Bond Law Review

Volume 27 | Issue 1 Article 4

2015

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Keywords
citation, analysis, scholarly, publications, literature, context

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KIERAN TRANTER* AND RODNEY MEYER**

Abstract

This article reports on a study into how the Queensland Law Reform Commission ('QLRC') cites journal articles. It found that journal articles had a limited presence within QLRC reports, suggesting that the QLRC does not engage significantly with academic literature in its approach to law reform. This raises issues both for law reform and the Australian legal academy. For law reform there is the issue of whether the QLRC should engage more deeply with material from journal articles. For the Australian legal academy there is the issue of whether it should be researching and writing about matters of importance to reforming Australian law.

I Introduction

This article reports on a study into the extent to which the Queensland Law Reform Commission ('QLRC') cites from journal articles in its reports. It was found that, at best, 2.8 per cent of citations in the final reports between December 2001 and December 2011 were to journal articles. Further, when journal articles were cited, the citing tended to be piecemeal and specific, indicating that academic literature has played a limited role in how the QLRC approaches its task of law reform. This limited role raises two issues. The first is whether the QLRC should engage more deeply with material from journal articles when it undertakes law reform. The second is whether the legal academy has produced research that is relevant to the task asked of institutional law reform.

This article is in three substantive parts. The first Part (II) provides the background for the study, introducing the QLRC and the method of analysis. The second Part (III) presents the findings of the study. The third Part (IV) discusses the findings in the context of the literature on institutional law reform. It is suggested that while the QLRC's rhetoric and practice affirms a community consultation approach to law reform, there does not seem to be a high number of citations to submissions from the community in the sample of reports examined in the study. While the QLRC has limited resources — and this could be an explanation for the low citation rate to journal articles — enhanced access to academic literature through digital media and the capacity to appoint experts from

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beyond the judiciary and professional legal practice suggests that the QLRC could exhibit greater sophistication in using journal articles. This raises a significant secondary question: does relevant and appropriate research exist that may be used for this purpose?

II Background: The Queensland Law Reform Commission and Citation Analysis

This Part provides the background for the study. It provides an overview of the QLRC and then introduces the method of citation analysis through a discussion of similar previous studies.

The QLRC is an independent statutory body established by the *Law Reform Commission Act 1968* (Qld) ('LRCA'). Like the law reform commissions established in other Australian states around the same time, the Act and the functions of the QLRC are based on the *Law Reform Commission Act 1965* (UK).[1] The functions of the QLRC are to:

> …take and keep under review all the law applicable to the State with a view to its systematic development and reform, including in particular —
>
> (a) the codification of such law; and
>
> (b) the elimination of anomalies; and
>
> (c) the repeal of obsolete and unnecessary enactments; and
>
> (d) the reduction of the number of separate enactments; and
>
> (e) generally the simplification and modernisation of the law.[2]

For the purposes of carrying out its functions, the QLRC is required to receive and consider any proposal for reform at the request of the Attorney-General.[3] In doing so, the QLRC is required to make a report on its inquiry including providing recommendations for reform.[4] These reports are required to be tabled in Parliament. [5]

The *LRCA* does not specify how the QLRC is to conduct inquires in response to an Attorney-General's reference.[6] Under s 10(3) the QLRC can 'hold and conduct such inquiries as it thinks fit, and inform itself on

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1 Willam Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986), 151; K C T Sutton, *The Pattern of Law Reform in Australia* (University of Queensland Press, 1970); Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 3–18.

2 *Law Reform Commission Act 1968* (Qld) s 10 (1).

3 Ibid s 10 (2) (a).

4 Ibid s 15 (2).

5 Ibid s 15 (2).

6 For a discussion of the different statutory directions of the New Zealand Law Reform Commission and the then Law Commission of Canada, see: Angela Melville, 'Conducting Law Reform Research: A Comparative Perspective' (2007) 28 *Zeitschrift für Rechtssoziologie* 153, cited in Kieran Tranter 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992–2012' (2015) 38(1) *University of New South Wales Law Journal* 323, 326.

any matter in such manner as it thinks fit.'[7] Further, where 'it thinks fit' the QLRC may publish and circulate 'working and discussion papers.'[8]

This presents an obvious question: how does the QLRC approach its function of recommending law reform? The QLRC website and annual reports do not directly answer this question.[9] However, Angela Melville has answered this question in the context of other law reform commissions. Instead of relying on statements by law reform commissions as to their approaches, Melville worked through final reports to identify how various commissions approached law reform. She undertook a comparative analysis of a report from the New Zealand Law Reform Commission and the then Law Commission of Canada.[10] She found that the New Zealand Law Reform Commission report, notwithstanding rhetoric from the Commission about community consultation, did not in the text of the final report discuss or put much weight on information derived from the community.'[11] This was different to the Law Commission of Canada's report, which demonstrated that Commission's commitment to community consultation through detailed inclusion of 'views other than just legal perspectives.'[12] A weakness in Melville's study was that the method through which she analysed the two reports was not evident.[13]

Kieran Tranter has recently suggested that the more structured and empirical method of citation analysis could be used to analyse law reform commission final reports as a way of determining the underlying approach to law reform.[14] He suggests that this could provide a more structured framework to the process that Melville undertook.[15] This article responds to this suggestion. However, before the findings can be reported more detail about citation analysis is required.

Citation analysis involves counting and cataloguing the citations found in a text to determine the types of sources referenced and then analysing those sources in respect of class, frequency, local holdings, or

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7 *Law Reform Commission Act 1968* (Qld) s 10 (3).

8 *Law Reform Commission Act 1968* (Qld) s 10 (5).

9 Queensland Law Reform Commission, *About Us* (21 December 2014) Queensland Government < http://www.qlrc.qld.gov.au/about-us>. The website notes the output of the QLRC in terms of reports and ongoing inquiries but it does not describe how the QLRC undertakes law reform. Similarly, the recent annual reports do not expressly document the QLRCs process of law reform. See Queensland Law Reform Commission, *Annual Report* (2012–2013), 12–20 <http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0019/372052/ar 2013.pdf>. This is different to the Australian Law Reform Commission which provides descriptions of its approach to law reform on its website and in its annual reports. See, Australian Law Reform Commission, *Law Reform Process* (10 December 2014) Australian Government <http://www.alrc.gov.au/law-reform-process>; Australian Law Reform Commission, *Annual Report*, Report No 125 (2013–2014) 112–116 < https://www.alrc.gov. au/sites/default/files/pdfs/publications/annual_report_2014.pdf>.

10 Melville, above n 6.

11 Ibid 161.

12 Ibid.

13 Ibid 156.

14 Kieran Tranter, 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992–2012' (2015) 38(1) *University of New South Wales Law Journal* 316, 326–7.

15 Ibid 327.

other factors.[16] Citation analysis is also concerned with the relationship between the cited and citing document such as the various reasons why authors reference the work of another.[17]

Citation analysis studies in the United States and Canada have focused on the citation practices of supreme and appellate courts.[18] For instance, Wes Daniels sought to determine how the secondary source citation practices of the United States Supreme Court has developed over the twentieth century, and whether any trends were discernible in the relative use of legal periodicals as authority.[19] He found that between 1940 and 1978 citations to legal periodicals increased 980 per cent with the *Harvard Law Review* and *Yale Law Journal* the most frequently cited journals.[20]

Although Australian research in this area is less extensive, the citation practice for state supreme courts has been substantially covered by Russel Smyth.[21] Of particular relevance in an Australian context was Smyth's

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16 Kristin Hoffmann and Lise Doucette 'A Review of Citation Analysis Methodologies for Collection Management' (2012) 73 *College & Research Libraries* 321.

17 Linda C Smith, 'Citation Analysis' (1981) 30 *Library Trends* 83, 84.

18 See for example John Henry Merryman, 'The Authority of Authority: What the California Supreme Court Cited in 1950' (1954) 6 *Stanford Law Review* 613; Neil Bernstein 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Georgetown Law Journal* 55; John Henry Merryman, 'Towards a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970' (1978) 50 *Southern California Law Review* 381; Richard Mann, 'The North Carolina Supreme Court 1977: A Statistical Analysis' (1979) 15 *Wake Forest Law Review* 39; Wes Daniels, Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Decisions, October Terms 1900, 1948 and 1978' (1983) 76 *Law Library Journal* 1; James Acker, 'Social Science in Supreme Court Death Penalty Cases: Citation Practices and their Implications' (1991) 8 *Justice Quarterly* 421; Peter McCormick, 'Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices ' (1993) 24 *Manitoba Law Journal* 286; Peter McCormick, 'Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences' (2002) 81 *Canadian Bar Review* 369.

19 Daniels, above n 18, 3.

20 Ibid 15.

21 Russell Smyth, 'Other than "Accepted Sources of Law"?: A Qualitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court' (1999) 17 *University of Tasmania Law Review* 164; Russell Smyth, 'What Do Judges Cite? An Empirical Study of the 'Authority of Authority' in the Supreme Court of Victoria' (1999) 25 *Monash University Law Review* 29; Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51; Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7; Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25; Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 *University of Western Australia Law Review* 1; Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6 *Deakin Law Review* 120; Russell Smyth, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2 *Queensland University of Technology Law and Justice Journal* 198; Dietrich Fausten, Ingrid Nielsen and Russell Smyth, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 *Melbourne University Law Review* 733; Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26 *University of Tasmania Law Review* 34; Dietrich Fausten and Russell Smyth, 'Coordinate Citations Between Australian State Supreme Courts Over the 20th Century' (2008) 34(1) *Monash University Law Review* 53;

study of the citation practices of the Supreme Court of Queensland. Smyth recorded all the citations to case law and secondary sources within decisions reported in the *Queensland Reports* at decade intervals between 1905 and 2005. He found that in 1905 the Court cited 2.8 sources per case, with this increasing to 16.2 sources per case (480 per cent) in 2005.[22] Although citations to secondary sources represented less than 5 per cent of total citations, in more than 80 per cent of cases after 1945 citations to secondary sources were to legal secondary sources such as books and journal articles.[23] Consistent with Smyth's previous studies approximately 75 per cent of citations to legal secondary sources were to textbooks.[24]

Citation analysis has also been applied to samples of Australian law journals to determine which authors, articles and journals were being highly cited.[25] However, Tranter's citation analysis of a sample of Australian Law Reform Commission (ALRC) final reports is of greater relevance to this article.[26] Tranter identified that the ALRC cited 120 310 sources in its reports comprising submissions (46 per cent), cases or legislation (25 per cent), material produced by government (14 per cent) and books and journals (6 per cent).[27] He concluded that the high citation of submissions is evidence that substantiates the ALRC's claim that it undertakes law reform through a community consultative approach.[28]

There are a number of limitations and assumptions that exist in relation to citation analysis. The bare recording of a cited source tells little about the context of the citing. Authors' often cite to bolster a point

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Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31 *University of New South Wales Law Journal* 189; Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34 *University of Western Australia Law Review* 145; Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29 *Adelaide Law Review* 113; Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland Over the Course of the Twentieth Century' (2009) 28 *University of Queensland Law Journal* 39; Russell Smyth, 'Citing Outside the Law Reports: Citations of Secondary Authorities on the Australian Supreme Courts over the Twentieth Century' (2009) 18 *Griffith Law Review* 692.

22 Smyth, above n 21, Trends in the Citation Practice of the Supreme Court of Queensland', 53.

23 Ibid 59.

24 Ibid.

25 Ian Ramsay and G P Stapledon, 'A Citation Analysis of Australia Law Journals' (1997) 21 *Melbourne University Law Review* 676; Tania Voon and Andrew D Mitchell, 'Professors, Footnotes and the Internet: A Critical Examination of Australian Law Reviews' (1998) 9 *Legal Education Review* 1; Russell Smyth, 'Who Publishes in Australia's Top Law Journals?' (2012) 35 *University of New South Wales Law Journal* 201.

26 Tranter, above n 14.

27 Ibid 337. Nine per cent were to newspapers, material produced by NGOs and other unclassified sources.

28 Ibid 345. On the Australian Law Reform Commission's community consultative approach, see: Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 56–61; Brian Opeskin, 'Engaging the Public — Community Participation in the Genetic Information Inquiry' (2002) 80 *Reform* 53; David Weisbrot, 'The Future of Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 18–39, 32.

or to show a range of opinions or they cite sources that they disagree with.[29] Another limitation is that not all sources that have influenced an author are cited. Notwithstanding these concerns, citation analysis has value in that authors make clear decisions to cite a source to enhance the authority of their text,[30] and this does allow researchers to derive some metrics about which sources are being cited and in what quantity, and to identify citation trends.[31] The empirical data generated by citation analysis tells a story about the type and quantity of sources cited. It does not go further and provide more nuanced data about how an author utilises a specific source. Questions of *impact* of a source within a document can only be gleaned by closer reading of the document and the text associated with a specific citation to determine how the author utilised the source.

This study draws upon citation analysis as it has been applied to law reform commission reports but with two differences. First, while Tranter undertook a full citation analysis of the ALRC reports, counting and cataloguing every source in every citation[32], this study focused on identifying and extracting the QLRC's engagement with journal articles. Journal articles were the focus because of the perceived quality of journal articles. Journals are generally considered as having gone through the highest form of academic scrutiny. The process of peer-review means that an article has a degree of verification that is not necessarily present in other academic forums such as books and new media. While books from certain publishers have high prestige, often secured by an extensive process of peer reviewing of proposals and manuscripts, articles in journals tend to provide a baseline indication of quality and reliability. Having identified the sample of QLRC final reports, each report was analysed to disclose (a) the total number of citations in the report; and (b) the citation details of any cited journal article. There was no discrimination concerning discipline. Citations to what might be seen as 'law' journals and 'non-law' journals were both counted. There was also no discrimination concerning the perceived quality of the journal. All citations to journal articles were counted; this included journals that were not double-blind peer-reviewed, such as professional association journals like the journals produced by the state law societies in Australia. While these journals are not double-blind peer-reviewed they nearly always undergo some form of peer review.

The second difference from Tranter's citation analysis of ALRC annual reports was that this study had a further qualitative stage. Having identified the cited journal articles this study then focused on the top-eight-ranked journal articles. The passage of text where the reference was cited was examined to determine how the QLRC utilised that source. This more qualitative approach allowed the study to make findings more

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29 Becky Batagol and Melissa Castan, 'Did You Know....Citations, Sources and References' (2012) 37 *Alternative Law Journal* 50.

30 Merryman, above n 18, 413.

31 Hoffman and Doucette, above n 16, 321.

32 Tranter, above n 14, 335.

directly about the impact of the cited academic literature. Both the quantitative and qualitative findings of the study are set out in the next Part.

III Findings: Use of Academic Literature in QLRC Final Reports 2001–2011

This Part sets out the findings. The citation analysis identified that, at best, 2.8 per cent of references in the sample were to journal articles. In doing so it provides ranks of the most cited journals and the most cited articles by the QLRC. This Part also reports on the qualitative analysis concerning the impact of the top-eight-ranked articles to suggest that when the QLRC cited from a journal articles it did so in a manner that was piecemeal and specific. The overall impression from the data is that journal articles have had a limited role in the QLRC's approach to law reform.

Over the study period the QLRC published a total of 14 reports which formed the sample for the study. For each report, a figure for total citations, as well as a figure for the number of citations to journal articles was extracted. Table 1 shows the total number of citations and journal article citations per report. This table includes basic metrics about the reports such as page length and number of recommendations.

Table 1: Reports published by the Queensland Law Reform Commission 2001–2011

Title	Year	Report No	Pages[33]	Recommend-ations	Citations	Journal Citations
Vicarious Liability	2001	56	155	21	570	24
Damages in an Action for Wrongful Death	2003	57	125	10	592	2
Supplementary Report on Family Provision	2003	58	141	22	464	1
The Abrogation of the Privilege Against Self-incrimination	2004	59	166	18	514	48
A Review of the Uniform Evidence Acts	2005	60	356	0	1996	34
Wills: the Anti-lapse Rule	2006	61	18	1	54	0

[33] The number of pages per report includes appendices and draft legislation. Although these sections may be considered as part of the substantive content contained in reports, they often do not contain references.

Title	Year	Report No	Pages[34]	Recommend-ations	Citations	Journal Citations
Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System	2007	62	532	82	4611	87
A Review of the Peace and Good Behaviour Act 1982	2007	63	698	225	3021	8
A Review of the Excuse of Accident and the Defence of Provocation	2008	64	542	16	1800	144
Administration of Estates of Deceased Persons	2009	65	1779	311	7745	42
A Review of Jury Directions	2009	66	747	30	2476	193
A Review of Queensland's Guardianship Laws	2010	67	1890	317	6118	223
A Review of Jury Selection	2011	68	495	88	2015	99
A Review of the Law in Relation to the Final Disposal of a Dead Body	2011	69	354	53	1064	22
		14	**7798**	**1194**	**33 040**	**927**

As Table 1 indicates, within the sample the QLRC provided 33 040 citations, of which only 927 (2.8 per cent) were to journals articles. On average, the number of citations per report is 2 360, with an average of 66 citations to journal articles per report. One caveat is needed when looking at this data. There is a slight skew in the figures based on the differences between how the overall citations were counted and how journal articles were identified. For the overall citation the number of references was counted. If a reference cited several sources it was counted as one. As a general feature of its reports, the QLRC rarely referenced more than one source in a single citation. However, given the study's focus on journal articles, on the few occasions that the QLRC referenced more than one journal articles in a single citation, all were identified and recorded. This means that the figure of 2.8 per cent is a slight over estimate; the actual

[34] The number of pages per report includes appendices and draft legislation. Although these sections may be considered as part of the substantive content contained in reports, they often do not contain references.

figure of all citations to journal articles would be lower, based on the differences in how overall citations and journal articles were counted.

Table 2 shows the top-eight-ranked law journals cited by the QLRC in the sample. Allowing for ties, the top eight journals comprised ten journals. The *Journal of Law and Medicine*, *Australian Law Journal*, and *Journal of Judicial Administration* were the most cited journals. A second feature of Table 2 is that the top six ranked journals are Australian based. A third feature of Table 2 is that the top-eight-ranked journals were responsible for 38 per cent of all journal article citations.

Table 2: Top eight law journals cited by the Queensland Law Reform Commission 2001–2011

Rank	Count	Periodical Cited	Origin
1	50	*Journal of Law and Medicine*	Australia
2	46	*Australian Law Journal*	Australia
3	43	*Journal of Judicial Administration*	Australia
4	33	*Psychiatry, Psychology and Law*	Australia
5	32	*Criminal Law Journal*	Australia
Rank	**Count**	**Periodical Cited**	Origin
5	32	*Current Issues in Criminal Justice*	Australia
6	31	*Australian Bar Review*	Australia
6	31	*Australian Institute of Criminology Research and Public Policy Series*	Australia
7	29	*American University Journal of Gender, Social Policy and the Law*	USA
8	26	*The Modern Law Review*	UK
	353		

Table 3 shows the top-eight-ranked journal articles cited by the QLRC in the sample. Allowing for ties, the top eight comprised eleven articles. The top-three-ranked articles, which account for 39.3 per cent of all academic citations, were: Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality';[35] Jane Goodman-Delahunty et al, 'Practices, Policies and Procedures that Influence Juror Satisfaction in Australia';[36] and, Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia.'[37]

[35] (2006) 18 *Current Issues in Criminal Justice* 1.
[36] Report No 87 (July 2007).
[37] (2006) 14 *American University Journal of Gender, Social Policy and the Law* 1.

Table 3: Top eight journal articles cited by the Queensland Law Reform Commission 2001–2011

Rank	Count	Author	Title and Citation Details	Author's Institutional Affiliation
1	32	Graeme Coss	'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18 *Current Issues in Criminal Justice* 1	University of Sydney
2	31	Jane Goodman-Delahunty et al	Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (2008) 87 *Australian Institute of Criminology Research and Public Policy Series*	Australian Institute of Criminology
1	32	Graeme Coss	'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18 *Current Issues in Criminal Justice* 1	University of Sydney
2	31	Jane Goodman-Delahunty et al	Practices, Policies and Procedures that Influence Juror Satisfaction in Australia, (2008) 87 *Australian Institute of Criminology Research and Public Policy Series*	Australian Institute of Criminology
3	29	Caroline Forell	'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Social Policy and the Law* 1	University of Oregon

Rank	Count	Author	Title and Citation Details	Author's Institutional Affiliation
4	20	Michelle Howard	'Principles for Substituted Decision-Making about Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6 *Queensland University of Technology Law and Justice Journal* 2	Queensland University of Technology
5	18	Anne-Louise McCawley et al	'Access to Assets: Older People with Impaired Capacity and Financial Abuse' (2006) 8 *Journal of Adult Protection* 1	The University of Queensland
5	18	John Blackwood	'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122	University of Tasmania
6	17	Kevin Dawkins	'Defence Disclosure in Criminal Cases' (2001) *New Zealand Law Review* 35	University of Otago
7	15	Michael J Allen	'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 *Journal of Criminal Law* 216	Newcastle Law School
7	15	Jacqui Horan and David Tait	Do Juries Adequately Represent The Community? A Case Study of Civil Juries in Victoria, (2007) 16 *Journal of Judicial Administration* 3	The University of Melbourne
8	13	Hazel Genn	'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 3	University of London
8	13	Geoff Flatman and Mirko Bagaric	'Accused Disclosure — Measured Response or Abrogation of the Presumption of Innocence?' (1999) 23 *Criminal Law Journal* 327	Deakin University

There are several features of Table 3 that are worth noting. First, there is a high correlation between the most cited articles and most cited journals. Seven of the eleven articles appeared in the top-eight-ranked journals. This reflects the small number of citations to journals by the QLRC in that repeat citation of a single article seems to be the primary factor in a journal being highly ranked. It seems to indicate that the QLRC is not reading and citing from a particular set of journals, but rather using individual articles based on relevance and not source. Second, Table 3 demonstrates that seven of the ten most cited works are authored by authors associated with Australian universities or institutes, with only three authors affiliated to universities in the United States, New Zealand and the United Kingdom. It seems that when the QLRC does have recourse to academic literature, they show a preference for Australian researchers publishing in Australian based journals. Third, Table 3 shows that the only Australian non-specialist, university affiliated law journal utilised by the QLRC was the *Queensland University of Technology Law and Justice Journal*.

Moving beyond the results of the citation analysis, Table 4 in the Appendix sets out the qualitative analysis of how the QLRC used the top-eight-ranked articles. This involved categorising how the QLRC cited the article. This process adhered to a content analysis method of identifying and then categorising according to how articles were being used by the QLRC.[38] There were six categories. The most basic categories were the 'point of law' and 'empirical evidence' categories. These categories identified references made by the QLRC in support of a discrete point, being either a statement of the law or a fact or finding from an empirical study reported by the article. For example, in *A Review of Jury Selection* the QLRC repeatedly cited the findings from Goodman-Delahunty et al's 2007 study of jury composition in New South Wales, Victoria and South Australia.[39] The next category was 'argument'. This category identified when the QLRC cited a criticism, comment, argument or conclusion made in an article. For example, in volume one of *A Review Queensland's Guardianship Laws*, the QLRC cited Michelle Howard's criticisms that the legislation is uncertain as to 'whose perspective the adult's best interests should be assessed: the adult's, the health provider's or the decision-maker's.'[40] A feature of all three of these categories was that they related to a specific pinpoint — a single citation to a specific identifiable piece of information.

The remaining categories were more detailed, often cited repeatedly across several pages in the report. These categories evidenced the QLRC engaging more thoroughly with a specific article. The category 'legal or

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38 For an overview of this approach, see: Kieran Tranter, 'Biotechnology, Media and Law-making: Lessons from the Cloning and Stem Cell Controversy in Australia 1997–2002' (2010) 2 *Law, Innovation and Technology* 51, 55.

39 Queensland Law Reform Commission, *A Review of Jury Selection,* Report No 68 (2011) 49–51.

40 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) 187.

academic commentary' captured when the QLRC was using the article as authority for a commentary on an area of law or as a literature review of previously published research. A feature in the reports where this occurred was that the author of the article would be mentioned in the body of the text. The article was not just providing specific information, like the point of law, empirical evidence or argument categories, but was being represented, often across many paragraphs and pages, as an authority on the law, the non-legal literature, or both. An example was in *A Review of the Excuse of Accident and the Defence of Provocation* (2008), where Forell's article was cited extensively for the state of the law and academic commentary on provocation in the United States.[41] The final category was 'recommendation'. This category recognised when the QLRC cited the source in the formulation of its recommendations. This only occurred once for the top-eight-ranked articles and was a reference to the argument in Coss' article that ordinary people do not kill when provoked, in *A Review of the Excuse of Accident and the Defence of Provocation*.[42]

Table 4 shows how the QLRC has used academic literature ranging from citing specific points to detailed engagement. Table 4 shows why the articles written by Coss, Goodman-Delahunty et al and Forell were the top-three-ranked. Coss and Forell were highly ranked because in *A Review of the Excuse of Accident and the Defence of Provocation* the QLRC engaged deeply with the analysis and arguments presented in those articles.[43] Goodman-Delahunty and colleagues was highly ranked because it provided a substantial amount of baseline empirical and demographic evidence about juries in Australia that the QLRC used in *A Review of Jury Selection*.[44] Table 4 shows the impact of the identified articles. However, what needs to be remembered when considering Table 4 is that it is not representative of the entire sample. Detailed engagement with specific articles was limited to the five reports in Table 4. In the other nine reports a much more limited and scattered engagement was evident. For example, *A Review of the Peace and Good Behaviour Act 1982* cited only eight journal articles in its entirety.[45] The QLRC cited articles for two points of law,[46] an argument that non-enforcement of orders is

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41 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) 338–41.

42 Ibid 480.

43 Ibid.

44 Queensland Law Reform Commission, above n 39.

45 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982*, Report No 63 (2007).

46 Ibid 76, citing Tamara Walsh, 'Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses' (2005) 24 *University of Queensland Law Journal* 123, for the reasonable person test for offensive behaviour. See also: Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act 1982*, Report No 63 (2007), citing Allan C Hutchinson, 'When is a Child not a Child?' (2006) 30 *Criminal Law Journal* 92 that s 6 of the *Juvenile Justice Act 1992* (Qld) provides for the age of responsibility to be fixed by regulation.

counterproductive,[47] arguments that publicity might undermine proceedings,[48] an argument that suppression of identifying information is a suitable compromise between privacy and open justice,[49] and an argument concerning developmental appropriate respect for a child's autonomy.[50] In a report that consisted of 3021 citations and was nearly 700 pages long this seems to demonstrate that the QLRC did not consider journal articles to be very relevant for that reference.

Indeed, when considering the sample as a whole the overall impression is that the QLRC does not consider drawing on journal articles as central to its task of law reform. The detailed engagement with Coss and Forell, in *A Review of the Excuse of Accident and the Defence of Provocation*, appears to be an outlier.[51] Rather, as can be seen Table 4 and in the overview of *A Review of the Peace and Good Behaviour Act 1982*, when the QLRC does cite a journal article it tends to do so for a single specific point, be it a statement of the law, an empirical observation or an argument. Rarely, within the sample, aside from the pinpoints provided in Table 4, are there repeat citations to an article that might be expected if the QLRC had a deeper engagement with journal articles. Furthermore, there is little evidence in the data that the QLRC undertakes an independent assessment of relevant secondary literature. There is simply not the expected breadth and depth of citations to journal articles that would suggest such an assessment. Even in *A Review of the Excuse of Accident and the Defence of Provocation*, the QLRC can be seen as using Coss and Forell as prima facie authority for the commentary and arguments cited and, when other academic sources were referenced within the text, these sources tended to be cited from Coss and Forell.[52] For example, when the QLRC assessed Coss' arguments on domestic violence and the defence of provocation two of the empirical studies referenced were quoted as 'cited in' Coss.[53] This seems to point to the conclusion that on the limited occasions that the QLRC does reference journal articles it does so in a manner that is fairly piecemeal. When the QLRC cites articles it generally does not do so by citing from a range of journal articles to collaborate and contextualise the points being relied upon; rather, articles are cited for specific facts or points.

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47 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act*, above n 45, 380, citing H Katzen, 'It's a Family Matter, not a Police Matter: The Enforcement of Protection Orders' (2004) 14 *Australian Family Law Journal* 1.

48 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act*, above n 42, 476, citing Garth Nettheim, 'Open Justice Versus Justice' (1985) 9 *Adelaide Law Review* 487 and Colleen Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92.

49 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act*, above n 42, 482, citing Colleen Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92.

50 Queensland Law Reform Commission, *A Review of the Peace and Good Behaviour Act*, above n 42, 511, citing Moria Raynor, 'Young People and the Law' (2005) 17 *Legaldate* 5 and Lauren Eade, 'Legal Incapacity, Autonomy, and Children's Rights' (2003) 5 *Newcastle Law Review* 157.

51 Queensland Law Reform Commission, above n 41.

52 Ibid.

53 Ibid 378.

In summary, the findings of the study suggest that the QLRC does not engage deeply with journal articles. At best, 2.8 per cent of all citations are to journal articles. These tend to be articles by Australian-based authors and published in Australian law journals. Further, within that 2.8 per cent, the QLRC's recourse to journal articles seems piecemeal and specific. Together, these findings suggest that academic literature plays a marginal role in the QLRC's approach to law reform.

IV Discussion: Law Reform and Research From Journal Articles

This Part locates and discusses the finding that journal articles have a limited role in how the QLRC approaches its task of law reform within the literature on institutional law reform. This literature raises a number of issues ranging from community consultation based law reform to the distinction between lawyers' law reform and social law reform and on the need for law reform to be based on diverse sources. It is suggested that while the QLRC's public representations and practice affirms what the literature on institutional law reform has identified as 'a community consultation' approach to law reform, there does not seem to be a high number of citations to submissions from the community in the sample of reports examined. Indeed, the texts of the QLRC reports seem to be primarily synthesising and commenting on cases and legislation. There is a concern that by not balancing this synthesis with material from journal articles the reports could be seen as based solely on the opinions of the QLRC. While the QLRC has limited resources — and this could be an explanation for the low citation rate to academic literature — enhanced access to journal articles through digital media and the capacity to appoint non-legal experts suggests that the QLRC might have the capacity to further engage with journal articles. This raises the further question as to whether such literature does exist and whether the Australian legal academy produces research that is useful to Australian law reform.

At one level the finding that journal articles have played a marginal role in the QLRC's approach to law reform is unsurprising. It is unsurprising as the QLRC does not hold itself out as purely a research institute undertaking scholarly and academic activities. The literature on institutional law reform has generally suggested that law reform commissions in Australia approach law reform through a 'community consultation approach.'[54] There are two hallmarks of the 'community consultative' approach. The first is statements from the commission concerning the importance of consultation and whether the commission provides for substantive opportunities for community consultation during an inquiry.[55] The second is evidence of detailed engagement within the

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[54] Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39 *Federal Law Review* 161, 172–81; Weisbrot, above n 28, 32–5.

[55] Ian Davis, 'Targeted Consultations' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 148–59; Ronald Sackville, 'The Role of Law Reform Agencies in Australia' (1985) 59 *Australian Law Journal* 151.

text of the Commission's reports with the material generated from the community in the form of submissions and consultations.[56]

Applying the first hallmark, it can be seen that, in its public statements and in the formal structure of its inquiries, the QLRC undertakes the task of law reform through a community consultative approach. Justice Roslyn Atkinson, Chairperson of the QLRC from 2002–2013, affirmed the importance of community consultation for the QLRC's approach to law reform. Justice Atkinson argued that public involvement in the law reform process leads to recommendations that are attractive to government because they often benefit from community support and awareness.[57] As such, she detailed how the QLRC had enacted a community consultative approach through direct targeting of stakeholders for consultation, forums, public submissions, and use of media and websites.[58] Justice Atkinson's descriptions can be substantiated by the observed practices of the QLRC. For example, in its review of the *Guardianship and Administration Act 2000* (Qld), the QLRC published two Discussion Papers,[59] followed by subsequent meetings with a Reference Group (which consisted of a cross-section of people who were affected by, administered, or were otherwise interested in the legislation) to obtain input on the issues raised.[60] The QLRC also held a number of community forums following the Discussion Papers, as well as consultation meetings with stakeholders.[61] It seems that in its rhetoric and its practice the QLRC embraces the community consultation approach.

Further, the finding that, at best, 2.8 per cent of citations were to journal articles could be seen to substantiate the second hallmark. Tranter's citation study of ALRC final reports found that only 4 per cent of references were to journal articles.[62] This figure seems similar to the findings of, at best, 2.8 per cent for this study. However, this does not mean that the QLRC's overall citation patterns are similar to the ALRC's. While this study did not comprehensively catalogue all of the sources cited by the QLRC, an examination of the QLRC reports suggests a telling difference. While the ALRC cited submissions often and throughout its reports, the QLRC was a lot more circumspect when it came to the referencing of submissions. Indeed, it would seem from the reports in the sample that the most frequently cited sources, according to Tranter's categories would be the primary law category comprising cases, legislation, bills, regulations and Hansard followed by the material

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56 Tranter, above n 14, 345.

57 Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 160–74, 174.

58 Ibid 166–73.

59 Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity: Discussion Paper*, Queensland Law Reform Commission WP No 64 (2008); Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Companion Paper*, Queensland Law Reform Commission WP No 65 (2008).

60 Queensland Law Reform Commission, *Annual Report* (2010–2011) 4 < http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0017/372050/ar2011.pdf>.

61 Ibid.

62 Tranter, above n 14, 337.

produced by government category. Submissions, when they were cited, ended to be clumped under a specific sub-heading in the text titled 'submissions' or 'consultations'.[63]

While the rhetoric and practice of the QLRC affirms a community consultative approach, and the low citation rate to journal articles is consistent with such an approach, the QLRC reports do not disclose similarly high rates of citations to submissions or consultations as has been identified in ALRC reports. In the literature on institutional law reform a distinction has been made between 'lawyers' law reform' and 'social law reform'.[64] Lawyers' law reform tends to be narrow and black-letter in orientation on topics of significance to specific communities of legal practitioners but not of interest to the wider community.[65] In contrast social law reform involves topics with broad social, political and economic considerations and as a consequence generates significant interest from the broader community resulting in more submissions.[66] This is not to suggest an 'either/or' categorisation; rather, each form a pole on a continuum of law reform topics ranging from the dry and highly specific to the controversial and highly political. In Australia, state law reform commissions such as the QLRC appear to undertake more lawyers' law reform while the ALRC undertake more social law reform.[67] Indeed, the topics of the reports in the sample set out in Table 1, including reviews of vicarious liability, the anti-lapse rule in wills and the law in relation to disposal of bodies, seem to be more towards the lawyers' law reform pole of the continuum. This possibly explains the difference in the citation practices between the QLRC and ALRC. Operating within a lawyers' law reform context, the QLRC, while it does undertake formal consultation processes, does not feel as compelled as the ALRC to prioritise submissions in its final reports. Instead, the QLRC reports are more law heavy with most of its citations to primary legal texts such as cases and legislation.

However, identifying that the QLRC reports cite submissions less than the ALRC does not explain the low recourse to journal articles in its reports. Arguably a report that was less orientated to documenting detailed community consultation through the citing of submissions, and was more analytical about cases and legislation, would also have greater reference to journal articles that comment upon, compare or criticise cases and legislation. However, this is not what this study found. Indeed, the QLRC, notwithstanding its lawyers' law reform brief, cites journal

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63 See, eg, Queensland Law Reform Commission, *A Review of Jury Selection*, above n 39, 80, 108, 123, 127, 132, 133, 138, 140, 142, 146, 154, 162, 165, 171, 174, 177, 183, 188, 194, 196, 207, 216, 229, 239, 246, 257, 262, 270, 278, 283, 292, 296, 318, 334, 341, 346, 365, 378, 397, 409, 440.

64 Geoffrey Sawer, 'The Legal Theory of Law Reform' (1970) 20 *University of Toronto Law Journal* 183, 192.

65 Hurlburt, above n 1, 9–14.

66 Lyria Bennett Moses, 'Agents of Change: How the Law 'Copes' with Technological Change' (2011) 20 *Griffith Law Review* 763, 772.

67 Marcia Neave, 'Institutional Law Reform in Australia: The Past and the Future' (2005) 23 *Windsor Year Book of Access to Justice* 343, 350; Tranter, above n 14, 332–3.

articles *less than* the ALRC with its strong evidencing of community consultation through referencing submissions. This raises two related questions: (1) why does the QLRC cite so few journal articles; and, (2) should the QLRC engage more with journal articles?

One possible answer to the first question is that the QLRC simply lacks the resources necessary to undertake the detailed examination and synthesise of the relevant journals articles within the topic of any specific reference. Recent data on the QLRC budget is limited.[68] In 2006–2007, the funding for the QLRC (both base funding and special allocations for *A Review of Queensland's Guardianship Laws*) was $774 939.[69] This is a quarter of the budget of the ALRC for that period which was $3.336 million.[70] This ratio is also reflected in the relative staffing sizes of the two commissions. In 2012–2013, the QLRC had five part-time members supported by a Secretariat comprising a full-time Director, Assistant Director, two Legal Officers and two part-time support staff.[71] Since March 2012, the QLRC has not had a full-time member.[72] In comparison, the ALRC has 1.8 full-time equivalent members and 13.6 full-time equivalent staff.[73] The QLRC is a small commission, with a limited budget and staffing and an explanation for the low citation to journal articles could be that the QLRC does not have the resources to find, review and synthesise journal articles. This is compounded by the fact that the commission is often given limited time to complete a reference.[74] For example, *A Review of the Trust Act 1973* was commissioned on 25 January 2012,[75] with the expectation that the QLRC provide an interim report on 30 June 2013 and a final report on 31 December 2013.[76] Unlike academic research, which can often take time to explore and synthesise published research in an area, the time-limits imposed on the QLRC may mean that it does not have the same scope to engage with academic literature. A further resource-related explanation for the QLRC's relative lack of engagement with journal articles is that its expertise seems to be firmly located in law and legal practice. The QLRC's enabling Act limits

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68 Financial reporting for the Queensland Law Reform Commission has since 2007–08 been subsumed into the general report for the Department of Justice and Attorney-General. Within the financial reports for the Department the Queensland Law Reform Commission allocation is not individually itemised. See Department of Justice and Attorney-General, *Financial Statements* (2012–13) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0005/211838//anzac-day-trust-financial-statements.pdf>.

69 Queensland Law Reform Commission, *Annual Report and Statement of Affairs* (2006–2007) 9 < http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0018/372042/ar2007.pdf>.

70 Australian Law Reform Commission, *Annual Report,* Report No 106 (2006–2007) 87 <http:///www.austlii.edu.au/au/other/lawreform/ALRC/2007/106.html>.

71 Queensland Law Reform Commission, *Annual Report,* (2012–2013) 2 <http:// www.qlrc.qld.gov.au/__data/assets/pdf_file/0019/372052/ar2013.pdf>.

72 Ibid 2.

73 Australian Law Reform Commission, *Annual Report*, Report No 125 (2012–2013) 41 << https://www.alrc.gov.au/sites/default/files/pdfs/publications/annual_report_2014.pdf>.

74 Peter Handford, 'The Changing Face of Law Reform' (1999) 76 *Australian Law Journal* 503, 516.

75 Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No 71 (2013).

76 Ibid.

members to judges, legal practitioners or 'a teacher of law in a University'[77] and in its *Annual Report 2012–2013* the Director, Assistant Director and Legal Officers all had legal qualifications and legal research experience.'[78] This suggests that the QLRC has clear strengths in primary legal research rather than expertise in identifying and synthesising material from legal and non-legal journal articles.

The answer to the second question — whether the QLRC should engage more with journal articles — depends, in part, upon the weight given to criticism of the community consultation approach to law reform. Regina Graycar has criticised this approach to law reform, at least in the family law context,[79] on the basis that specific interest groups, using sectorial and anecdotal accounts, have been able to persuade lawmakers to change the rules on how the care of, and responsibility for, children is to be determined.[80] This 'evidence' was regarded by lawmakers as comparable to detailed studies into, and academic literature on, children, families, separation and violence.[81] Graycar generalised that law reform based on submissions and consultations, as opposed to verified research from journal articles, runs the risk of being corrupted by vocal and organised sectarian interests.[82] Insofar as the QLRC does not appear to prioritise submissions in its reports, it may be less open to Graycar's criticism than, it has been argued, the ALRC is,[83] but her comments regarding the need for law reform agencies to engage with academic research applies with equal force to the QLRC.[84] The QLRC presents its findings based on its own examination of the primary law and relevant government materials. Submissions and consultations are often employed in order to check or support its determination. The QLRC reports generate authority because the QLRC synthesises and comments on the relevant law and how it should be changed, not because the QLRC has drawn upon national and international studies and scholarship published in peer-reviewed journals and generated its recommendation for reform based on this material. Like the reform proposals that Graycar criticises as one-sided because of an over-emphasis on submissions, it might be

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77 *Law Reform Commission Act 1968* (Qld) s 4 (1) (a).

78 Queensland Law Reform Commission, *Annual Report* (2012–2013) 6–9 < http://www.qlrc.qld.gov.au/__data/assets/pdf_file/0019/372052/ar2013.pdf>.

79 Regina Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737; Regina Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13 *Theoretical Inquires in Law* 241; Regina Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in Rosemary Hunter and Mary Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 49–77; Reg Graycar and Jenny Morgan, 'Law Reform: What's in it for Women?' (2005) 23 *Windsor Year Book of Access to Justice* 393.

80 Graycar, 'Law Reform by Frozen Chook', above n 79, 745; Graycar and Morgan, above n 79, 416.

81 Graycar, 'Law Reform by Frozen Chook', above n 79, 737–46; Graycar, 'Family Law Reform in Australia', above n 79, 263.

82 Graycar, 'Law Reform by Frozen Chook' above n 79, 753; Graycar, 'Family Law Reform in Australia', above n 79, 267.

83 For this, see: Tranter, above n 14, 349–50.

84 Graycar, 'Frozen Chooks Revisited', above n79, 49–77, 67–9.

argued that the QLRC reports over-emphasise the QLRC's own expertise in legal analysis, and that these reports should be balanced by recourse to relevant research of that area of law and its wider contexts from journal articles. Tranter has suggested that in an era of 'evidenced-based reform' authority and persuasiveness of law reform proposals increasingly rests on the veracity of the material used to generate the proposals.[85] Greater engagement with academic literature, which has gone through the testing and quality controls employed by peer-reviewed journals, enhances the authority and persuasiveness of the QLRC's reports.

As noted above, there are distinct staffing, expertise and time costs involved in a deeper engagement with academic literature. However, in the past twenty years we have witnessed a significant increase in the accessibility of journal articles through digital media,[86] one consequence of which has been a significant reduction in the time (and therefore staffing costs) involved in the research process.[87] Certain law reform commissions have embraced the opportunities of the digital world, by enhancing opportunities for consultation and through decreasing the costs of accessing and synthesising primary legal material.[88] While engagement with academic literature still takes time, digital access has significantly increased academic productivity.[89] Even with its limited resources, it seems reasonable to suggest that the QLRC has the capacity to engage more deeply with material from journal articles.[90]

While digital media has potentially reduced the resource and time costs in accessing journal articles, much of the material with which the QLRC ought to be engaging is likely to coincide with its expertise in legal research, and is published in law journals. Nevertheless, it is likely that additional material, which is both significant and useful, might be located in economic, social science and policy literatures.[91] While members of the QLRC must be legally qualified,[92] there is no bar for the

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85 Tranter, above n 14, 355.

86 See generally: Kayleen Wardell, 'From Caveman to CaseBase: The Evolution of Legal Research through the Technological Age' (2010) 18 *Australian Law Librarian* 10; Terry Hurtchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1065.

87 Stéphan Vincent-Lancrin, 'What is Changing in Academic Research? Trends and Future Scenarios' (2006) 41 *European Journal of Education* 169.

88 Anna Rees, 'Strategic and Project Planning' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 119–33, 128–31; Martin Partington, 'Research' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 134–47, 141–43.

89 Andrew C Worthington and Boon L Lee, 'Efficiency, Technology and Productivity Change in Australian Universities, 1998–2003' (2008) 27 *Economics of Education Review* 285.

90 There is a suspicion within the sample that the Queensland Law Reform Commission referencing of academic literature was increasing over the 2000s. It is hypothesised that a more longitudinal study of the Queensland Law Reform Commission citation patterns would see the frequency of academic literature citation increasing, reflecting the emergence and growth of digital access.

91 On the need for law reform commission to look beyond primary law and legal research see Rod MacDonald, 'Recommission Law Reform' (1997) 35(4) *Alberta Law Review* 831; Roderick Macdonald, 'Continuity, Discontinuity, Statsis and Innovation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 87–101.

92 *Law Reform Commission Act 1968* (Qld) s 4 (1) (a).

QLRC to appoint non-legal specialists as 'special assistants.'[93] Also the QLRC is not subject to a disciplinary limitation when it comes to the appointment of staff.[94] This means that it is possible for the QLRC to gather appropriate expertise in the synthesis of material from legal and non-legal journal articles.

Having established that the QLRC could, notwithstanding its limited resources, engage more deeply with material from journal articles both in law and other disciplines, a further question is whether there are bodies of academic research that address the agenda of law reform commissions. Given the significant growth of the Australian legal academy, both in terms of the number of law schools and the number of university-based legal researchers over the past thirty years, it seems likely that in most instances there will be a large and detailed body of academic research for the QLRC to access. It could be argued that the findings in this study as to the QLRC's low citation rate of journal articles, reflect not so much the QLRC's willingness to engage with research published in journals, but rather that such literature does not exist. In recent years, Australian legal academics have operated within a research framework concerned with 'Excellence', which is driven by the Federal government's 'Excellence in Research for Australia' ('ERA') policy administered by the Australian Research Council.[95] While the metric and evaluation tools have changed between the different ERAs, a clear message that Australian legal scholars have received from the ERA process, and especially the now abandoned but still highly influential ERA 2010 journal ranking list,[96] was to publish on global legal topics in international journals.[97] What was undervalued in the process was research on Australian law that might be of limited interest to an international research community, and which might not be accepted into an international journal, but which would be highly relevant to the pragmatic work of Australian law reform commissions.[98] This, in itself, does not explain the low citation rates to journal articles by the QLRC between 2001 and 2011, as the first ERA was in 2010. However, the ERA represents the research policy trajectory that Australian legal academics had been working within over the previous decade where recognition and reward tended to go to scholars working on global issues publishing in international forums over reform

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93 Ibid s 9.

94 Ibid s 14.

95 On the ERA see http://www.arc.gov.au/era/ accessed 28 June 2015.

96 On the ERA ranking list see Smyth, above n 25, 205.

97 Dan Svantesson and Paul White 'Entering an Era of Research Rankings — Will Innovation and Diversity Survive?' (2009) 21 *Bond Law Review* 173. These fears were echoed by humanities scholars who saw in the ERA rankings and processes a generalisation of the science model of research and distribution of scholarship, which meant Australian specific research and Australian-based journals were undervalued. The implication was that Australian scholars researching Australia and disseminating that research in Australian forums would be similarly undervalued by their institution. See_Paul Genoni and Gaby Haddow 'ERA and the Ranking of Australian Humanities Journals' (2009) 46 *Australian Humanities Review* 5.

98 Margaret Thornton *Privatising the Public University: The Case of Law* Routledge 2012, 180.

orientated research into domestic Australian law.[99] The suggestion is that the research policy context over the past twenty years has been shaping the outputs of Australian university-based legal scholars towards topics and journals that do not directly relate to the law reform tasks that commissions like the QLRC are asked to report on.

The findings of this study do not provide any basis to determine whether the low citation rates to journals by the QLRC reflects a bias within the Australian legal academy about research and writing on domestic Australian law. The expansion of Australian based law reviews during the 1990s and 2000s[100] — generalist and specialist, law-school-based and commercial — might suggest that this is not the case. There are many domestic forums that specialise in publishing research on Australian law. There is much debate about what is exactly the purpose and point of legal scholarship, with many suggesting that legal scholarship has a wider purpose than merely servicing the law reform activities of judges and commissions.[101] While there are calls that legal scholarship should pursue 'truth', this is usually an aspiration that legal research should aim for *in addition* to instrumental reform-orientated research. The suggestion that evidence of low citation to journals within QLRC final reports highlights a gap, or possibly a fault with the research and scholarship produced by the Australian legal academy, would require much further investigation, specifically by triangulating the nature and scope of references provided to law reform commissions with an analysis of the research outputs by the Australian legal academy.

Whether a suitable and sufficient body of academic material exists for the QLRC to draw more deeply upon is a further research question. If there is evidence supporting this suggestion than there are some serious questions to be asked as to the role, purpose and underlying policy framework of the Australian legal academy.

In summary, it is suggested that while the QLRC's low engagement with academic literature is explainable in terms of resource limitation, there are reasons relating to balance why the QLRC should engage more thoroughly with material from academic journals. It was suggested that, even though the QLRC is a small entity with a modest budget and staffing, it still has the potential to engage more deeply with material from journal articles. This highlighted a further question, not relating to the QLRC's capacity and willingness to engage with academic literature, but rather whether there is a suitable pool of research and scholarship relating to the scope of the QLRC.

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99 Margaret Thornton 'The Mirage of Merit: Reconstituting the 'Ideal Academic'' (2013) 28(76) *Australian Feminist Studies* 127, 132.

100 John Gava 'Law Reviews: Good For Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560, 572.

101 John Gava 'Scholarship and Community' (1994) 16 *Sydney Law Review* 443; Michael Kirby 'Welcome to the Law Reviews' (2002) 26(1) *Melbourne University Law Review* 1; Marilyn Pittard and Peter Heffey '*Ancora Impato:* The Historical Role of the Law Review in University Scholarship' (2003) 29 *Monash Law Review* 278; James Boyd White 'Law Teachers' Writing' (1994) 92 *Michigan Law Review* 1970; Ramsay and Stapledon above n 25; Voon and Mitchell above n 25.

V Conclusion

This article reported a study into the QLRC's citation of journal articles. It was found that, at best, 2.8 per cent of the references in the final reports between December 2001 and December 2011 were to journal articles. Further, it found that when journal articles were cited this tended to occur in a piecemeal and targeted manner. This suggests that academic literature has played limited role in the QLRC's approach to law reform. By failing to balance its analysis of cases and legislation with material from academic literature, QLRC reports could be criticised as one-sided. It was suggested that while the QLRC has limited resources, enhanced access to academic literature through digital media and the capacity to appoint non-legal experts could facilitate more thorough engagement with academic literature. The lead to a significant caveat; the findings could suggest, not that the QLRC does not engage with academic literature in a more detailed manner, but that relevant and useful academic literature on topics that the QLRC is asked to report on, does not exist. This intriguing suggestion — that the Australian legal academy is not producing research and writing that is suitable for the task of reforming Australian law — requires a much more systemic investigation. It poses an essential and significant question for the Australian legal academy about the purpose of research into Australian law.

VI Appendix

Table 4: The Queensland Law Reform Commission's reasons for citing the top eight authors

Article	Report	Pages	Reason for Citation	Category
Author: **Graeme Goss**				
'The Defence of Provocation: An Acrimonious Divorce from Reality'	*QLRC, A Review of the Excuse of Accident and the Defence of Provocation,* Report No 64	349–50	Summarises Coss' argument that the 'ordinary person' test is incomprehensible to the ordinary person.	Argument
		350–3	Summaries Coss' commentary on Australian case law.	Legal commentary
		353–78	Extracts in detail Cross' review of non-legal literature on intimate partner violence and his Australian case law examples.	Legal / Academic commentary
		379–80	Sets out Coss' conclusion that the partial defence of provocation should be abolished.	Argument
		480	QLRC states it agrees with Coss regarding that ordinary people do not kill and injure when provoked.	Recommend-ation
Author: **Jane Goodman-Delahunty et al**				
Practices, Policies and Procedures that Influence Juror Satisfaction in Australia	QLRC, *A Review of Jury Selection,* Report No 68	14	Cited as evidence that jurors have more confidence on criminal justice system than no-jurors.	Empirical evidence
		49–51	Cited as evidence of jury demographic composition.	Empirical evidence
		56–7	Cited as evidence of jury demographic composition.	Empirical evidence
		122	Cited for the opinion that police, lawyers and judges remain excluded as jurors.	Argument
		252–4	Cited as evidence for community attitudes to serving as jurors.	Empirical evidence

Article	Report	Pages	Reason for Citation	Category
Author: **Jane Goodman-Delahunty et al — *Continued***				
		277	Cited as setting out benefits of a deferral system.	Argument
		295	Cited for the proposition that a deferral system is manageable.	Argument
Author: **Caroline Forell**				
'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia'	QLRC, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64	313	Cited for the argument that the defence should be retained for 'battered persons' who kill abusers.	Argument
		332	Cited for distinction between formal and substantive equality.	Argument
		334–6	Sets out Forell's argument for the retaining the defence but with greater jury education.	Argument
		337–8	Sets out Forell's argument for retaining the defence based on substantive equality.	Argument
		338–41	Sets out Forell's commentary on the US literature and case law on provocation.	Legal/ Academic commentary
		341–2	Sets out Forell's commentary on the Canadian literature and case law on provocation.	Legal/ Academic commentary
		346	Cited approving of criticism of Canadian decision.	Argument
		347–8	Sets out Forell's commentary on Australian provocation law.	Legal commentary
Author: **Michelle Howard**				
		52	Cited for the proposition that the existing principles are uncertain.	Argument

Article	Report	Pages	Reason for Citation	Category
Author: **Michelle Howard — *Continued***				
'Principles for Substituted Decision-Making about Withdrawing or Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform'	QLRC, *A Review Queensland's Guardianship Laws*, Report No 67(1)	52	Cited for the proposition that the existing principles are uncertain.	Argument
		53	Cited as summarising the General Principles.	Point of law
		136	Cited concerning changing level of compliance with General Principles.	Argument
		169	Cited for the point that decision-making should not be codified.	Argument
		170–1	Cited concerning relevance of all General Principles to all decisions.	Argument
		178	Cited for the point that non-legal decision-makers might not understand the legal rights involved in withholding or withdrawing decisions.	Argument
		183	Cited for the criticism of the 'best interest approach.'	Argument
		185	Cited for the point that non-legal decision-makers might not understand the legal rights involved in withholding or withdrawing decisions.	Argument
		187	Cited for the criticism of the 'best interest approach.'	Argument
		196	Cited as to correct interpretation of relevant Queensland legislation.	Argument
		202	Cited as to correct interpretation of relevant Queensland legislation.	Argument

Article	Report	Pages	Reason for Citation	Category
Author: **Michelle Howard — *Continued***				
		206	Cited as to correct interpretation of relevant Queensland legislation.	Argument
Author: **Anne-Louise McCawley et al**				
'Access to Assets: Older People with Impaired Capacity and Financial Abuse'	QLRC, *A Review Queensland's Guardianship Laws*, Report, Report No 67(1)	320	Cited for the point of potential for abuse in enduring documents.	Argument
		322	Cited for criticism of the safeguards in *Power of Attorney Act 1998* (Qld).	Argument
	QLRC, *A Review Queensland's Guardianship Laws*, Report No 67(3)	11	Cited for criticisms of informal decision-making.	Argument
		131	Cited for empirical analysis of Tribunal case files regarding financial abuse of older people.	Empirical evidence
		173	Cited for the proposition for registering powers of attorney.	Argument
		239	Cited for empirical analysis of Tribunal case files regarding financial abuse of older people.	Empirical evidence
		241–2	Cited for empirical analysis of Tribunal case files regarding financial abuse of older people.	Empirical evidence
Author: **John Blackwood**				
		55	Cited for application of the principle of procedural fairness.	Point of law
		57	Cited for scope of the principle of procedural fairness.	Point of law
		60–3	Legal commentary on application of procedural fairness to guardianship decisions.	Legal commentary
		65–6	Cited for confidentiality of information involved in guardianship matters.	Argument
		107–8	Cited for content of the hearing rule.	Point of law

Article	Report	Pages	Reason for Citation	Category
Author: **John Blackwood — *Continued***				
		198	Cited for the application of procedural fairness as a means to get documents in guardianship matters in NSW.	Point of law
		206	Cited for content of the hearing rule.	Point of law
		207	Cited for an example of when withholding information might be beneficial.	Argument.
Author: **Kevin Dawkins**				
'Defence Disclosure in Criminal Cases'	QLRC, *A Review of Jury Directions*, Report No 66(1)	170	Cited concerning restrictions in Queensland on pre-trial disclosure for defendants.	Point of law
		172	Cited for the argument that pre-trial disclosure helps prosecution.	Argument
		173	Cited for the point that 'defence by ambush' is not a problem.	Academic commentary
		174	Cited for the argument that pre-trial disclosure would lead to increase in interlocutory matters.	Argument
		182	Cited for the point of pre-trial disclosure for defendants in other Australian jurisdictions.	Point of law
		188–9	Cited for details of Victorian regime.	Legal commentary
		200–1	Cited concerning UK scheme.	Legal commentary
		207	Cited concerning operation of Canada's pre-trial disclosure obligation for defendants.	Point of law
		235	Cited for the point that pre-trial disclosure only successful if supported by the judiciary and the legal profession.	Argument

Article	Report	Pages	Reason for Citation	Category
Author: **Michael J Allen**				
'Provocation's Reasonable Man: A Plea for Self-Control'	QLRC, *A Review of the Excuse of Accident and the Defence of Provocation* Report No 64	209–12	Cited for the history and development of the defence of provocation.	Legal commentary
		333	Sets out Allen's argument against the defence of provocation.	Argument
		469	Sets out Allen's argument against the defence of provocation.	Argument
Author: **Jacqui Horan and David Tait**				
'Do Juries Adequately Represent The Community?: A Case Study of Civil Juries in Victoria'	QLRC, *A Review of Jury Selection*, Report 68	11	Cited for history of juries.	Legal commentary
		53–4	Cited for empirical evidence of demographic composition of juries in Victoria.	Empirical evidence
		64	Cited within a quote from a judgment on history of juries.	Legal commentary
		67	Cited for the argument the jury service is an entitlement.	Argument
		211–12	Cited for the argument unfair to exclude linguistic minorities from jury service.	Argument
		221	Cited for the argument that persons with certain disabilities should perform jury service.	Argument
		311	Cite for empirical evidence on embarrassment of jurors when challenged.	Empirical evidence
		313	Cited for argument that peremptory challenges help achieve a balanced jury.	Argument

Article	Report	Pages	Reason for Citation	Category
Author: **Jacqui Horan and David Tait — *Continued***				
		315	Cited for argument that peremptory challenges infringes rights to act as a juror.	Argument
		375	Cited to a citation concerning more representative juries of the demographics of the accused.	Argument
		405	Cited for the point regarding limited availability for civil jury trials.	Point of law
Author: **Hazel Genn**				
'Tribunals and Informal Justice'	QLRC, *A Review of Queensland's Guardianship Laws*, Report 67(4)	33–4	Cited for an overview of tribunals compared with courts.	Point of law
		34	Cited for the arguments concerning represented and unrepresented parties at tribunals.	Argument
		36	Cited for the point that procedural fairness prevents a tribunal from adequately assisting an unrepresented party.	Argument
		36	Cited for overview of past empirical studies of tribunals in the UK.	Academic commentary
Author: **Geoff Flatman and Mirko Bagaric**				
'Accused Disclosure — Measured Response or Abrogation of the Presumption of Innocence?'	QLRC, *A Review of Jury Directions*, Report No 66(1)	171	Cited for the criticism of pre-trial disclosure as undermining presumption of innocence.	Argument
		172	Cited for the argument that the right against self-incrimination is not absolute.	Argument

Article	Report	Pages	Reason for Citation	Category
Author: **Geoff Flatman and Mirko Bagaric — *Continued***				
		182	Cited for the point of pre-trial disclosure for defendants in other Australian jurisdictions.	Point of law
		246	Cited for the argument that early statement of a defence can be to the defendant's advantage.	Argument