputs. The outputs followed the same general pattern of outputs as a whole but were more heavily weighted in favour of books (469 – being 4% of the FOR-code total), and book chapters (3584 – 31%), with a smaller percentage of journal articles (7400 – 65%). There were 7 non-traditional research outputs recorded.[11]

12 The data tells us, perhaps, a piece of the story. Legal academics, together with their colleagues in other humanities disciplines, are continuing to write books. No books were recorded by any of the science disciplines, nor the economics discipline, nor those of commerce, management and tourism. I surmise that the majority of the books submitted by law schools for the ERA were monographs and first editions of doctrinal texts. Those legal academics who persisted with publishing subsequent editions of their doctrinal texts are unlikely to have had their work submitted for the ERA and so will have continued to publish primarily from the altruistic perspective of professional service.

III. THE ACADEMIC – JUDICIAL DIALOGUE

13 In her Patron's Address to the Academy of Law in 2019, Chief Justice Kiefel spoke of the particular dialogue between academic writing, directed to judges, the profession and on occasion to the public, and contrasted it with academic writing that is directed to other academics. She notes that "materials of the former kind are a valuable resource for judges. Their use confirms our shared concern with the correct and coherent development of the law."[12]

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[10] Australian Research Council, *State of Australian University Research* (ERA National Report, 2018) Section 2: Research Outputs <https://dataportal.arc.gov.au/ERA/NationalReport/2018/pages/section2/research-outputs/>.

[11] Ibid.

[12] The Hon Susan Kiefel AC, Chief Justice of Australia "The Academy and the courts; what do they mean to each other today?" (Australian Academy of Law Patron's Address, Brisbane, 31 October 2019) 1, 8.

The Chief Justice observed that "Academic lawyers are well placed to provide commentary both in terms of their focus on particular topics and the time available to them. Judges are under special constraints and therefore appreciate academic literature which is on point and useful".[13]

14 The dialogue between the legal academy and judges described by the Chief Justice has had an interesting evolution in common law courts. For some time, English and Australian courts were subject to a self-imposed restraint concerning the use of academic writings. Even as late as the 1980s, it was not uncommon for some judges to insist on the "living author" rule to. This convention prevented counsel or judges citing living authors as authoritative, preferring "work to be hallowed by Time's patina of authority".[14] This was also known as the "better read when dead" approach.[15]

15 As Posner shows in a short comparative analysis, a quite different approach is taken in some civil law systems. In Germany, some judgments have been criticised for an overreliance on academic quotation which clouds "a clear and authoritative statement of the court's own view of the law.[16] In contrast, other civil law countries like Italy bar the citation of academics in judgments.[17]

16 In Australia (and the United Kingdom), a different course is taken: judges can have recourse to academic commentary to find a theoretical basis to resolve a dispute, or even to distil the development of a point of law to the point where it can be applied to the facts at issue. A former Judge of the High Court of Australia, Sir Frank Kitto, suggested in 1992 that judges in Australia have a duty to look for scholarship in resolving matters.[18] Sir Frank's remarks seem to reflect what had been an increasing tendency of judges in the late twentieth century to look to scholarship to resolve matters. The Chief Justice referred to a study conducted in Australia in 1999 which found that there was a sharp "rise in the [High] Court's use of secondary authority between 1960 and 1990, and then a significant increase between 1990 and 1996".[19] Her Honour also drew attention to a study conducted by the High Court's library,

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[13] Ibid 2.
[14] *Lord Neuberger of Abbotsbury, Master of the Rolls,* 'Judges and Professors – Ships Passing in the Night?'(Max Planck Institute, Hamburg, 9 July 2012) 8.
[15] Ibid 4.
[16] Richard A Posner, 'Judges and Academics in the United Kingdom' (2010) 29(1) *University of Queensland Law Journal* 29, 32.
[17] Ibid.
[18] F Kitto, *Why Write Judgments?* (1992) 66 Australian Law Journal 787, 793.
[19] Russell Smyth, "Other than 'Accepted Sources of Law? A Quantitative Study of Secondary Source Citations in the High Court" (1999) 22 *University of New South Wales Law Journal* 19, 29; cited in The Hon Susan Kiefel AC, Chief Justice of Australia "The Academy and the courts; what do they mean to each other today?" (Australian Academy of Law Patron's Address, Brisbane, 31 October 2019) 5

limited to books and articles, by comparing three years' of High Court decisions – 1963, 2016 and 2018. That study found an increase in citations, in a comparable number of annual judgments, from 88 in 1963, to 399 in 2018.[20] A subsequent review of the 48 cases decided in 2020 found 448 citations of secondary materials comprised of books and articles.

17 The Chief Justice notes, however, that whether such writings are useful depends largely upon the understanding of an academic author of the role of a judge and how judge-made law is developed. She observed that "such an understanding is often missing, particularly as an increasing number of legal academics have no practical legal experience. Such was not always the case".[21]

18 In my view, the notion that legal academic writing sees judges and academics in a kind of "constructive partnership" is overstated.[22] The roles of a judge and an academic are intended to be discrete. However, as put by Lord Neuberger: "judge and academic inhabit… the same world and influenc[e] each other more openly and honestly than in the past".[23] Scholarship that is conscious of the role of judges can provide useful context for the specific task of dispute resolution undertaken in courts. The academy can provide an underpinning for a judgment, but perhaps most importantly at least from my current perspective, simplify the work of judges, and the practitioners before them, in accessing the common law.

19 At a CALD workshop on research engagement and impact held at the University of Melbourne in 2016, which I attended, two senior judges and a senior silk were invited to provide their views on the value of the work produced by the legal academy. Both judges were adamant that it was important to measure the impact of academic writing on judicial decision making. One of the judges expressed the view that judges are more likely to refer to books which canvass a particular topic in a holistic manner. He said he found many articles "deeply unhelpful" and attributed their proliferation to a "publish or perish mentality". A similar view was expressed by the leading silk – who I note has recently been appointed to a superior court.

20 The reason they are unhelpful is because judges decide cases. They resolve controversies. True it is that they also develop the law, but they do so in a way which is clear and certain,

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[20] The Hon Susan Kiefel AC, Chief Justice of Australia "The Academy and the courts; what do they mean to each other today?" (Australian Academy of Law Patron's Address, Brisbane, 31 October 2019) 5.
[21] Ibid.
[22] Braun, *Judges and Academics* (2010) cited in *Lord Neuberger of Abbotsbury, Master of the Rolls,* 'Judges and Professors – Ships Passing in the Night?'(Max Planck Institute, Hamburg, 9 July 2012) 21.
[23] *Lord Neuberger of Abbotsbury, Master of the Rolls,* 'Judges and Professors – Ships Passing in the Night?'(Max Planck Institute, Hamburg, 9 July 2012) 21.

especially where guidance is necessary to lower courts. Again, if I may quote the Chief Justice, it is "no part of their role to create ambiguity by identifying especially fine distinctions or points of difference, let alone attempting new classifications. This kind of thinking may properly be deployed by academics in critical analysis, but rarely is it of real assistance to the resolution of a case".[24] Judges are necessarily cautious; independence and impartiality require it. As put by Lord Rodger of Earlsferry, a former Justice of the Supreme Court of the United Kingdom: "Making huge statements of principle in advance of the development of case law is neither wise nor useful".[25] Academics in articles and scholarship can be in the process of "working out" a theory and to adopt it prematurely does little to assist the parties or the law.[26]

21 For many judges and practitioners, academic literature which is useful and on point is more readily found in doctrinal textbooks. Perhaps that explains the increase in the number of doctrinal texts written in more recent times by judges (both sitting and retired – Edelman J *McGregor on Damages*;[27] Heydon's *Heydon on Contract*,[28] and *Cross on Evidence*;[29] Derrington J (a different one) *The Law of Liability Insurance*;[30] Griffiths J *Current Issues in Australian Constitutional Law*;[31] Black J *Securities and Financial Services Law*;[32] Thomas J, *Judicial Ethics*;[33] Leeming JA, Gummow & Lehane's *Equity: Doctrines & Remedies*[34] and the *Statutory Foundations of Equity*;[35]and Bell P and Brereton J, *Nygh's Conflict of Laws in Australia.*[36]

22 CALD's response to the ARC's Consultation Paper is instructive as it sets out the "work arounds" that it was compelled to come up with to include in any assessment of those outputs and measurements that are of most value to the profession, communities, and industries with

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[24] The Hon Susan Kiefel AC, Chief Justice of Australia "The Academy and the courts; what do they mean to each other today?" (Australian Academy of Law Patron's Address, Brisbane, 31 October 2019) 1, 9.
[25] Richard A Posner, 'Judges and Academics in the United Kingdom' (2010) 29(1) *University of Queensland Law Journal* 29, 32.
[26] Richard A Posner, 'Judges and Academics in the United Kingdom' (2010) 29(1) *University of Queensland Law Journal* 29, 32.
[27] James Edelman, Simon Colton, and Jason Varhuas (eds) *McGregor on Damages* (Sweet & Maxwell Ltd, 21st ed, 2020).
[28] J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019)
[29] J D Heydon, *Cross on Evidence* (LexisNexis, 12th ed, 2019).
[30] Desmond Derrington and Ronald Shaw Ashton, *The Law of Liability Insurance* (LexisNexis, 3rd ed, 2013).
[31] John Griffiths and James Stellios (eds) *Current Issues in Australian Constitutional Law* (Federation Press, 2020).
[32] Ashley Back and Pamela Hanrahan. *Securities and Financial Services Law* (LexisNexis, 10th ed, 2021).
[33] Thomas, *Judicial Ethics in Australia* (LexisNexis, 3rd ed, 2009).
[34] JD Heydon, M J Leeming, and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2014).
[35] Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).
[36] M Davies, AS Bell, PLG Brereton, M Douglas, *Nygh's Conflict of Laws in Australia* (10th ed, Butterworths, 2019).

whom the legal academy engages in dialogue. It was CALD's view that "Citations of legal scholarship in judgments, law reform commission reports and consultation papers, Hansard, government papers, judicial and political speeches, media whether local, national or international" should be included as an indicator of engagement, as should "Legal writings not considered research for ERA or non-traditional outputs which are nonetheless influential within the profession eg: subsequent editions of research books, loose-leaf monographs, professional texts, articles published in practitioner journals, research reports for an external body, academic submissions to Parliamentary enquiries or commissions".[37]

23 It is, in my view, time for subsequent editions of research books, loose-leaf monographs, and professional texts to be included, and valued, in the ERA given their significance to the legal profession and the influence they have on the legal system as a whole, particularly the judiciary and legal education. This accords with the view expressed at the CALD workshop that it is important for law as a discipline to articulate how its research should be compared amongst the legal academy and not be subjected to the proxies developed for any other discipline.

24 Good legal scholarship is also essential to the particular type of legal research conducted by practitioners that is necessary in the day-to-day practice of the law before the courts. One of the blessings of modern legal practice is also one of its curses; that is the ready access to online legal materials, including every decision of nearly every court through open-source platforms such as those provided by *Austlii* (a service that, incidentally, was highlighted as part of UNSW's Engagement Narrative[38]). It is a blessing because the principle of open justice is an important safeguard of a legal system subject to the rule of law. It requires courts to operate transparently in public. Access to the judgments that result from the conduct of proceedings in court is an essential feature of the principle. It is also a curse because the vast majority of judicial reasons for decisions are unremarkable. They settle a particular controversy between particular parties but otherwise do not advance the development of the law by the creation or extension of a principle and so have no unique precedential value.

25 The sheer volume of open-source material makes it impossible for busy practitioners to distil the authoritative principles, and that is when they must, or at least should, rely on thorough

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[37] Council of Australian Law Deans, "CALD Response to the ARC's Engagement and Impact Assessment Consultation Paper" (23 June 2016). http://www.arc.gov.au/sites/default/files/filedepot/Public/ARC/consultation_papers/ARC_Engagement_and_Impact_Consultation_Paper.pdf

[38] Australian Research Council, *Engagement Narrative – The University of New South Wales* (Engagement Narrative, 2018) https://dataportal.arc.gov.au/EI/Web/Engagement/EngagementNarrative/252.

legal scholarship to assist with the distillation of the principles. This is particularly important in a jurisdiction like ours where the doctrine of *stare decisis* inures.

IV. ACADEMIC WRITING AND PUBLIC DISCOURSE

26 Let me turn now to the impact of legal academic writing on public discourse, particularly in the context of policy development and law reform.

27 I will begin with a brief introduction to the work of the ALRC. The ALRC sits within the Attorney-General's portfolio of agencies and currently operates under the *Australian Law Reform Commission Act 1996* (Cth). It was originally established in 1975 with then Justice Michael Kirby as its first chairman. The primary function of the ALRC, and indeed really its only function as prescribed by the Act, is to advise the Parliament and the Australian Government on the systematic development and reform of areas of the law referred to it by the Attorney-General. This is a significant, if little understood feature of the ALRC; namely, that we have no ability to "self-refer" or to develop a systematic programme of law reform on our own initiative. Rather, we are beholden to the political will of the day. Many agencies in other countries do have the power to self-refer matters and therefore to choose their own law reform projects.[39]

28 Once the ALRC receives a reference, which will also have prescribed the terms of reference, we embark on a process of framing the project, preparing a Consultation or Discussion paper, establishing appropriate advisory committees, consulting as widely as possible, receiving submissions and preparing a final report by the deadline set in the original terms of reference. Once the report is delivered to the Attorney-General, it must be tabled within 15 parliamentary sitting days, but there is of course no obligation on the Government to accept or enact any of the recommendations contained in the final report.

29 Currently, the ALRC has two active references: one into Federal judicial impartiality, and one into the legislative framework for corporations and financial services regulation. In the past two years, we have completed three other reports: one relating to class actions and litigation funding; one being a review of the family law system; and one into corporate criminal responsibility.

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[39] The Hon Justice S C Derrington, "Law Reform – Future Directions" (Paper, Supreme & Federal Courts Judges' Conference, Hobart, January 2019).

30 Let me return briefly to the inability of the ALRC to develop a systematic programme of law reform on our own initiative. By way of contrast, the UK's Law Commission has an express statutory duty to take and keep all the law under review with a view to its systematic development and reform.[40] It is required to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law with a view to reform. Before deciding what projects to take forward, the Law Commission takes views from judges, lawyers, government departments, the voluntary and business sectors and the general public. It considers reviewing an area of law against five criteria: *impact* – the extent to which law reform will impact on the lives of individuals, on business, on the third sector and on Government; *suitability* – whether the independent non-political Commission is the most suitable body to conduct the review; *opinion* – the extent to which proposed law reform is supported by Ministers/Whitehall, the public, key stakeholders, Parliament, the senior judiciary; *urgency* – whether there are pressing reasons why reform is required; and *balance* – the Commission seeks a portfolio of work which takes account of the statutory requirement to keep all areas of the law under review, the balance of work across Government departments and the balance of legal skills and expertise available to the Commission.[41]

31 Consequently, the work of the Law Commission of England and Wales, and that of the Scottish Law Commission, is shaped by a thoughtful and thorough examination of which aspects of the law are considered to be most in need of reform. The process is not entirely free from political input. In 2010, a Protocol was agreed between the Law Commission and the Lord Chancellor on behalf of the Government, pursuant to which, before approving the inclusion of a law reform project in a Law Commission Programme, the Lord Chancellor will expect the Minister with relevant policy responsibility to give an undertaking that there is "a serious intention to take forward law reform in this area".[42] Together, the governing legislation[43] and the Protocol have enabled the Law Commission to focus on projects with a real prospect of implementation. For example, a call for ideas for its 14th Programme of Law Reform was launched in March 2021

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[40] *Law Commissions Act 1965* (UK) s 3(1).
[41] 'Generating ideas for the Law Commission's 14th Programme of law reform', *Law Commission (UK)*(Web Page, March 2021) https://www.lawcom.gov.uk/14th-programme/.
[42] Law Commission (UK), *Protocol between the Lord Chancellor (On behalf of the Government) and the Law Commission* (Law Com No 321, March 2010).
[43] *Law Commission Act 2009* (UK) s 3B(1).

and identified the following themes that may be suitable for law reform: emerging technology; leaving the EU; the environment; legal resilience and simplification.[44]

32 Despite the different circumstances of the ALRC, it was decided in 2019 that the ALRC would embark on a "national conversation" to assist us with reviewing the current law with a view to making recommendations to government as to areas which might fruitfully be the subject of an ALRC inquiry. This resulted in the publication of *The Future of Law Reform: A Suggested Program of Work 2020-25* in December 2019.

33 Broadly, the methodology for holding the "national conversation" involved preliminary research of recent and publicly available suggestions for law reform in Australia, comments by courts, and common topics advanced for reform in other jurisdictions. Key to this process was a review of the extensive work undertaken by the academy. Selection criteria by which to assess appropriate topics were also developed and publicised. We then invited public submissions by way of an online survey, to which we received almost 400 responses, many from the academy, and consulted with state and territory law reform bodies about potential areas for cooperative reform projects.

34 The ALRC held public seminars on particular focus topics in conjunction with our academic partner organisations: in Sydney (with UNSW) on 'Public Law Reform'; in Canberra (with ANU) on 'Technology and the Law'; in Melbourne (with the University of Melbourne) on 'Constitutional and Immigration Issues'; and in Brisbane (with the Federal Court) on 'Energy, Resources, and Environmental Law'. The contribution of the legal academy to this project cannot be overstated. Academics (some 41) from numerous sub-disciplines participated in seminars and workshops, consultations or wrote submissions in relation to the five topics which were prioritised – automated decision making and administrative law; principle-based regulation of financial services; defamation; press freedoms and whistleblowers; and legal structures for social enterprises – and in relation to eight additional topics that were considered significant – the Australian Constitution; Environmental Law; Migration Law; Statutory Drafting Practices; Creditors and Trusts; Surrogacy; Credit, Debt, and Financial Hardship; and Human Tissue. It through these kinds of processes that the legal academy contributes to the public discourse about matters with the potential to affect the citizenry as a whole.

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[44] 'Generating ideas for the Law Commission's 14th Programme of law reform', *Law Commission (UK)*(Web Page, March 2021) https://www.lawcom.gov.uk/14th-programme/.

35 The ALRC relies heavily on the academy throughout its inquiries – and there is no doubt that the ARC does not measure adequately the impact of the academy's contributions. In the 2020-21 financial year, the highest downloaded reports were:

- *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC 133) – 4457 downloads – there were 11 academics on the Advisory Committee; 17 consultations with academics; and 16 formal submissions from academics
- *Corporate Criminal Responsibility* (ALRC Report 136) – 3341 downloads – there were 6 academics on the Advisory Committee; 33 consultations with academics; and 9 formal submissions from academics
- *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135) – 2787 downloads – there were 6 academics on the Advisory Committee; 33 consultations with academics; and 9 formal submissions from academics
- *Elder Abuse—A National Legal Response* (ALRC Report 131) – 1754 downloads – there were 8 academics on the Advisory Committee or serving as Expert Readers; 6 consultations with academics; and 10 formal submissions from academics.

36 For the Inquiry into *Class Actions and Third-party Litigation Funders* (ALRC 134) we constituted a separate academic Expert Panel of nine legal academics from Australia, Canada, the US, the UK and the Netherlands.

V. CONCLUSION

37 The value of the legal academy is to shape and mould the foundation of the discussion on contemporary legal issues. This value does not manifest as a dialogue, or partnership with the bench, as judges undertake the task of resolving disputes about pre-existing rights and duties arising from specific facts. Rather, where academic writing is directed to judges, it demonstrates what Chief Justice Kiefel describes as a "shared (and I would add unidirectional) concern with the correct and coherent development of the law".[45] Legal academic scholarship of this kind is essential to the proper functioning of the third arm of government.

38 The true value of the scholarship of the legal academy is, however, much broader. Those instruments of government who are vested with the power to effect changes to the law, the executive (in its various manifestations) and the legislature, rely on the considered output of the academy as they craft and shape the direction of legal development in Australia. It is time for this public role of the legal academy to be recognised and fostered, beyond the hurdles and confines of ERA funding.

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