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Making good law: research and law reform

Wendy Larcombe
University of Melbourne

Natalia K. Hanley
University of Wollongong, nhanley@uow.edu.au

Bianca Fileborn
University of Melbourne

Nicola Henry
La Trobe University

Anastasia Powell
RMIT University

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Abstract

Research plays an integral role in law-making processes. But could academic research be applied more strategically to improve the processes and outcomes of law reform?

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Wendy Larcombe, Natalia Hanley,
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Anastasia Powell

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Introduction

RESEARCH PLAYS AN INTEGRAL ROLE IN LAW-MAKING PROCESSES. BUT COULD ACADEMIC RESEARCH BE APPLIED MORE STRATEGICALLY TO IMPROVE THE PROCESSES AND OUTCOMES OF LAW REFORM?

This issues paper seeks to prompt discussion about the role that research plays in improving law-making, with a focus on statutory reform. In particular, we consider whether empirical and social science research could be used more extensively and strategically to inform the development and implementation of law reforms.

Designing and implementing effective legislative reform is challenging not least because the law reform process is technical, political, non-linear and involves a changing array of actors and stakeholders. The public and legal policy objectives of law reform may also be controversial or in dispute. It can be particularly difficult to formulate practical and coherent legislative provisions when reforms relate to socially sensitive topics on which there are diverse views.

There are significant costs to both litigants and the wider community when law reforms are not interpreted and applied as expected or are otherwise ineffective. Improving the outcomes and impacts of law-making processes would have a range

of social, regulatory and economic benefits. These benefits underpin current interest in 'research-based' law reform.

Various forms of research are already integral to law-making processes in Australia and other wealthy democracies. However, as this paper explores, the role of research in law-making is not consistent and the uptake of findings may depend on the area of reform and the drivers for change. There are also political and strategic challenges to integrating academic empirical research into law reform processes. Notwithstanding these challenges, we argue that there are opportunities for timely, innovative research projects designed to inform law reform processes and contribute to development of legislative policy. We offer some suggestions for a law reform research agenda that would highlight and consolidate the role that academic social science research does and could play in making good law.

The use of research in the messy business of law-making

Law-making or law reform is always a technical, political and emotional process, driven by a range of policy, regulatory and social objectives (Freiberg and Carson, 2010). The ways in which political institutions, parties and actors approach and frame the task of law reform is often premised on competing conceptualisations of the role of law within society. As Melville (2007) has discussed, some conceive of legal reform as driven by the goals of increased efficiency and effectiveness while, for others, the aim of law reform is to better align social and legal norms, often with the goal of promoting social cooperation or social justice.

Within that wider context, particular statutory provisions may be developed and adopted for a range of reasons including: to provide a technical fix; to implement government policy; to reflect changing community views and attitudes; to give effect to international obligations; or to respond to new economic and technological developments. Making law is also a way for members of Parliament to be seen to be taking action in response to particular events and issues that capture community attention.

The variable drivers and objectives of law-making mean it cannot be approached as a purely technical or rational exercise. The idea of 'evidence-based' or research-informed law-making might thus be sceptically viewed as a 'technocratic wish, located in a political world' (Jensen and Lewis, 2013, 10). Yet it is an idea that has taken hold over the past 50-60 years, particularly through the work of law reform commissions which have sought to strengthen the perceived independence and merit of their recommendations by presenting them, in various ways, as 'research-based' (Melville, 2007; Partington, 2005).

Empirical research of various kinds is a regular feature of contemporary law reform. A survey of the published law reform literature (Hanley et al, 2015) shows that quantitative research methods are commonly used to identify the extent and nature of the problem to be addressed by legislative reform and to analyse the cost implications of reform models under consideration. Qualitative research methods are also used across the law reform cycle including stakeholder and expert consultations through interviews, surveys, focus group discussions, roundtables and working groups.

Comparative legal research that investigates how comparable jurisdictions address a common issue or offence is another typical feature of major law reform projects, used to help identify reform options and their respective merits and limitations.

Once government has identified its preferred reform option, prospective legislation is often assessed to identify potential financial, administrative, social or environmental costs and benefits as well as impacts on, and resource implications for, legal processes and institutions. In this context, there is a strong case for greater use of simulation-based research to predict likely impacts and effective law reforms in the immediate environment. This research is of particular benefit when undertaken with current practitioners or professionals who would be tasked with implementing the proposed reform in the specific jurisdiction.

Finally, empirical research is a mainstay of retrospective evaluation of law reforms that investigate the actual impacts and effects of a reform measure, including stakeholders' perceptions of the reform's benefits and limitations, its impact on legal doctrine and decision-making, and regulatory effects. Retrospective evaluations of major law reforms are generally accepted as crucial, yet they are not systematically conducted.

Hence, while the political and policy driven nature of law reform must be recognised and respected, various forms of empirical research are now an established feature of legal policy and law reform development processes.

When can research inform law reform? Opportunities and challenges.

While the value of research in the law reform process is generally accepted, whether and when the various actors in the law reform process will take up empirical research findings is not straightforward. Published research on law reform shows there is significant variation in views about the value of different types of research in the law reform context. Moreover, the influence or use of research findings is likely to depend on the organisations and individuals involved in a particular law reform process, the topic of reform, the timeliness of the research, as well as the credentials of the researchers and type of research that is being conducted in the specific area (see Tanford 1991).

Empirical research undertaken by law reform commissions and other statutory bodies with dedicated research staff is often regarded as particularly valuable. However, these bodies may frame research inquiries in ways that sit comfortably within, rather than challenge, existing legal structures (Melville, 2007). The views of stakeholders may not be fully explored, or may be shaped in important ways creating a greater likelihood for technical, as opposed to social reform (Graycar and Morgan, 2005).

Moreover, Melville (2007) has noted the variety of research approaches taken by different law reform commissions; for example, some proactively commission independent, external research to inform the approach to the topic and the options for reform, while others take the more common approach of canvassing a series of options through applied comparative work and inviting comments through stakeholder submissions.

This echoes existing literature which suggests that the opportunities for empirical research, as well as for research take-up, are complicated by the diversity and multiplicity of decision-makers and actors in the law reform process (Tanford, 1991). It also highlights the important role that academic research does and can play in producing independent law reform research informed by in-depth knowledge of research methodologies.

The challenges involved in coordinating academic research and law reform processes cannot be overlooked. As Horrigan (2008) has observed, there are multiple and sometimes competing institutional and individual interests at stake, and recent changes in university environments may

'make it harder rather than easier' for academic researchers to engage in law reform activities. Horrigan notes in particular that governmental research priorities and the classifications of research outputs and activities often fail to acknowledge or facilitate the involvement of academics in public policy and law reform activities. The emphasis on funding academic research through external competitive grants also means that academic researchers' time may be committed for years in advance, making it difficult if not impossible to contribute to time-sensitive law reform processes.

Notwithstanding these challenges, Horrigan suggests that innovative collaborations between law reform agencies and academic researchers are possible, particularly if grant-related research projects can be aligned with the needs of law reform bodies in a project managed approach. Such collaborations will be dependent on mutually agreed time-lines and outputs. Issues of intellectual property, authorship and decision-making also need to be canvassed and resolved. University-based centres or networks that can draw together multidisciplinary teams to contribute to law reform research, nationally and transnationally, may be one mechanism to facilitate such collaboration.

Towards a law reform research agenda

In this final section we briefly suggest potential projects or research strategies that would improve the quality and impact of empirical research undertaken to inform law reform processes (see also Genn, Partington and Wheeler, 2006). This is by no means an exhaustive list, but it is hoped that these suggestions might stimulate renewed discussion and consideration of the types of research that might usefully inform law reform processes.

First, research is needed on innovative ways of stimulating and facilitating community participation in and engagement with law reform processes. Law reform commissions in particular frequently undertake consultative research with interest groups, service providers and relevant professionals. This recognises the importance of soliciting the views of those likely to be affected by proposed changes, as well as understanding how the changes are likely to impact affected groups. However, community consultation is typically conducted through publication of an issues or discussion paper followed by calls for written submissions, or comment provided through public and small group meetings and interviews.

It is currently rare for commissions to use more innovative communication and information gathering mechanisms such as on-line surveys and quizzes, online discussions or chats, social media and apps (Melville, 2008). Moreover, community consultation commonly only occurs after the issues and reform agenda have been determined, dictating a top-down approach that may miss the issues of greatest importance to community members (Graycar and Morgan, 2005). Investigating and understanding innovative ways of engaging diverse community members and public participation in law reform processes and agendas is vital to improving the outcomes and normative legitimacy of law-making.

Second, although community consultation has become a standard feature of contemporary law reform it is often not conducted or reported systematically or methodically. Work is needed to improve understanding of the social science research methods that are best suited for particular law reform tasks and of the methodological advantages and limits of different approaches or techniques.

Increased engagement between law reform actors and social science researchers, particularly those with expertise in qualitative research methods, may assist to improve the selection, justification and documentation of consultative research methods commonly used in law reform. Improved understanding of appropriate analytical and reporting techniques will also improve the chances of empirical findings being taken up in decision-making and recommendations, and may contribute to public confidence in the consultation process. At present, it is often difficult for those consulted by law reform agencies to discover whether and how their contributions have informed decision making beyond general statements that 'submissions made have received extensive consideration'. Improved reporting to participants on research findings may assist in turn to improve public engagement with law reform, particularly when it demonstrates that contributions have been systematically and methodically analysed (see, e.g., Partington, 2005).

Third, research is needed to investigate and develop sustainable mechanisms through which community members, topic experts and law reform actors can participate in law reform related research.

At present, in some areas of law reform, key community and professional stakeholders are continuously engaged in consultations or subject to numerous requests to participate in research. If the capacity to integrate research into law reform processes is to be enhanced, the demands of research processes on key stakeholders must be sustainable and managed. In this context, there is a case for exploring the feasibility of new mechanisms such as panels or networks who could facilitate consultation and data gathering processes within particular communities or professional bodies.

Fourth, law reform research may benefit from an expanded understanding of the range of agencies, entities and bodies that make important contributions to law-making in the 21st century. Conceptualisations of law reform in the second half of the 20th century were almost exclusively limited to government law-making, either domestically or internationally. While nation-states continue to play a central role in contemporary law-making, there is now growing appreciation of the need for and scope of law-making activities by non-government agencies and private entities, as well as transnational groups and networks.

As a consequence, it is no longer only government ministers and departments who need and are able to apply timely and relevant law reform research to inform law-making decisions. Opportunities for academic collaboration with diverse law-making entities and groups merit further exploration.

Fifth, there are untapped opportunities to undertake empirical research into how, when and why law reform works to achieve its intended effects, and when it doesn't. The fact that law reform is a political, policy-driven process that responds to emotional triggers as often as empirical evidence (Freiberg and Carson, 2010) does not mean that it cannot be empirically studied. Such research can then inform our understanding of the constraints and opportunities for effective reform. A recent example is provided by McMahon-Howard's (2011) longitudinal study of the factors that placed US states 'at risk' of adopting selected rape law reforms. Her research identified that prior adoption of weak, partial reforms substantially reduced a state's likelihood of passing stronger reforms on controversial issues, even years later when the issue was no longer controversial.

This indicates that legislators may only have limited opportunities to adopt strong reforms on controversial topics, such that reform agencies and legislators supportive of such reform should be advised to avoid 'incremental' approaches. Research such as this that identifies enablers of law reform is likely to be of interest to a wide range of law reform actors and stakeholders.

Finally, for such projects to advance, it is necessary to take up Horrigan's (2008) call to investigate current barriers to academic participation in and engagement with law reform research processes, and to devise innovative institutional mechanisms and research training practices to support such work (Genn, Partington and Wheeler, 2006). Without skills training, institutional support and recognition, and opportunities for timely funding of research projects, individual academics are unlikely to be in a position to undertake extensive empirical research as and when particular issues rise to prominence on the political agenda.

Conclusion

There are significant barriers and challenges to academic engagement in law reform research processes. The political nature of law reform and scepticism about the role that research evidence plays in informing the decisions and actions of law reform agents is one such barrier. The distinct and sometimes conflicting priorities, work patterns and planning cycles of academic institutions and law reform agencies is another. However, the value of evidence-based approaches and consultative practices to law reform processes and outcomes is now well established. This means that research can and should play an important and integral role in contemporary law reform, even if its role is not determinative.

Academic research is often particularly respected by law reform actors and agents. In this context it is timely to consider further opportunities to apply empirical, social science research methods to contribute to law reform processes, as well as developing our understanding of how those processes work.

This paper has offered suggestions towards a law reform research agenda that takes note of the opportunities and challenges posed by new technologies, the increasingly transnational and plural character of legal regulation, and the economic and regulatory changes currently impacting universities and academic research.

It is hoped that these suggestions will stimulate thinking and discussion about the role that empirical research plays in law reform processes mindful that, to take advantage of the research opportunities generated by the need for evidence-based law reform, there is considerable work to be done in designing mechanisms and processes to enable and support empirical research and academic engagement with law reform.

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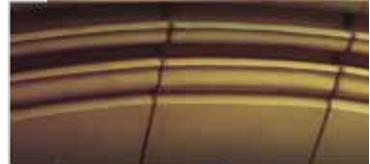
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RESEARCH COLLABORATION

Leanne McDonald
Research Development Manager
Phone: +613 9035 7677
Email: l.mcdonald@unimelb.edu.au
@Government_UoM

GOVERNMENT.UNIMELB.EDU.AU