Editorial

The Newcastle Law Review, the journal of Newcastle Law School, was first launched in 1995. Since that time an impressive series of articles and notes has been published, representing traditional categories of legal scholarship as well as interdisciplinary contributions. As the leading clinical law school in Australia, that focusses on clinical and interdisciplinary approaches to teaching, the research focus within Newcastle Law School is diverse although grouped within four main theme areas: international law; law and society; applied law and justice, and justice innovation.

As a very active research School, much of our research is underpinned by deep engagement within our local community and beyond. Newcastle Law School also aims to have an impact. In this regard, Newcastle Law School plays a pivotal role in promoting access to justice. This is achieved through engagement with local, state, national, and international communities; academic, as well as applied and evidence-based research focused on improving the capability and capacity of the justice system and minimising barriers to access; the promotion of clarity and fairness through public interest advocacy and test cases; and other clinical work performed by the University of Newcastle Legal Centre.

The reinvigoration of the *Newcastle Law Review* with a broader circulation is part of our commitment to contribute to dialogue and discussion by supporting from 2018 an open access approach. From this edition, the *Newcastle Law Review* will be available free of charge to a global readership with the format of online open-access resource. Our publication supports double blind peer reviewing and also has an editorial Board to oversee the operations and content of each issue.

It is also intended that *Newcastle Law Review* will reflect some of the significant outreach activities undertaken by Newcastle Law School. Whilst traditional academic events that include the Hon Michael Kirby Lecture and the Sir Ninian Stephen Lecture (now in its 26th year) continue, the Newcastle Law School also hosts a number of symposia, conferences, academic and professional seminars and higher degree by research focussed events. One commitment of Newcastle to research in 2017 was to host a 'Symposium on Evidence-based Law and Practice'. The feasibility of such an event was secured by external and internal grants that had been approved to support Newcastle researchers to investigate in the area of evidence-based law. However, the underlying reason for Newcastle to commit to research in this particular field is that we have seen the value of evidence-based approach to legal scholarship and evidence-based approaches to law and justice research underpins much of the research undertaken at Newcastle Law School.[1] This issue of *The Newcastle Law Review* focusses on evidence-based law and practice and shares the fruits of the Symposium with our readers.

The concept of evidence-based thinking arguably originates from the medical area where the term of 'evidence-based medicine' emerged and was developed. As David Sackett and others wrote in their article that 'The practice of evidence based medicine means integrating

[1] See https://www.newcastle.edu.au/about-uon/governance-and-leadership/faculties-and-schools/faculty-of-business-and-law/newcastle-law-school/school-research/areas-of-research-strength.

individual clinical expertise with the best available external clinical evidence from systematic research.' [2] The authors argued that even the most experienced clinicians needed external systematic research evidence to support them in making best decisions as to patient care. In other words, good medical service can only be achieved based on systematic research and scientific evidence, rather than on the experience of the clinicians alone.

More recently, the evidence-based approach has been transplanted by business academics to describe the movement in business area where people subject even their deeply-held assumptions to empirical evidence. In his paper, Professor Rachlinski raised an interesting example where in the USA, Wal-Mart stores sold turkey in July as sales data had shown that customers had the same desire for turkey meat in both summer and winter. This example sheds light on how these business operators began to question their belief that turkey would only be popular whilst customers in winter.[3] The Wal-Mart's decision to sell turkey in July is based on the prior collection of and analysis on its sales data, or 'evidence' from its empirical analysis of this data.

Apart from the application of evidence-based approach in business, the evidence-based movement has also been increasingly relevant in other areas of social sciences, including the political science area. Specifically, from the perspective of policy-making, evidence-based methodology has been endorsed and embraced by many countries, including Australia. In 2008, the then Australian Prime Minister Kevin Rudd noted, in his *Address to Heads of Agencies and Members of Senior Executive Service* [4], that one of the elements of Australian Government's vision for the future Australian public service would be 'developing evidence-based policy making processes as part of a robust culture of policy contestability'. He further emphasized the importance of the Government to 'receiv[ing] the best advice, based on the best available information and evidence.'

The notion of evidence-based policy clearly contributed to the formation of 2013 Report on 'Science for Policy: Mapping Australian Government Investments and Institutions Discussion'[5] where the effect of the evidence-based policy on public service reform was examined and explored. The efforts of the Australian Government, academia and business have in recent years further cemented the notion that an evidence base is critical in terms of the policy making process in Australia and how Government decisions about the public sector can be made. Interestingly, recent criticism on some of government policies further justifies the evidence-based factor in the policy making process.[6]

Law has also been influenced by the evidence-based movement sweeping almost each and every area in natural and social sciences, which can be inferred by the explosive growth in empirical legal work. Although arguably empirical legal scholarship is not the same as

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[2] See David L. Sackett et al, 'Evidence-Based Medicine: What It Is and What It Isn't' (1996) 312 *British Medical Journal* 71.
[3] See Jeffrey J. Rachlinski, 'Evidence-based law' (2011) 96 *Cornell Law Review* 903.
[4] <http://pmtranscripts.pmc.gov.au/release/transcript-15893>
[5] Paul Harris and Dr Kerrie Jackson, 'Science for Policy: Mapping Australian Government Investments and Institutions Discussion' (Report, The Australian National University, June 2013) <https://coombs-forum.crawford.anu.edu.au/public_policy_community/content/doc/APS200-Science-for-Policy-mapping-report.pdf?0>.
[6] See Richard Denniss, 'The Notion of Evidence-Based Policy in Australia is Dead', *Australian Financial Review* (online) 13 December 2016 <https://www.afr.com/opinion/columnists/listening-to-your-own-great-advice-20161212-gt94c2>.

evidence-based law,[7] the former enables relevant data collection and analysis processes that constitute the foundation of the latter. In this respect, there are two major advantages for law academics to actively participate in empirical research. The first is linked to the evolving and more accessible technology which facilitates academics in terms of access to data, making the foundational evidence-based work possible. The second is the increasing interdisciplinary collaborative opportunities among academics from different backgrounds, exposing law scholars to a more empirically-friendly research environment.[8]

The importance of empiricism in legal research cannot be overlooked and much has been written about the virtues of evidence-based law. [9] However, the real value of such empirical work lies more in its application rather than a focus at the level of academic discussion and exchange. To some extent, this difference distinguishes empiricism in law from evidence-based law. As pointed out by Prof. Rachlinski, 'the point is to create better law – law informed by reality'.[10]

The need to integrate more evidence in terms of law reform has been widely recognised by countries such as Australia. For example, the Australian Legal Reform Commission (ALRC) commented in the Managing Justice report[11] that:

> '[The] depreciation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption. This can include both untested and unfounded criticism of some current practices, procedures and institutions, as well as uncritical acceptance of alternatives.'

The ALRC has also noted that 'law reform recommendations … need to be anchored in an appropriate evidence base'. [12] Nevertheless, it is clear that the legal sector lags behind other disciplines in terms of the evidence-based movement and more work is required to meet this gap. A number of factors are responsible for the 'law lag.' In addition the law lag does not necessarily apply evenly across the justice sector. In the criminal area for example, a range of bodies continue to inform policy and funding.[13] In the family law area, there may also be a greater focus on evidence based approaches and more reliance on empirical evidence.[14] In the civil justice area however, despite some federal focus on this area[15], it remains relatively uncommon for evidence based work to underpin academic work which may focus more on doctrinal developments.

First, the nature of law making itself may present an inherent obstacle to evidence-based law. This is partly because legislation is closely related to and influenced by the political process. This nature of law means that for legislators, during both the law making and reform

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[7] Rachlinski, above n 3, 910.
[8] See generally Felicity Bell, 'Empirical Research in Law' (2016) 25 *Griffith Law Review* 262.
[9] See Ann Seidman and Robert B. Seidman, 'ILTAM: Drafting Evidence-based Legislation for Democratic Social Change' (2009) *Boston University Law Review* 448.
[10] Rachlinski, above n 7.
[11] Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115 (2011) < https://www.alrc.gov.au/publications/1-introduction-inquiry/evidence-based-reform>.
[12] Ibid.
[13] See, eg, in New South Wales the Bureau of Crime Statistics and Research <http://www.bocsar.nsw.gov.au/>.
[14] See, eg, The Australian Institute of Family Studies <https://aifs.gov.au/>
[15] See, eg, The Commonwealth Attorney General material on building and evidence base in relation to the civil justice system available at <https://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx>

processes, not only the benefits and adverse consequences of legislation suggested by the scientific research will be considered, as political gains will often be taken into account. As Antokolskaia notes, evidence-based legislation is developed when 'the legislator in [their] choices for legislative interventions take[s] a rational and focused approach and does not let [themselves] be guided by JUST political and ideological reasoning, but also by relevant results of scientific inquiry assessing the effectiveness of those interventions.' [16] It is therefore somewhat difficult to assess how much evidence the legislator would take into account and echoes Professor Rachlinski's concerns about the prospect of empirically informed legal policy.[17]

Second, methodological concerns about poorly designed empirical research can undermine the value of evidence-based law. Empirical legal research, based on data collection and analysis, can involve surveys and interviews as well as interrogation of existing data sets. Issues can arise in the context of the design of appropriate methodologies in part because legal academics often have little training in terms of empirical methodologies. This can cause issues in terms of the capacity of legal researchers to interrogate data, or to design survey and interview questions in order to gain useful and reliable evidence. Poorly planned research, may trigger the question of 'how evidence-based is this evidence-based research?'

Unlike the concerns expressed above about the nature of law and policy changes, this methodological issue could be addressed (at least to some extent) by providing more training to legal scholars and helping them develop skills in empirical research. [18] In addition, recognising and learning research methods adopted by colleagues in areas other than law, such as psychology and social science, is a feasible way for legal academics to facilitate their own empirical research and expand their contribution to evidence-based law. To some extent, this special issue of *The Newcastle Law Review* to include a couple of articles focusing on methodologies and we hope that our readers will benefit from this part of our peer-reviewed collection.

Arrangements to gather evidence in law can also be complex. Issues relating to confidentiality, consent and to some extent culture can impact on attempts by researchers to explore data and to undertake and extend research. For example, an inquiry about legal costs, might rely upon lawyers sharing their data about their costs. Such an undertaking would be dependent on lawyers being engaged in such research and to some extent being satisfied that such material would be kept confidential. More developed studies in the same area might require consideration of court data which may raise issues relating to stretched court budgets as well as interest in terms of research objectives. There may also be restrictions in terms of comparative research. This is particularly the case when research may be conducted in a foreign country and where the government has restrict regulations in place on research projects conducted by overseas researchers. [19]

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[16] See Rob van Gestel and Jurgen de Poorter, 'Putting Evidence-Based Law Making to the Test: Judicial Review of Legislative Rationality' (2016) 4(2) *The Theory and Practice of Legislation* 156.
[17] Rachlinski, above n 3, 922.
[18] Bell, above n 8, 268.
[19] See Mohamed Abdel Salam, *Foreign Researchers in Egypt are being Harassed* (15 April 2016) Al-Fanar Media <https://www.al-fanarmedia.org/2016/04/suspects-the-security-harassment-of-foreign-researchers-in-egypt>

This *Newcastle Law Review* issue is comprised of a combination of articles arising from the 'Symposium on Evidence Based Law and Practice' held by Newcastle Law School in May 2017. This one-day workshop attracted more than 50 participants who shared their latest research on evidence-based law and practice and generated some valuable interdisciplinary discussions on evidence-based approach among academics from law and other fields, including social workers. The issue includes six articles and one research note all with a focus on how evidence-based methods have been utilised by the academics and the practitioners in their research and practice, including family and children protection issues, reform on jury's decision-making process, cyber security and open data policy and mediation.

We thank all the authors for their interest in contributing to and publishing with *The Newcastle Law Review*. Primarily though, we would like to show our great appreciation to The Hon Justice Margaret J. Beazley AO as we are very fortunate to have the permission to include Her Honour's paper titled 'Language: Law's Essential Tool'. This article was further developed by Her Honour on her speech at the 25th Sir Ninian Stephen Lecture at Newcastle in 2017. As law academics, we appreciate the vital importance of considering the language of law in terms of evidence-based approaches and Her Honour's article assists to explain how the language has impacted the law, including evidence-based law. We also would like to thank all the colleagues who contributed to this issue.

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