Chapter 1 Legal Research as Qualitative Research

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Introduction

In the first two editions of this book we began by noting the 2002 research of two eminent social scientists.

They had analysed all American law review articles published between 1990 and 2000 which had the word 'empirical' in the title. The conclusions, they said, were discouraging with every single one breaching what they contended were basic rules of empirical research.[1]

A law professor, whose research had been specifically criticized by the social scientists, responded by saying that, in his opinion, "the authors are simply wrong."[2]

Manderson and Mohr, however, noted what they saw as;

> … a strange disjunction between, on the one hand, the limited notion of 'legal research' as it is understood in text-books and, on the other, the rich and complex world of research presented … in graduate seminar rooms, and in the academy.[3]

As was previously noted, the above debate raises important issues in terms of the quality of legal research which has been and continues to be undertaken at law schools by both graduate students and academics.[4] A problem that arises is that many law academics are simply untrained and lacking in experience when it comes to empirical research and the general rules applicable to such research. This is largely due to a deficiency in their education as graduate research students. Many academics are accordingly limited in the extent to which they can train future graduate students in the requirements of empirical research. Writing now in 2023, the question that must be asked is the extent to which this has changed.

In 2016, Zeiler reported that while things had improved, major problems continued to exist in the area of empirical legal research. A lot of these problems, she said, arose due to the limited ability of law journal editorial boards, particularly where these were comprised mainly of law students.

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[1] L. Epstein and G. King, 'Empirical Research and the Goals of Legal Scholarship: The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1, , 115–116.
[2] R. L. Revesz, 'Empirical Research and the Goals of Legal Scholarship: A Defense of Empirical Legal Scholarship' (2002) 69 *University of Chicago Law Review* 169, 171.
[3] D. Manderson and R. Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6 *Law/Text/Culture* 159.
[4] Epstein and King, n. 1 above.

While empirical problems were less evident in peer reviewed journals, significant issues were still present largely due to the research conclusions not being based on reproducible analyses[5]

Seven years on, there remains considerable room for improvement. This is based on a very recent review carried out by a group of Australian, US and German academics published in 2021[6] From a law journal perspective, their conclusion is that most journals have failed to keep pace with what they describe as a revolution in social science research credibility. Based on credibility indicators, they conclude that there is considerable room for improvement in how law journals regulate empirical legal research. This is one part of their article, the other being recommendations for legal researchers focusing on content analyses of judicial decisions, surveys and qualitative studies. As such, a detailed reading of this article is highly recommended.

The 2021 research, however, was not so much concerned with the shortcomings of empirical legal research, but rather how it could be improved. Likewise, this is the principal aim of this edited collection, and for this chapter how to best do qualitative legal research from a graduate student perspective. As part of this "best or good practice" approach, however, there is a need to first identify the fundamentals of our topic. We start therefore by identifying, in a broad sense, categories which could be considered as covering the majority of legal research that is currently carried out.[7] Two categories are identified; doctrinal and non-doctrinal. Qualitative legal research we define as simply non-numerical and contrasted as such with quantitative (numerical) research (see Chapter 2).

We also differentiate between academic legal research, that is, that carried out by academics and students, as compared to legal research for professional (legal practice) purposes or research by government[8] and non-government agencies. It is all legal research in both a quantitative and qualitative sense but there will be significant differences between the scholarly research endeavours of a student or academic and that undertaken by a law reform commission. Not the least of these differences will be the resources available at the university level and that which might be provided by the government.

As noted, the focus of this text, is on graduate research undertaken at the law school level. Having said this, however, much can be learnt in terms of correct approach from non-law school research and some of the research examples referred to later have been done by government research agencies. Their use is not as a benchmark but rather to highlight examples of good practice, the purpose being to inform and guide graduate law students and teachers involved in research degree programmes.

We accept Epstein and King's assertion that both qualitative and quantitative legal research is empirical research.

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[5] K. Zeiler, 'The Future of Empirical Legal Scholarship: Where Might we go from Here?' *Journal of Legal Education* (2016) 66(1), at 78-99.

[6] Chin et al, 'Improving the Credibility of Empirical Legal Research: Practical Suggestions for Researchers, Journals and Law Schools' (2021) (3(2)) *Law, Technology and Humans*

[7] It is noted that such categories are not mutually exclusive and that a single research project could encompass a number of legal research areas.

[8] Note, for example, the British Home Office and Australian Law Reform Commission.

> What makes research empirical is that it is based on observations of the world, in other words, data, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys, or the outcomes of secondary archival research or primary data collection. Data can be precise or vague, relatively certain or very uncertain, directly observed or indirect proxies, and they can be anthropological, interpretive, sociological, economic, legal, political, biological, physical, or natural. As long as the facts have something to do with the world, they are data, and as long as research involves data that is observed or desired, it is empirical.[9]

This is an extremely broad definition and it is arguable that it is perhaps too broad. By comparison, legal research, as taught in many law schools, is far too narrow in its outlook. So called legal research texts demonstrate this, most being only concerned with very narrowly defined doctrinal research. Manderson and Mohr see this as an oxymoron particularly in light of the research done by law school academics and postgraduate law students.[10]

Doctrinal Research

Much past and current legal research could be placed under this heading. Doctrinal or theoretical legal research can be defined in simple terms as research which asks what the law is in a particular area. The researcher seeks to collect and then analyse a body of case law, together with any relevant legislation (so-called primary sources). This is often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries on the case law and legislation. The researcher's principle or even sole aim is to describe a body of law and how it applies. In doing so the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment. In this regard, the research can be seen as normative or purely theoretical.

King and Epstein state that purely theoretical research is not empirical.[11] Whether the activity of engaging in legal research can be considered a social science has been discussed in detail elsewhere.[12] The main arguments are that law is an authoritative rules-based discipline where doctrinal observations are merely self-referential and do not reveal anything about the outside world. However, such arguments also acknowledge that where law engages with society in a way revealed by legal realists or where a researcher reaches beyond jurisdictional authority to consider comparative law issues that doctrinal research may take on some of the elements of social science research.

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[9] Epstein and King, n. 1 above, 2–3.

[10] Manderson and Mohr, above, 164. The authors have not found more recent research on which to rely. However, it is possible there is an even greater emphasis on cross-disciplinary and socio-legal research. See for example Susanne Davies 'From law to "legal consciousness": a socio-legal pedagogical expedition' (2013) 29(2) *Law in Context* 42.

[11] Epstein and King, see n. 1 above, 3. The authors qualify this, however. 'But even many articles whose main purpose is normative often invoke empirical arguments to shore up their normative points.'

[12] See for example Geoffrey Samuel 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67(2) *Cambridge LJ* 288; David Monsma 'The Academic Equivalence of Science and Law: Normative Legal Scholarship in the Quantitative Domain of Social Science' (2006) 23 *TM Cooley L Rev* 157.

So, while the status quo assumes that legal research is not social science research we are not like minded and it is arguable that doctrinal research is qualitative not simply because it is non-numerical, but because modern academic legal research has moved beyond a strict scientific or formalist approach to rules. A modern legal researcher is not declaring the law nor solely engaged in textual analysis. Doctrinal texts tend to be examined within an acknowledged social context with specific inferences drawn which may be tested (i.e., they are falsifiable) by a superior court.

In any case, such labeling is somewhat meaningless, particularly when one's objective is to consider legal research from a best or good practice perspective. In engaging in doctrinal research, it is important to acknowledge the law researcher's dilemma. While legal sources can be accessed to determine what the law is, in terms of case law and legislation, the application of the law is contentious. Indeed, this may be the very reason for why the research was undertaken in the first place. A piece of doctrinal research may not involve what would technically be described as an empirical method but this does not mean that inferences will not be drawn from what is found.

Many legal researchers do not readily distinguish between research directed at finding a specific statement of the law and an in-depth analysis of the process of legal reasoning. For example, in the standard legal education text, *Learning the Law*,[13] Glanville Williams identifies two types of legal research:[14] one being 'the task of ascertaining the precise state of the law on a particular point'; the other being 'the sort of work undertaken by lawyers (often but not always academic lawyers) who wish to explore at greater length some implications of the state of the law …' Williams may be in fact be describing one sort of research which only differs in degree, that being doctrinal research. The methodology involved would be common to both approaches.

The overriding objective of this chapter is accordingly to help legal researchers understand the importance of acknowledging the type of research they are doing and approach it in a structured way which enables the most effective research outcomes.

Non-doctrinal Research

All other legal research can be generally grouped within three categories; problem, policy and law reform based research. It is accepted that these categories are not mutually exclusive and are identified in terms of an assessment of what a piece of research is largely about. They can be considered together because of the often occurring link between them. In fact, all four categories of research, doctrinal, problem, policy and law reform could be part of a large scale research project. A researcher, for example, could begin by determining the existing law in a particular area (doctrinal). This may then be followed by a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting, for example, the flaws in such policy. This in turn may lead the researcher to propose changes to the law (law reform).

While the doctrinal component of the above example could be seen as non-empirical, the assessment of the problem, evaluation of the policy and the need for law reform would require an empirical approach which could be quantitative, qualitative or a combination of the two. By its very nature, such research is inferential. Even in the most descriptive of forms, policy research on

[13] G. Williams, *Learning the Law* (17th ed.) (London: Sweet & Maxwell, 2020).
[14] *Ibid*.

legislation, for example, would seek to provide some level of explanation as to why particular laws were enacted. Other research may seek to explain this historically and could include consideration of the effect of relevant appellant court cases on the development of such policy leading to the enactment of the legislation concerned.

Other research may simply seek to outline an existing legal problem. As noted, this could lead to law reform which itself could then be subject to evaluative research. Such research might begin by collecting all relevant case law in order to demonstrate how a particular law is not working. Alternatively, a researcher may observe a number of cases to assess whether there are existing procedural problems in the way in which certain parts of a trial are carried out. Based on this, the researcher could reach a tentative conclusion that the current law needs amendment, repeal, or there is a need for new law.

Problem, policy and law reform research often includes a consideration of the social factors involved and/or the social impact of current law and practice. In this regard, the type of research done might include surveys and interviews with various individuals and groups affected. Such research is often referred to as socio-legal research. As a generic category, socio-legal research encompasses a huge range of different types of research, but it is beyond the scope of this chapter to describe and analyse this type of research in detail.[15] As such a more general approach is taken to so-called non-doctrinal research which encompasses both legal and socio-legal studies. Regardless of whether the research done is legal or socio-legal or a combination of the two, various qualitative approaches should be taken. The researcher's aim should be to reach certain conclusions (or inferences) based on what is found. In this sense, legal research is no different to all other forms of academic or scholarly research. Where there is a difference is in the empirical method used. Using such empirical method, however, requires a level of academic rigour and it is here, according to King and Epstein and Chin et al,[16] that much legal research which is done falls down. This chapter seeks to alert the would-be legal researcher to such pitfalls. In addition, it will discuss, by reference to examples, how to best undertake qualitative legal research.

Is Doctrinal Research Qualitative?

If the law can simply be discovered using a systematic approach and the same law would be found no matter who was carrying out the research then it could be argued that doctrinal research was in a way quantitative. In 2006, Hutchinson described doctrinal research as though it was equivalent to quantitative research or at least does not categorise it as qualitative research.[17] Hutchinson also noted the reluctance and inability of lawyers to move beyond the doctrinal in their research and broaden their approach to adopt social science methodologies. She describes qualitative research as an exploration of 'social relations and reality as experience'[18] rather than 'dealing in specific cases'.[19] The characterisation of doctrinal research not being qualitative is interesting because it

[15] Note the vast body of literature (social science) on research methodology. From a qualitative perspective, this includes literature on sampling, questionnaire design and interviewing.
[16] Epstein and King, n. 1 above.
[17] T. Hutchinson, *Researching and Writing in Law* (2nd ed.) (Pyrmont, NSW: Lawbook Co., 2006) 31–42.
[18] *Ibid*, 85.
[19] *Ibid*, 87.

reveals the established paradigm of legal research which suggests that there is somehow an objective approach to finding the law. In 2012, however, Hutchinson and Duncan noted that:

> "Now, more than ever, it is imperative that academic lawyers, working within an increasingly sophisticated research context, explain and justify what they do when they conduct 'doctrinal research'. Lawyers need to explicate their methodology in terminology similar to that used by other disciplines."[20]

We agree, noting that the assumption that doctrinal research is not qualitative is at odds with the type of reasoning that judges apply. Judges reason inductively, analysing a range of authorities relevant to the facts, deriving a general principle of law from these authorities and applying it to the facts in front of them. The dynamic relationship between law and facts has been defined as the 'stepping stone approach'.[21] A common law lawyer applies a process of distinguishing cases on their facts until what is left is an applicable principle. This is a process of elimination which is an application of the inductive reasoning where the principle is gleaned from a detailed analysis of all relevant precedent. Returning to the social science perspective it can be argued that judicial inductive reasoning, which is what a doctrinal researcher does, must be qualitative in its research methodology.

> In summary, theory produces as part of qualitative data analysis is typically a statement or a set of statements about relationships between variables or concepts that focus on meanings and interpretations. Theories influence how qualitative analysis is conducted. The qualitative researcher attempts to elaborate or develop a theory to provide a more useful understanding of the phenomenon. The focus on meanings makes qualitative research difficult to do well, because meanings are more 'slippery' than quantitative statistics.[22]

Ultimately law may be knowable but it is not necessarily predictable. Doctrinal research is not simply a case of finding the correct legislation and the relevant cases and making a statement of the law which is objectively verifiable. It is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation. It is not simply textual analysis. It is not merely a self-referential exercise. A researcher comes to understand the social context of decisions and draws inferences which need to be considered in a range of real-world factual circumstances. The provision of advice, the pursuit of litigation and modern academic legal research arguably engage with and describe the outside world. Any prediction about what the law might be in given circumstances may ultimately be tested in a court. For these reasons it can be argued that doctrinal research is qualitative. In any case even if from a strict social science or epistemological standpoint this position is not supportable it cannot hurt for a researcher to approach an enquiry regarding legal rules with the discipline or organisation of a qualitative approach.

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[20] T. Hutchinson and N. Duncan "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17(1) *Deakin Law Review* 83

[21] K. M. Hansen, 'The US Legal System: Common Values, Uncommon Procedures' (2004) 69 *Brooklyn Law Review* 702.

[22] D. Ezzy, *Qualitative Analysis: Practice and Innovation* (Crows Nest, NSW: Allen & Unwin, 2002) 5.

Student lawyers are not trained in any awareness of research methodologies. They will rely on hierarchy and authority to support a particular principle. Doctrinal legal research traditionally proceeds on the basis that the law can be found without enquiry into meaning or origins.[23] Epstein and King contrast the approach of a lawyer and a science PhD where the lawyer is encouraged to research from the perspective of the client whereas the science PhD has to acknowledge contrary positions. 'An attorney who treats a client like a hypothesis would be disbarred; a PhD who advocates a hypothesis like a client would be ignored'.[24]

Hutchinson and Duncan conclude that there is urgent need to change this approach to doctrinal research.

> However, in a modern interdisciplinary framework, where the research is being directed, read and more importantly 'judged' by those outside a narrow legally trained discipline, articulation of method is vital — especially if funding is tied to quality, and quality depends on methodological clarity.[25]

Doctrinal Research Methodology

To describe doctrinal legal research as qualitative recognises that law is reasoned and not found. It is important also to recognize that lawyers are not trained in a research methodology that acknowledges that the law cannot be objectively isolated. The aim here is to establish a doctrinal legal research methodology which takes into account the nature of law. Social science can be referred to again to get a sense of the objectives of a research methodology:

> These three elements–the techniques, the research community and the methodological rules – together constitutes a methodological domain through which all research must pass in order for it to achieve certain standards of integrity and validity. It acts as a mediator between the researcher's subjective beliefs and opinions and the data and evidence that he or she produces through research. If this domain is functioning properly, it acts a something like a filter which prevents bad research from passing through.[26]

This analysis is referring to research generally. With legal doctrinal research the methodology is going to be very specific. The identification of relevant legislation, cases and secondary materials in law can be seen as analogous to a social science literature review. Fink defines a literature review as being 'a systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars and practitioners'.[27] More specifically, Fink's requirements for a thorough literature review are listed below.[28]

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[23] Manderson and Mohr,above, 162.
[24] Epstein and King, n. 1 above, 9
[25] Hutchinson and Duncan, above, 119
[26] J. O. Davidson and D. Layder, *Methods, Sex and Madness* (London: Routledge, 1994) 35.
[27] A. Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (2nd ed.) (Thousand Oaks, CA: Sage) 3.
[28] *Ibid*, 3–5.

1. Selecting research questions
2. Selecting bibliographic or article databases
3. Choosing search terms
4. Applying practical screening criteria
5. Applying methodological screening criteria
6. Doing the review
7. Synthesising the results

For the purposes of this chapter Fink is used as a template because it reflects the discipline of social science research and because it is focused on literature, can be seen as providing a model which can be adapted to law. What is described below is by no means a definitive approach for legal research but could be seen as a departure point for developing a research discipline within law. The question night be, is how successfully these requirements could be applied to doctrinal legal research. It is useful to look at these steps point by point and consider their application. The emphasis will be on the first five points. These elements when considered in the context of legal research could be the foundation of a comprehensive approach. The last two are not so relevant to law as they are related to the correlation and comparative analysis of literature that focuses on field research results which is not what doctrinal research covers.

Requirement 1: Selecting research questions

For doctrinal research the question is going arise from a search for law which is applicable to a given set of circumstances. Unlike policy research there are no apparent value judgments to be made. The established assumption will be the law is there to be found. A research methodology however should aim to eliminate the possibility of selectivity. Manderson and Mohr[29] warn that the natural predisposition of the legally trained is to research as an advocate and not as an academic. It is also important to acknowledge that the law is there to be derived from the reasoning applied to the sources found.

Requirement 2: Selecting bibliographic or article databases

For doctrinal legal research this is perhaps the most important step. Doctrinal law is based on authority and hierarchy. The objective will always be to base any statements about what the law is, on primary authority: that is either legislation or case law. Secondary sources such as journal articles or textbooks may be useful in supporting a particular interpretation but they cannot replace primary sources.

In doctrinal legal research where the aim should be to research as an academic rather than an advocate the methodology should be thorough, systematic, justifiable and reproducible. There may be a number of approaches depending on the nature of the search. Below is listed a number of research tools and an overview of their respective utility. This chapter is not going to describe how to use these sources, rather why they should be used, their value, and where they fit in to a methodology.

[29] Manderson and Mohr, above, 159.

- Encyclopaedic works – Where the research question is regarding the law which can be applied in a specific circumstances then the starting point could be an encyclopaedic work. The term 'encyclopaedic work' does not mean simply legal encyclopaedias but reference publications that attempt to cover the law of a jurisdiction.

- Case citators – Case citators are most often used to find the correct citation or parallel citations for a case. Their main purpose however is to enable a researcher to check the status of a case and to find other cases which have discussed the legal principles expressed in that case.

  Checking the status of a case means tracking the subsequent treatment of a case to see if it is good law. It also means understanding the fine distinctions between the annotations used to characterise the cases, for example the terms *followed*, *applied* and *distinguished*. If a case has been followed the expectation is the subsequent case has similar facts, if the case has been *applied* then the principal of law has been relied upon in different factual circumstances. Clearly law from a case which has subsequently been consistently *applied* rather than *followed* is going to represent a more fundamental and significant legal principal. If a case has been subsequently *distinguished* it can be two things. Either the case was simply not relevant or that the legal principal relied upon is narrow and should be confined to the circumstances of the original case.

  Note that the classification process can involve a subjective editorial element. It may be relied upon to support an assumption of a formalist approach to law. However, a comparison of competing citators covering the same case may result in different assessments. This comment is made to emphasise the dynamism of law. Doctrinal research is not simply about determining objectively verifiable rules. This is a formalist assumption. Nevertheless, use of a case citator to check any cases derived from an encyclopaedic search are essential to determine the relative value of case authority that the researcher wishes to rely upon.

- Legislation – Where an area is governed by legislation finding the relevant source is generally straightforward. However, it is essential to check currency and judicial consideration. Checking currency is a routine technical process. Checking if there has been judicial consideration of an act or section ensures that any personal assumptions about interpretation or application are not misdirected. It may also be useful to examine the context in which the legislation was created, for example the relevant parliamentary debates and specifically second reading speeches.

- Statute annotators – One way to do this is by using a statute annotator. These publications will track changes to legislation over time including listing amending legislation and identifying commencement dates of any changes. A statute annotator will also indicate where there has been judicial consideration. Most annotators will list cases that have considered an act or regulation generally and will also list where specific sections have been subject to judicial consideration.

- Secondary sources – The overview so far has focused on tracking developments in primary sources. Secondary materials can also be important in developing approaches to how a doctrinal legal issue might be analysed. They will enable the researcher to know who the leaders in a particular field are. In depth doctrinal research must acknowledge work that has been done previously in the area. They are also useful in establishing the context of the law.

- Textbooks – A doctrinal research methodology would be incomplete if leading text books were not consulted. While not authoritative they may be persuasive. They often represent the standard form of expression of particular areas of law. [30] Long established texts will entrench the author's association with a legal area—*Cross on Evidence*, *Palmer on Bailment*, *Nimmer on Copyright*, *Bowstead on Agency*, *Chisum on Patents*, *Wigmore on Evidence*, *Corbin on Contracts*. The name will have such value that new editions may outlive the author.

- Periodicals – Periodicals are regularly published subscription works which may contain articles which are thematically linked: for example, the *Journal of Legal Education* or the *Journal of Contract Law*.

  Periodicals may be in the form of law journals or law reviews. It is important to distinguish between law journals and law reviews. Law journals tend to be published by professional organisations such as law societies or bar associations and will comprise short articles that focus on the practical application of current law. Law reviews are usually published by universities and will contain in depth articles emphasising a theoretical rather than practical approach and may be peer reviewed. Beware that this is not a hard and fast rule. The terms journal and review may be used loosely nevertheless there is a consistent distinction between practice and academic periodicals.

  In the preparation of a research methodology for doctrinal research it will be important to choose between a practice and academic approach. If the doctrinal research is simply asking a question relating to finding the relevant applicable law, researching journals may be sufficient. However, if the purpose of the doctrinal research is a critique of whatever law is found then perhaps a researcher should look to academic law reviews to develop a theoretical basis for analysing the law.

  For doctrinal research then a possible methodology for doctrinal legal research in relation to selecting sources would be to (i) consult a legal encyclopaedia to establish an overview of the law and gather an initial list of authorities; (ii) refer to a case digest to see if there is any other authority which might be useful to include; (iii) check with a current awareness service to add the latest cases; (iv) use a case citator to check the status of any authority that will be relied on and as a way of discovering further authority; (v) if legislation is relevant check the a currency using a current awareness service; check for judicial consideration using a statute annotator or do an online search; parliamentary sources may

[30] For an example of the importance of key legal texts see F. R. Shapiro, 'The Most-Cited Legal Books Published since 1978' (2000) 29 *Journal of Legal Studies* 397.

be useful if ambiguity exists in the text; and (vi) a survey of secondary sources is important to compare approaches of other researchers in the field and establish a context for the law.

The detail in these steps for a research task should be documented so they can be reproduced. The outcomes may of course change over time because law is dynamic and the treatment of issues may be qualified in subsequent law or commentary. Note that this research will not result in a definitive statement of an applicable rule. Inferences may be drawn on what is found based on not simply an analysis of the texts but the facts of any dispute or the social context in which a putative rule may be applied.

Requirement 3: Choosing search terms

Legal research has been transformed by the easy access to vast databases of online materials. It has been argued that the change of medium has changed the nature of legal research – that outside the context of the library, legal research is now less structured which challenges the emphasis on authority.

> We no longer live in a universe where absolutes can be discovered through judicious reading of common law precedents …
> … For the modern Supreme Court there is no final primary authority, only a kaleidoscope of sources that one can shift to provide any of a number of pictures …[31]

Fink emphasises the importance of constructing a Boolean search when using an online service. However, it should be acknowledged that because of the volume of legal materials available online that Boolean or free text searching may not be the most efficient way to proceed.[32]

Given that the majority of users may not employee anything more complex than using the AND connector or a phrase search it is essential that the terms used will be productive. This is not the place for a lesson on Boolean logic. However here is a hint which ties in closely with the notion of a systematic legal research methodology. In common law countries case names can be seen as encapsulating the essence of a legal principle. In the common law profession, the case name *Donoghue v Stevenson* needs no introduction or explanation. Other jurisdictions will have their equivalents in each area of law: *Roe v Wade*; *Delgamuukw v British Columbia*; *Associated Provincial Picture Houses v Wednesbury*; *ACLU v Reno*; *Waltons v Maher*. Without any complex logic a search can be structured which includes a name of a case that must be referred to in another case or article. It is a very effective method of narrowing down a search without unwittingly excluding important hits.

The same can be done with the names of leading authors. A search which includes 'Glanville Williams' will retrieve legal education documents, a search which includes 'Stanley Fish' will retrieve documents relating to law, language and culture. In the context of a legal research such

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[31] R. C. Berring, 'Symposium on Law in the Twentieth Century: Legal Information and the Search for Cognitive Authority' (2000) 88 *California Law Review* 1688, 1690. See also M. E. Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995).

[32] For an overview of the impact on Boolean searching on legal research see C. M. Bast and R. C. Pyle, 'Legal Research in the Computer Age: A Paradigm Shift?' (2001) 93 *Law Library Journal* 285.

searches recognise there are leading cases as well as leading authors in the respective fields, which is an essential element in developing a credible legal research methodology.

Requirements 4 and 5: Applying practical screening criteria and methodological screening criteria

These requirements are placed together because legal literature is considered unique. In a way relevant documents are self-selecting because law is characterised as being precedential and hierarchical. A superior court judgment is going to be preferable to an inferior court's judgment. However, as Manderson and Mohr warn lawyers are trained to be advocates and may be tempted to be selective in a literature review.[33] Whether the screening of sources is based on quality or relevance it should not be screened on the basis of whether they support the researcher's legal position.

The challenge for common law lawyers is the relationship between the law and the facts. A holding within a case is dependent upon the facts which gave rise to the dispute, and the law which is relevant to the researcher will be determined by the facts or circumstances which gave rise to the research task. The researcher is proceeding by a combination of fact analogy and principles of law.[34] This process has been discussed above. The reasoning applied here is part of the screening process.

Requirements 6 and 7: Doing the review and synthesising the results

As mentioned above these final steps in Fink's list apply to literature reviews of field research done in a social science context. A legal research literature review is based on primary sources which state the law or secondary sources which analyse the law. In legal research the process of reviewing the documents and synthesising results is a process of inductive reasoning. Authorities will be summarised and acknowledged and an overall principle derived from the survey. This inductive approach is the process of judicial reasoning.

At this stage the difference between the application of these steps in conventional legal research and legal research based on a more thorough and systematic methodology is that the outcome should have more credibility.
In summary, the preceding paragraphs have set out a comprehensive approach to legal research which establishes a methodology which relies on key resources to ensure that all possible relevant documents will be discovered. The research is not done on the basis of proving a point but by applying a systematic approach which can be documented and duplicated. The social science model cannot be wholly applied to legal research because the source documents are derived in a different way. But the discipline of a thorough unbiased and reproducible methodology can be.

As for the resources themselves the examples provided above should be seen as simply a list of useful works with an attempt to give a sense of their value and where they would fit in a legal

[33] Manderson and Mohr, above.
[34] Hansen, above, 689.

research methodology. It does not pretend to be totally comprehensive. A complete overview of relevant sources for each jurisdiction and how to use them is covered in other publications.[35]

When looking at doctrinal research there are two points. The first is that the law as a set of rules is not objectively ascertainable, it is not there simply to be found; and the second is that lawyers are not trained in effective research methodologies. When considering the steps outlined above it can be seen that the underlying rationale is formalist. However, the discovery of relevant law and the development of an argument regarding the application of the law can only proceed on the basis of understanding the social context of the rules. Law is not simply self-referential but can teach us something about the real world. Acknowledging that doctrinal legal research could be seen as qualitative is the first step to developing a credible doctrinal legal research methodology.

Research and Artificial Intelligence

In 2023 a question now needs to be asked whether AI now threatens to impose itself on the way research is done by subverting the structured approach just discussed. In December 2022 the world was introduced to ChatGPT which is a web-based tool, apparently able to answer research queries in a narrative form, supported by available Internet resources, with a currency of up to September 2021. While the automation was tempting, because of the speed and convenience, at the same time it needed to be asked if this convenience was at the expense of a researcher's autonomy, and risky in the absence of verification of either the sources found or rules expressed.

In June 2023 a New York attorney Steven A Schwartz appeared in a disciplinary hearing in relation to his use of Chat GPT to draft a legal brief which contained fictional authorities.[36] It appears he had no idea that the AI was not only unreliable but had the potential to fabricate case references. At around the same time Thomson-Reuters announced its Microsoft Word 365 Co-pilot initiative which promised to integrate Westlaw data with generative AI to assist with legal research and drafting documents.[37] Note that the wording of the announcement was careful to make it clear that what was going to be produced was draft documents with the expectation they would be further refined by legal professionals.

These are examples of two extremes of the use of AI. One was a replacement of legal research and drafting altogether, whereas the other is an example of the use of AI as a productivity tool. They exemplify the potential of AI as well as the dangers.

Decades ago when researchers were first querying digital databases it was usually by relying on Boolean search strings. This had the virtue of mathematical or logical precision. Documents could be found based on the presence of terms or phrases, the frequency of terms, the combination of terms or proximity of terms or phrases to each other. The eventual comprehensive

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[35] See for example, R. Mersky, and D. Dunn, *Fundamentals of Legal Research (University Textbook Series)* (8th ed.) (New York: West Group, 2002); Hutchinson, above; P. A. Thomas and J. Knowles *Knowles & Thomas: Effective Legal Research* (London: Sweet & Maxwell, 2006).

[36] Benjamin Weiser and Nate Schweber 'The ChatGPT Lawyer Explains Himself' The New York Times (8 June 20)

[37] Thomson Reuters brings forward vision to redefine the future of professionals with content-driven AI technology < https://www.thomsonreuters.com/en/press-releases/2023/may/thomson-reuters-brings-forward-vision-to-redefine-the-future-of-professionals-with-content-driven-ai-technology.html> accessed 3 July 2023.

structuring of documents further enabled the ability to search in prescribed fields, whether it was, for example, by case citation, act section number, or judge's name. This added another layer of precision.

Even in the 90s there was already so-called natural language searching, a type of AI. A question in plain English could be entered which would be parsed, and key terms matched with a legal thesaurus and semantically linked, could then be the basis of the search process.

In each of these examples there was an element of control exercised by the researcher with a degree of precision and the potential for further refinement. A researcher could adjust their input in response to outcomes with the confidence that specific adjustments would result in a predictable range of results. This ability to adjust the search parameters and narrow down a hit list was an essential step in traditional search strategies.

In this sort of searching, it was understood that a research string was an instruction to the database interface to retrieve the documents which corresponded with the command. However, the advent of AI research may represent a challenge to that inherent precision, or even hide the way the instructions are being interpreted.

The way this might occur can be illustrated by examining how Google searching has evolved over the last twenty-five years.

Google's initial success was based on its ability to respond to searches with results which best matched a user's objectives. This was due to a comprehensive indexing of the whole of the available Internet content, as well as the ranking of results on the basis of how many other websites pointed to them. This results hierarchy reflected a global intelligence of what the most trusted and useful webpages might be, and for the general user there appeared to be an uncanny ability to find what was required. The key here was a combination of genuine relevance, reliability and trust.

However now Google relies on RankBrain which is an algorithm which processes the search terms and syntax to predict a user's true intentions. The typical researcher is constructed based on RankBrain and results are targeted towards that idealised person rather than the person who may be undertaking the research.

It is too easy to forget that Google's business model used to be considered revolutionary in that it provided a range of valuable services at no cost to the user. However, we now realise that what we have exchanged for these benefits is data about ourselves. For Google, each search has value not only because of the data extracted, but also because each search represents a potential customer for one of Google's clients. Google is ruthlessly efficient at capturing its clients' markets. But what this means now is that for many of us searching Google can be a frustrating experience.

If Google's idea of the researcher's intention is constructed and not directly related to their actual intentions then that researcher may find it a challenge to find exactly what they want. The construction of an ideal user is based on what a majority of searchers may want, that is, coloured by the assumption that whoever is running a search is buying something, looking for a service or

wants celebrity gossip. But this is not going to be the intention of a unique, singular, novel researcher who may have a scholarly or academic motivation.
When we look at the differences between Boolean searching, the original Google search and the more commercial algorithm driven searching of Google today, it gives us a sense of the trajectory which leads to AI research.

The AI approach is analogous to the Google algorithm driven approach to except of course with a far greater level of sophistication. For example, Google has a vast database of facts which it calls *Knowledge Graph* which enables Google to instantly respond to questions such as 'how old is …' or 'how high is…' [insert your own preferred subjects here]. But as mentioned above, AI can go one step further and respond to questions in a grammatical, coherent and persuasive narrative form.

AI products, whether they are producing text or even images or music, have been described as examples of *prompt engineering*. The expression, prompt engineering, conveys the idea that while AI might be a black box, that is you can never be sure what processes are taking place to produce results, there is an onus on the user to develop the skills to achieve the required results. You need to be able to ask the right question. No doubt in the future, a marketable skill is going to be an ability to second guess an AI's processes to generate the most appropriate content.

This may be useful for advertising copy or graphic art but it may not be as useful for legal researchers. Copywriters and graphic artists may be seeking to persuade but they are not relying on establishing a hierarchy of authority as legal researchers must.
For legal researchers the issues with AI are going to be transparency, the searcher's lack of control and autonomy, the inability to verify the sources of reasoning, and the overall constraints in being able to invest total trust in the process.

As with any commercial enterprise AI has the advantage of saving time and labour costs. The pressure to use AI is going to increase.

There is a further issue in relation to activities being mediated by unknowable algorithms. The Google search algorithm in its current form, and AI research, can be seen as a type of intermediation between the researcher and the source. There is an element of irony here in that the Internet revolution was a process of disintermediation where customers could deal directly with wholesalers or manufacturers and bypass bricks and mortar. So-called Web 2.0, as another example, enabled content creators to correspond directly with their audience, with the freedom to produce and curate their own content.

However now it seems that new approaches to searching represent a re-intermediation which may constrain a researcher's autonomy in conveying instructions to a search engine. It may also mean that no matter how persuasive and convincing an AI response to a legal question might be, there may be persistent doubts regarding provenance and reliability.

If we consider search engines as inferencing machines, that is, we provide instructions in the form of a query and the list of results or the answer represents an inference where there is not a clear and transparent connection between the instruction and the outcome this brings us back to the initial discussion in this chapter.

Lawyers are not trained to think critically in regards to the connection between data and inferences which can be drawn from the data. This applies as much to conclusions based on a tenuous link to data collected in a survey and a hit list provided by a search engine operating an opaque algorithm.

Non-Doctrinal Research – Problems, Policy and Law Reform

Qualitative research under this heading can be divided into two general types; descriptive and evaluative. It is arguable that graduate research could never be purely descriptive but such research may contain a descriptive component. Undertaking this part or stage of a research project would often be in the form of a literature review and might even be doctrinal. In this regard it would rely on the guidelines specified in the first part of this chapter both in terms of researching the law as well as the relevant literature.

A consideration of whether the research is descriptive or evaluative, or a combination of the two, is useful from a researcher's perspective in first identifying what his or her objectives are. This in turn will determine the research questions and methodology adopted.

All good legal research should begin by identifying the specific goal or goals which the researcher wishes to achieve. The research then undertaken must follow some general rules. Fink specifies five requirements:

1. Specific research questions
2. Defined and justified sample
3. Valid data collection
4. Appropriate analytic methods
5. Interpretations based on the data.[38]

King and Epstein suggest four rules 'that are, regardless of whether the research is qualitative or quantitative, essential to reaching valid inferences: (1) identify the population of interest; (2) collect as much data as is feasible; (3) record the process by which data come to be observed; and (4) collect data in a manner that avoids selection bias.'[39]

With regard to these four rules, Chin et al recommend a process of pre-registration. We do not propose to consider this in detail or the merits but rather note its preeminence as a credibility indicator. At least from an Australian legal research perspective, however, it is unclear how and where pre-registration would be done. The other recommendations, especially as they relate to the ability to replicate research and the retention of data and materials are important and should be adopted.

The analysis that follows considers a number of selected pieces of qualitative legal research using Finks' five requirements. The research projects were selected to demonstrate adherence to Fink's requirements as well as strengths and weaknesses as they relate to these.

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[38] Fink, n. 25 above, 138.
[39] Epstein and King, n. 1 above, 99.

While there have been some additions, previous selected research has been retained, largely because of their continued ability to demonstrate good practice as well as shortcomings in terms of the general rules outlined above. In terms of more recent research, there is much to suggest improvement, particularly with regard to the adoption of social science methodology. Having said this, there remains room for improvement as well as ongoing deficiencies in terms of law reviews and journals. This was worryingly evident in the Australian context where Chin et al noted that, of the 11 Australian law journals considered, all scored 0 (zero) in terms of their transparency and openness policies.

Requirement 1: Specific research questions

The researcher should begin by identifying the specific research questions. In an article on the preventive detention of sex offenders in Australia, the authors begin by stating that their general objective is to "examine both the law and practice of preventive detention of those considered to be at high risk of reoffending in Australia."[40] The article is divided into two parts with five essential research questions being posed.

Part 1

- What are the laws and legal regimes governing preventive detention for sex offenders?
- What is the constitutionality of these regimes?
- How has the judiciary responded to them?

Part 2

- How do these regimes operate in practice?
- What are their strengths and weaknesses?[41]

This is clear and precise and the authors go on to note the methodologies for both parts. In this regard, Part 1 is both descriptive and doctrinal. Contrastingly, Part 2 is based on the analysis of "86 in-depth interviews with police officers, corrective services officials, social workers, lawyers, psychologists and psychiatrists experienced in the operation of the schemes in Queensland, Western Australia and New South Wales."[42] As stated, the research questions are clear and precise, allowing the authors to conclude that:

> "It is argued that while the legal parameters of preventive detention schemes may be settled, members of the judiciary have cautioned that they must be used sparingly and there is evident judicial reluctance to impose indefinite sentences. Most importantly, the views expressed by those implementing post-sentence preventive detention and supervision schemes reveal that there are serious concerns about their operation."[43]

[40] P. Keyzer and B. McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *University of New South Wales Law Journal* 792, at 793
[41] *Ibid*.
[42] *Ibid.*
[43] *Ibid.*

Contrastingly, the research questions in a paper on the persistence of 'rape myths' in the discourse of rape trials are less clear.[44] Arguably, the overriding question is whether such discourse demonstrates the continuation of such myths. Towards the end of the Introduction the researchers state that:

> "In particular, our analysis sought to identify the various ways in which contested meanings of 'sex', 'rape' and 'consent' are drawn upon and constructed at trial, in light of the communicative model of consent (see explanation below), and whether there have been any discernible shifts in these various discourses."

In addition, and this is not questioned here, the article presupposes the existence of such myths. While the quality of the research and the article is not in question, the lack of clearly articulated research questions is contrary to this first requirement.

Considerable care and thought is required in determining the specific research questions. Resource issues, such as funding and time, may limit the scope of these questions particularly in light of the appropriate methodologies required to answer such questions. In this regard, it is important to acknowledge that the research on preventive detention was externally funded by an Australian Research Council Grant and undertaken by two very senior and experienced law academics.[45] In terms of the article on rape trials, this was also undertaken by experienced academics, but would appear to have been unfunded. From a student and academic supervisor perspective, the first research example might therefore be beyond a research project at this level. The second piece of research, however, could well be an example of the type undertaken at the post-graduate level.

Requirement 2: Defined and justified sample

The rape trial research is also a good example of the selection of a defined and justified sample. In the article it is noted that 10 out of total population of 12 trials were selected.

> "The ten cases were identified from appellate reports throughout 2010 and 2011, after a search for all cases involving adult victim-complainants, where the judicial directions on consent or the accused's awareness of consent were at issue. This search identified a total of twelve eligible cases, although due to the confines of the pilot study and relevant judicial permissions, we obtained access to ten complete trial transcripts."[46]

Arguably, a larger sample could have been selected by increasing the time period but the limitation was justified due to the researchers' aim of considering the possible impact of reforms introduced in 2007.

In another discourse analysis project, however, the sampling is less clear. Once again, we make no comment on the effect of this on the research outcomes but simply note this lack of clarity as

[44] A. Powell, N. Henry, A Flynn and E. Henderson, 'Meanings of "Sex" and "Consent"' (2013) 22(2) *Griffith Law Review* 456
[45] Keyzer and McSherry above, 793
[46] Powell, Henry, Flynn and Henderson, above, 457

evinced in the published article. In her study of the characteristics of 'normalisation discourse' in the context of Aboriginal land tenure reform in the Northern territory, Howey states that her research is primarily based on a "qualitative analysis of the word 'normalise' as it appears in a number of texts between 2006 and 2010, comprising of parliamentary *Hansard* and other government sourced documents."[47] No questions are raised here with regard to methodology, rather that there is a lack of clarity as to the definition and justification of the sample.

Once again, however, the impact of resources must not be understated. In its study of Independent Children's Lawyers (ICL's) in Australia's family law system, for example, the Australian Institute of Family Studies (a federal government institute) undertook online surveys of 149 ICL's, 192 non-ICL legal practitioners, 113 non-legal family law professionals and 54 judicial officers.[48]

Returning to King and Epstein's four basic rules for legal research, it is accordingly worth noting the first; (1) identify the population of interest; and (2) collect as much data as is feasible.[49] In some cases, the collection of a large amount of data may not only be feasible but generally required. In her study of partly or wholly suspended sentences imposed by the Tasmania Supreme Court over the period from 2002-2004, Bartels analysed the court's Comments on Passing Sentence in 351 cases.[50]

At this point, it must be acknowledged that an inability to collect as much data as is feasible, and necessary, should call into question the undertaking of the actual research proposed. This does not mean that the research be abandoned altogether but that such inability should necessitate a review of the specific research questions posed and the consequent methodology. Attempting to draw conclusions where the research is deficient in terms of the data collected calls into question the very validity of any so-called findings.

But even this has certain provisos and should not be seen as excluding research which considers very small numbers. In their study of intimate partner femicide, Eriksson et al undertook 8 interviews with family members of femicide victims. What they note right from the beginning, however, is that "Given the small sample, the themes presented are illustrative only and caution must be exercised in interpreting or generalising the results[51]."

Requirements 3 and 4: Valid data collection and appropriate analytical method

The previous two discourse analysis studies provide an opportunity to compare and contrast the significance of these requirements. In the study on "rape myths" the researchers analysed the complete trial transcripts of 10 out of a possible total of 12 eligible cases. These trial transcripts

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[47] K. Howey, 'Normalising What? A Qualitative Analysis of Aboriginal Land Tenure Reform in the Northern Territory' (2014/15) 18(1) *Australian Indigenous Law Review* 4

[48] R. Carson, R Kaspiew, S Moore, J. Deblaquiere, J. De Maio and B. Horshall, 'The Role and Efficacy of Independent Children's Lawyers' (2014) No.94 *Family Matters* 58

[49] Epstein and King, n. 1 above, 99.

[50] L. Bartels, 'To Suspend or Not to Suspend: A Qualitative Analysis of Sentencing Decisions in the Supreme Court of Tasmania' (2009) 28(1) *University of Tasmania Law Review* 23

[51] Li Eriksson, Paul Mazerolle and Samara McPhedran, 'Giving voice to the silenced victims: A qualitative study of intimate partner femicide' *Trends and Issues in Criminal Justice*, Issue 645, at 1-13.

were then analysed "employing a discursive method whereby we critically examined micro-linguistic courtroom 'conversations' within discernible contexts of social interaction' or 'discourses'."[52] The focus was on the examination and cross examination of witnesses, as well as the accused if they gave evidence. The researchers went on to note that they had taken this well established methodology from both feminist and social science research as "a way of examining the 'meaning making' that occurs in both the form and function of the law and its application in legal proceedings."[53]

In the study of Aboriginal Land Tenure Reform, the researcher notes that the then Minister for Indigenous Affairs "summarized the tenure reforms as facilitating the 'normalisation' of Aboriginal communities and townships."[54] The methodology adopted was a qualitative analysis of the word 'normalise' as it appeared in Hansard and other government documents.[55] In comparison to the discourse analysis outlined above, however, the methodology adopted here is unclear. The researcher notes that:

> "I investigate whether, as a matter of textual interpretation, policy-makers were evincing an intention to 'normalise' Aboriginal communities premised upon a construction of Aboriginal people which is suggestive of the Northern Territory's colonial history and whether the characteristics of normalisation discourse shifted over time, and if so, how it shifted."[56]

A number of issues arise here. While the researcher considers the appropriate and relevant time period (in terms of the law reforms), there is limited information about and description of the actual data collection, the only prerequisite being that the term 'normalise' occurred in the text. In terms of the discourse analysis, the methodological details are quite general, the researcher stating that:

> "Within each text containing the word 'normalise', I focused on particular features of the term's use in order to determine its meaning. These features included the frequency of use, the author or speaker, the 'object' of normalisation (eg, land tenure, Aboriginal communities, Aboriginal people themselves), the stated objective of normalisation and how Aboriginal people and communities were portrayed, viewed and constructed within the text."[57]

More recent research, however, has seen the adoption of quite advanced social science methodologies. In 2022, for example Keyzer and Richardson reported on their legal history project on NSW disability services. They noted from the outset that historical research such as theirs was subject to bias in terms of the accounts of persons involved in the system. In order to counter this, they adopted a qualitative research technique known as nominal group technique as a method of countering confirmation bias. From a resource perspective, however, it should again be noted that the authors had won a tender to do the research from the NSW Government.

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[52] Powell, Henry, Flynn and Henderson, n. 42 above, 458
[53] Ibid
[54] Howey, above, 4
[55] Ibid
[56] Ibid, 5
[57] Ibid, 8

Requirement 5: Interpretations based on the data

According to King and Epstein, it was under this heading that they were most critical of the legal research they analysed.[58] Many conclusions, they argued, were simply not justified by the data collected and the methodologies utilised.

A comparison of the above two discourse studies demonstrates the point. In the rape trial research, a specific and tested discourse methodology was adopted and applied to almost 100% of rape trials in a specified period. The researchers, however, were still cautious in their conclusions.

> "The indications from our exploratory analysis of ten Victorian rape trials suggests that there may be some discernible shifts in the discourse on rape taking place since the introduction of the communicative model of consent. This model does appear to have enabled prosecutors, at least in a handful of cases, to shift focus to the accused person's awareness of consent, based on the steps that they took to ascertain that the victim-complainant was, or was not, consenting."[59]

While there was some detail as to the sample, the methodology used in the aboriginal land tenure study was unclear. In addition, there is a lack of detail as to how the methodology was applied other than to determine the frequency of the use of the term "normalise" or its variants. To this extent, questions arise as to the validity of the researcher's principal conclusions.

> "In concluding, I contend that changes in the key features of normalisation discourse identified above were reflected by a parallel shift in the legal structure of the reforms."[60]

While this conclusion may well be valid, it is difficult to justify it based on the research undertaken.

But even where caution is expressed, researchers continue to extrapolate or draw conclusions. This is most evident where the research or part of it involves interviews. In their study of mandatory helmet laws (MHSs) for bicyclists, Quilter and Hogg report on both quantitative and qualitative parts to their research. The qualitative part involved 27 interviews with most participants recruited by the authors via email. Eighteen of those interviewed were lawyers working in the area. To this extent, those interviewed could not be seen as representative of the wider community or more specifically lawyers working in the area. In terms of their findings, however, they noted the following.

> Our informants were not a representative population sample, and so their opinions do not provide any basis for concluding as to how the wider community regard MHLs. It is nonetheless noteworthy that lawyers and others with a good understanding of the operation[61] of MHLs did not regard them as an appropriate method of promoting road safety.

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[58] Epstein and King, n. 1 above.
[59] Powell, Henry, Flynn and Henderson, above, 476
[60] Howey, above, 19
[61] J. Quilter and R. Hogg, '[I]f it's a public health and safety thing…Why not just give the kids helmets?' Policing mandatory health laws in New South Wales, *UNSW Law Journal*, (2021) 44(2), 747-785.

Does this mean that all such research lacks credibility? This is a critical question given the extent to which it is a component of a significant amount of non-doctrinal legal research. The simple answer is no. But this is conditional on how findings are reported. Limitations in numbers must be acknowledged together with any inherent biases. In this regard, and using the mandatory helmet law study as an example, the best that can be said is that the findings represent the opinions and views of those interviewed and these cannot be attributed to a wider population.

With regard to all three studies mentioned under Requirement 5, however, none appear to have been funded. This lack of funding is a critical factor in terms of the research methodology adopted. This will necessarily limit, for example, the number of interviews that can be undertaken, their length and the degree of analysis. All researchers must be aware of the limitations placed on the type and scope of any project undertaken where there is little or no financial support. Findings need to reflect this with an emphasis on caution in terms of any conclusions reached. This will be of even greater significance where it is in the form of graduate legal research.

This can be compared to some of the funded research considered earlier. In the study of preventive detention, for example, the research was funded by an Australian Research Council Grant. The research questions were specifically stated, the sample, data collected and methodology sound. To this extent, one can have confidence in the conclusions reached. In terms of the outcomes of the interviews with those working in the various state schemes, the authors are still cautious in their conclusions.

> "For those working with such schemes, however, there is an acknowledgement that a number of practical issues need to be addressed to ensure a 'real' rather than perceived reduction in the risk of reoffending."

And then further down;

> "Care must be taken to ensure that in practice such schemes actually do protect the community through evidence-based treatment and rehabilitation of offenders. The concerns raised by those who work with these schemes should therefore be heeded."[62]

Such caution was also evinced in the conclusions of the Independent Children's Lawyer scheme. The researchers concluded that they "found that considerable value is placed on the ICL role." But, that while "the data suggest that the involvement of a competent ICL can contribute to better outcomes for children and young people, concerns were raised by all participant groups about ICL practitioner quality."[63]
Finally, the data collection and methodology employed in study of Tasmanian suspended sentences allowed the author to justifiably conclude that:

> "In my view, the analysis in this article demonstrates a need for judicial officers to more fully enunciate the relevant factors that make it appropriate to suspend a sentence and the evidence on which that decision is based."[64]

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[62] Keyzer and McSherry above, 822
[63] Carson, Kaspiew, Moore, Deblaquiere, De Maio and Horshall, above, 68
[64] Bartels, above, 62

Conclusion

Graduate law students have and continue to undertake a diverse range of research. Historically, this has been largely doctrinal, predominantly concerned with the analysis of legal principle and how it has been developed and applied.

Whether or not there has been a major change in direction in legal research is debatable. As noted earlier, however, Manderson and Mohr in their analysis of Australian law schools found that only 20 per cent of all doctoral research projects were doctrinal, 20 per cent were law reform, 17 per cent were 'theoretical', 17 per cent were interdisciplinary, with the remaining 26 per cent being international or comparative.[65]

Based on these findings it is evident that many graduate law students are undertaking quantitative or qualitative research or a combination of the two. This chapter is concerned with qualitative research. In the past, doctrinal or theoretical research has been seen as non-empirical simply because it does not use empirical method. In this sense it is neither quantitative nor qualitative. It is argued in this chapter, however, that doctrinal research is qualitative on the basis that such research is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation. In guiding the graduate student undertaking doctrinal research, we have argued that social science can be referred to so as to get a sense of the objectives of a research methodology. In this regard, the identification of relevant legislation, cases and secondary materials in law can be seen as analogous to a social science literature review. Hutchinson and Duncan also note that doctrinal research may also be historical and/or involve content analysis.[66]

Other legal research can be quite specifically defined as qualitative. We have categorised such research under three headings; problems, policy and law reform. There may well be others but we contend that these categories describe the majority of qualitative research undertaken. We also acknowledge that such research can be legal or sociolegal or a combination of the two.

The principal aim of this chapter was to assist the graduate law student, as well as his or her academic supervisor, as to how to best undertake qualitative legal research, that is doctrinal, theoretical, problem, policy and law reform research. The common factor across all these types of legal research is the need to carefully and specifically determine the research questions. In addition, the researcher must also consider any resource implications involved. This will not be a problem in terms of doctrinal research where the only real concern is time, but undertaking interviews or court observations, for example, will have major resource implications where the graduate student is working alone and has no or very limited financial support for the research project.

This will in turn impact on the methodology adopted. For doctrinal and theoretical research we have suggested a methodology along the lines of a social science literature review. For problem, policy and law reform research, there are a variety of methodologies which includes a literature

[65] Manderson and Mohr, above.
[66] Hutchinson and Duncan, above, 117-118.

review but also may involve interviews, questionnaires and observations. Social science and socio-legal methodological rules or guidelines are useful benchmarks. These include the need to define and justify the target population; collect valid data; use appropriate analytic methods; and base interpretations on the data.

In addition, the researcher should collect as much data as is feasible; record the process by which data is collected; and collect data in a manner that avoids bias. Chin et al recommend pre-registration of the research as an integral part of this process. At the time of writing, however, and from an Australian perspective, there is no clearly identifiable process for this to occur. In addition, and like King and Epstein, they make a number of recommendations for empirical legal researchers. King and Epstein go much further in terms of proscribing certain rules. Chin et al also discuss how law journals and reviews can support this. A number of randomly selected research projects in the form of published articles and reports were selected in order to demonstrate these rules, guidelines and recommendations. These examples have been grouped for comparative purposes. Where shortfalls have been identified it is not to suggest that the research is of no value. The shortfalls or criticisms are identified in order to alert the graduate student to them and by reference to other research suggest how such problems can be avoided.

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