

THE ACADEMY'S CONTRIBUTION TO THE DEVELOPMENT OF THE LAW[#]

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I INTRODUCTION

When I was asked to give this lecture I was given free rein as to the topic. I elected to speak on the Academy's contribution to the development of the law because I feel strongly that it is a contribution that is often overlooked.

I understand that the term 'Academy' comes from the ancient Greek name for the academy or college of philosophy in the north-western outskirts of Athens where Plato acquired property in about 387 BC and where he used to teach. At the site there had been an olive grove sacred to the legendary Attic hero, Academus. I use it now to refer to the community of scholars and teachers, mostly but not invariably, found in universities and research institutes.

Unlike Academus, academics are not heroes in our society. The stereotype of an academic may be compared with that of our real heroes on the sports field. I have yet to see an academic used in advertisements for sports cars or Rolex watches. Though among the most able of our university graduates, they are poorly rewarded and little valued. The common reference to something as, 'purely academic' is generally dismissive — an assessment of irrelevance.

Nevertheless, by their research and their contribution to public debate they exert considerable influence. Consider, for instance, the burgeoning concern for the environment which is fuelled by the scientific research in many disciplines; the influence of anthropologists and archaeologists on our changing views of indigenous societies; the remarkable shift in society's attitude to smoking; the development of in-vitro fertilisation and the consequent debate about who should be able to take advantage of it. These are but some of the more well-known examples.

At a less public level, analyses of salinity influence our treatment of agricultural land; social workers and psychologists help in setting standards of care for children and the aged; ethical debate stimulated by academics in many disciplines affect society's attitude to difficult questions such as euthanasia and animal welfare; and historical research repositions our understanding of who we

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are and where we come from. At the individual level the impact of a gifted teacher may be lifelong — we are all aware of such examples.

It is no accident that most of these examples relate to scientific research. But for obvious reasons, this afternoon, I want to concentrate on legal scholarship — mostly but not invariably — done by lawyers. This form of research is less well understood and consequently less valued. Indeed to many a non-lawyer (and particularly to scientists) the concept of *legal* research is puzzling. A common paradigm of scientific research (one that I think is epistemologically flawed) is of a voyage of discovery, finding the existing unknown. It is not surprising that those who accept this paradigm have difficulties with the concept of legal research. What is there to discover, they ask?

Among judges and, hopefully, among the more sophisticated of our community, this is not a difficulty. There is ample evidence that judges and practitioners at all levels draw heavily on the work of legal academics and benefit from it. Nevertheless, it seems to me that many practitioners really appreciate only one aspect of the contribution that the legal academy makes to the development of the law.

In the Fourth Fiat Justitia Lecture at Monash University on 21 March 2001, Justice Hayne of the High Court of Australia commented on the contribution of the legal academy to judicial development of the law. Let me read you some of what his Honour had to say:

The role which the most thoughtful legal scholars of this country play in shaping the development of the law should not be underestimated. Those who think deeply about a subject and articulate relevant principles have much to offer and their writing is read with great care. There is much to offer in relation to both of the [following] questions [namely] ... *is the state of precedent such that it is open to a judge to make some change* and, if it is, *what change should be made?* The former of those questions, although framed as one relating to the application of the doctrine of precedent, will often require consideration of whether any change should be left to the legislature, rather than for the judiciary to make it ... Much more often than not it will be necessary to recognise that the parties to the particular litigation, with their properly narrow and self-interested focus, will provide little information from which a judge could, if so minded, make an assessment of some kinds of policy issues or the ramifications of some kinds of choice. Plainly the scholar has much to contribute in this regard. But so too does the scholar have much to contribute in the articulation of unifying principles which may suggest that the law should develop in a particular way.¹

The contribution to which Justice Hayne refers is directed to the principled development of the law by judges. Obviously this is of crucial importance, especially to the judges, but also to other practitioners whose core tasks do not allow them the time to identify and articulate the unifying principles to which Justice Hayne refers. I want to suggest however, that the contribution to which Justice Hayne refers is only one aspect of a much more complex contribution and that his Honour's comment ignores what is perhaps the unique contribution that the Academy makes. In the context of Justice Hayne's lecture, which was a plea for judicial reticence, this is not surprising nor is it a basis for criticism.

1 Justice Hayne, 'Letting Justice Be Done Without The Heavens Falling', (Speech delivered as the Fourth Fiat Justitia Lecture, delivered at Monash University, Melbourne, 21 March 2001) (emphasis added).

In my experience, however, many non-academic lawyers see this concern with the application of precedent as the major, if not the only contribution that the Academy has to make. They see their academic colleagues as fulfilling a similar role to counsel, perhaps with the advantage of more time and fewer commercial pressures. Accordingly, academics are seen to be at their most useful when they assist in finding solutions for the problems that arise in the context of litigation or in the course of transactions.

It may be that this focus comes from the common method of teaching law through the medium of appellate judicial decisions. The case law method has much to recommend it, but it can lead to undue importance being placed on the role of judicial decision-making in the development of the law and to contributions to legal development being judged by their input into the judicial process. Recognition that judges *make* law rather than merely discover it (an insight that has come from academic research) should not blind us to other, more important, areas of law-making (particularly through legislation) nor to the contribution that the Academy can make to law reform and to informed public debate on many controversial and difficult issues in our society.

In particular I want to focus on much more fundamental, radical and time-consuming work that is uniquely within the sphere of the academic. This is the investigation and exploration of issues in a manner that is not, at least directly or immediately, oriented towards resolving individual disputes or difficulties. It is not directed to an immediate outcome and may take years to come to fruition. It may find its eventual justification in legal innovation generally effected through legislation, or in a more informed understanding of what lawyers do, or in the development of analysis and principles that ultimately have a profound influence on the vindication of individual interests.

II EMPIRICAL RESEARCH

One aspect of legal research that has had, and is having, a substantial influence on the law in Australia involves practical or empirical research at many levels. The need for research into the effects of legal regulation or into the myriads of factual assumptions that underpin judicial decisions over a wide range of issues cannot be doubted.² There is only time here to give a few examples.

There is, at the Australian National University, a group of researchers whose work concerns regulatory theory. Among other things they are concerned with the issue of how best to regulate human behaviour and with the design of regulatory institutions and regimes. Such work is notably interdisciplinary, bringing to the study of law the insights of sociology, psychologists, criminologists, political scientists, philosophers and others. A leading example is

2 For a recent plea for more of this kind of research, see Richard A Posner 'Against Constitutional Theory' (1998) 73 *New York University Law Review* 1.

provided by Professor John Braithwaite's theory of 're-integrative shaming'.³ Professor Braithwaite distinguishes between stigmatising shame, which disintegrates the moral bonds between the offender and the community and reintegrative shaming, which strengthens the moral bonds between the offender and the community. This distinction forms the basis of a theory of criminal punishment that seeks to give offenders the opportunity to rejoin their community as law-abiding citizens. The theory has been tested in an experimental program in the ACT involving the use of conferencing for repeat offenders.⁴

The work of feminist legal theorists in relation to reform of rape law, problems of domestic violence and sexual harassment are well known.⁵ The work of George Zdenkowski at the University of New South Wales in relation to prison and sentencing reform has had a significant influence.⁶ The New South Wales Court of Criminal Appeal in its landmark judgment⁷ setting out sentencing guidelines where a plea of guilty is entered, drew heavily on a study by Professor Mack and Sharyn Roach Anleu, both of Flinders University, concerning issues and practices surrounding a guilty plea.

Much has been done and there is much more to do. Assumptions of fact that warrant examination are built into seemingly the most innocuous decisions. For example an element of concern to courts considering the extent of rights of free speech is the chilling effect of defamation laws on (especially) political speech. There is an empirical assumption that should at least be recognised and can be usefully tested, namely the reaction of proprietors, editors and journalists to the threat of litigation.⁸

Another example of practical research going beyond that referred to by Justice Hayne is to be found in the work of Professor John Peden who, in 1976, published his *Report on Harsh and Unconscionable Contracts* ('Peden Report').⁹ The report, which had been commissioned by the New South Wales government, resulted in the *Contracts Review Act 1980* (NSW).

Professor Peden's report reviewed legislative responses to harsh and unconscionable contracts in a number of countries including the United Kingdom, Germany, Israel, Sweden, the United States and Canada. The *Peden Report* went far beyond what any judge could do or should do. It suggested

3 John Braithwaite, *Crime, Shame and Reintegration* (1989).

4 See Lawrence W Sherman, Heather Strang and Daniel J Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (2000) Final Report, <<http://www.aic.gov.au/rjustice/rise/index.html>> at 23 November 2002.

5 See, eg, Reg Graycar *The Hidden Gender of Law* (2nd ed, 2002).

6 See, eg, *Jupiters Ltd v Stephen Thirkettle & Anor* [1997] IRCA 258 (Unreported, Madgwick J, 25 July 1997); *R v Rich* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Brooking and Buchanan JJA, 25 November 1997).

7 *R v Thomson* (2000) 49 NSWLR 383, 390.

8 For a study in another context, see Eric Barendt et al, *Libel and the Media: The Chilling Effect* (1997); see also Frederick Schauer, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' (1978) 58 *Boston University Law Review* 685 (arguing that the assumption is well founded).

9 John Peden, *Harsh and Unconscionable Contracts: Report to the Minister for Consumer Affairs and Co-operative Societies and the Attorney General for New South Wales* (1976).

'reforms of a radical nature'¹⁰ and had a 'revolutionary effect'¹¹ on the law of contracts in New South Wales. At the time the report was commissioned the 'general inadequacy of the common law and statutory law applicable in New South Wales as to harsh and unconscionable contracts was not to be doubted.'¹²

The need for such legislation was accepted by Rogers J, Chief Justice of the Commercial Division of the New South Wales Supreme Court, who commented:

For many years prior to 1980 the commercial community had been disturbed by the apparent insufficiency of legal remedies which could, in appropriate circumstances, safeguard contracting parties. The applicable equitable principles which had evolved over many years were thought by many to be insufficient. For this reason the government of the day commissioned Professor Peden to prepare a report on the desirability of bringing into existence some legislation which could provide for curial review of unfair contracts.¹³

The legislation that resulted from his report was seen by Professor Peden as an aid to the development of a comprehensive doctrine of unconscionability. He commented that,

[I]n view of the history of the sanctity of contract doctrine in the common law courts, and their reticence in overtly embracing policy justifications for changes in the common law [it was unlikely that a comprehensive doctrine of unconscionability would develop spontaneously], except over a long period of time.¹⁴

Although there was some initial hostility, mainly relating to the scope of the proposed legislation, the report and the ultimate legislation have been well received.

III JULIUS STONE — WRITER AND TEACHER

In Australia, no one has contributed more to the understanding of the judicial process especially at the appellate level than Julius Stone and I would like to spend a little time examining his influence. Julius Stone came from the sociological school of jurisprudence that was influenced so strongly at Harvard University by Roscoe Pound. He came to Australia in 1942 and for 30 years was professor of International Law and Jurisprudence at Sydney University. Throughout his long and prolific academic life his concern was with law as an instrument of social control and as a means towards justice. His seminal work, *The Province and Function of Law* was published in 1946 and the successor trilogy, *Legal System and Lawyers' Reasonings*, *Human Law and Human Justice* and *Social Dimensions of Law and Justice* was published between 1964 and 1966.

10 'Current Topics: The Peden Report on Harsh and Unconscionable Contracts' (1977) 51 *Australian Law Journal* 232.

11 Andrew Terry, 'Unconscionable Contracts in New South Wales: The *Contracts Review Act 1980*' (1982) 10 *Australian Business Law Review* 311.

12 'Current Topics: The Peden Report on Harsh and Unconscionable Contracts', above n 10.

13 *Australian Bank Ltd v Stokes* (1985) 3 NSWLR 174, 175.

14 Peden, above n 9, 10–11.

Stone's analysis of substantive law and of process have been drawn on many times by the High Court.¹⁵ It is worth noting that much of this work is not directed to any particular outcome but is directed to clarifying the process by which decisions as to outcomes are made. This is a contribution uniquely to be made by academics.

In the entry on 'Jurisprudence' in the recently published *Oxford Companion to the High Court of Australia*, Bryan Horrigan has noted that,

the Court's jurisprudence in the various areas of law has been shaped by influential legal philosophers throughout its history. ... Sometimes, the Court has referred expressly to leading jurisprudential works and thinkers of the twentieth century, including theorists such as Stone ... In *Trident* and in *Gala v Preston* (1991) there are references to Stone's *Precedent and Law* (1985) ... In particular, Stone's notion of the 'leeways for choice' available to appellate court judges has been an important influence on the Court: for example, see Kirby's judicial use of 'leeways for choice' in *Northern Sandblasting v Harris* (1997), and his extra-judicial homage to Stone's influence upon the High Court in 'Julius Stone and the High Court of Australia' (1997) 20 *UNSWLJ* 239.¹⁶

Justice Kirby, himself a former pupil of Stone, has divided the references in the *Commonwealth Law Reports* to Stone's works, into three categories: substantive law analysis; international law; and appellate decision making.¹⁷ Under substantive law analysis Justice Kirby notes the following with respect to s 92 of the *Constitution*:

By the 1970s, Justices of the Court were citing substantive articles by Stone with greater alacrity. None was more willing to do so than Justice Murphy. In *Buck v Bavone* he referred to the criticism of the Court's approach to the interpretation of s 92 of the *Constitution* ventured by Professor Stone [in an article in the *New York University Law Review*]. In due course of time, that criticism was to bear fruit [see *Cole v Whitfield* (1988) 165 CLR 360].¹⁸

Justice Kirby also identifies Justice Murphy's reliance on Stone's *Legal Systems and Lawyers' Reasonings* (1964) in *Jackson v Harrison*¹⁹ and again in *Wyong Shire Council v Shirt*²⁰ where Murphy J embraced Stone's analysis of the 'defects in the concept of duty of care'. Toohey J referred to Stone's writing in *Gala v Preston*²¹ in discussing whether or not it was necessary for the Court to distinguish or overrule a previous authority.²² Justice Kirby writes:

15 Including *Cain v Doyle* (1946) 72 CLR 409; *Jaensch v Coffey* (1984) 155 CLR 549; *Waterford v Commonwealth* (1987) 163 CLR 54; *Trident General Insurance v McNiece* (1988) 165 CLR 107; *Gala v Preston* (1991) 172 CLR 243; and *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

16 Bryan Horrigan, 'Jurisprudence' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 388.

17 Justice Michael Kirby, 'Julius Stone and the High Court in Australia' (1997) 20 *University of New South Wales Law Journal* 239.

18 *Ibid* 243.

19 (1978) 138 CLR 438, 461.

20 (1980) 146 CLR 40, 49.

21 (1991) 172 CLR 243, 284.

22 The previous authority in question was *Smith v Jenkins* (1970) 119 CLR 397.

Thus, in those areas where Stone contributed writings of an orthodox and comparatively narrow kind, dealing with particular topics of substantive and criminal law, his writings are quite often referred to. Whether his opinions were accepted or not, their influence was acknowledged and their reasoning was respected.²³

In respect to international law, Justice Kirby notes:

Stone was foremost in Australia at the time in teaching the growing influence and importance of international law. Not only did he teach law students but he was a tireless public commentator on the subject. He explained the role, functions and potentiality of the United Nations. His exposition clearly influenced the thinking of Justices of the [High] Court and was expressly acknowledged by Justice Stephen in his critical decision in *Koowarta*.²⁴

*Koowarta v Bjelke-Petersen*²⁵ was decided by a 4:3 majority, with Stephen, Mason, Murphy and Brennan JJ holding that the *Racial Discrimination Act 1975* (Cth) was valid as law with respect to external affairs.

Arguably Stone's greatest impact has been in the area of appellate decision-making. It is worth noting that in this endeavour it is the process that is under scrutiny. This is not an approach that can be adopted in the context of litigation by lawyers or by judges. It does not involve commitment to any particular outcome. In the introduction to *Legal System and Lawyers' Reasoning*, Stone wrote that the book's purpose was: 'to study the processes of judicial and juristic thought, and the place therein of logic and other kinds of reasoning; and to do this against a background understanding of the elements of unity and disunity within a going legal order.'

In *Gala v Preston* Toohey J accepted Stone's explanation of how courts find the ratio decidendi of a case.²⁶ As Justice Kirby notes, '[b]y 1996 there is a frank acknowledgment of Stone's views on the "leeways for choice" and the policy problems which face appellate judges striving to give candid reasons for choosing one path over another.'²⁷ Justice Kirby, referring to a statement by Deane J in *Oceanic Sun Line Shipping Company v Fay*²⁸ as to how an appellate court derives a solution where such a solution is not provided by past authority, states that Justice Deane's

exposition of the judicial technique is a clear restatement of what Stone taught. It is not that the appellate judge is free to follow his or her unstructured whim and idiosyncratic opinion. The judge remains a judge, working within the constraints of the law. But the task is better and more honestly done if 'the leeways of choice' are acknowledged. Doing so will assist in an understanding of the difficulties which the judge faces. It will promote techniques of advocacy and reasoning which assist in the resolution of those difficulties. It will encourage the giving of reasons which more honestly state the considerations that have led the judge to one conclusion rather than another. Stone would ask, and expect, no more; but no less.²⁹

23 Kirby, above n 17, 244.

24 Ibid 244.

25 *Koowarta v Bjelke-Petersen* (1982) 155 CLR 168.

26 (1991) 172 CLR 243, 284.

27 Kirby, above n 17, 245.

28 (1988) 165 CLR 197, 252.

29 Kirby, above n 17, 245.

The impact of the teachings of Stone on those who studied under him, including Mason CJ, Jacobs, Murphy, Deane and Kirby JJ, have been described as 'deeply influential'.³⁰ As a sidenote, Justice Kirby, in discussing two areas of law that were to become abiding interests in his life, namely jurisprudence and international law, has stated in respect of Stone's teachings:

Little did I imagine, as we studied Stone's theories of precedent and of how appellate courts operate, that one day this humble acolyte would serve on the High Court of Australia, whose works he repeatedly analysed. I imagine that the only person who thought less of my chances in that respect at the time was Stone himself.³¹

Justice Jacobs, when a judge of appeal of the Supreme Court of New South Wales, wrote that between 1946 and 1964 in the United States, then later in England, he detected a change in attitude, towards recognising the forces, which operated in judicial decision-making. He attributed this change to writers such as Stone. In a comment that sheds light on the contribution of academics he said: 'Their work is an outstanding example of the influence which the academic lawyer over a period of time exerts not only in respect of particular aspects of law but also in respect of the broad approach to the judicial task.'³²

At a symposium to mark the 50th anniversary of the publication of the *Province and Function of Law* it was noted that Stone's influence

did not come through his writing alone ... in addition to his writings he exerted influence through his teaching, through his direct contact with those on whom he tested his ideas. And as some of these students have risen and continue to rise to the ranks of the senior judiciary, the Stone perspectives on the judicial task — no doubt in combination with other influences and in combination with the force of the individual's own intellect — have been directly translated into the law-making process, even blurring perhaps, the line between art and life.³³

IV RESTITUTION — PREVIOUSLY UNCHARTED TERRITORY

Perhaps the most dramatic example of the impact of theoretical academic research on the development of the law is the found in the seminal work of Goff and Jones on the law of restitution.³⁴ Sir Anthony Mason has stated that their great text, *The Law of Restitution*, published in 1966, 'has deservedly established itself as one of the great textbooks of modern times. It lifted the Law of Restitution from relative obscurity to a position of central importance on the legal stage.'³⁵ Lord Goff has said of his exploration of restitution with Gareth

30 Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 583.

31 Kirby, above n 17, 240.

32 Justice Kenneth Jacobs, 'Lawyers' Reasoning: Some Extra-Judicial Reflections' (1967) 5 *Sydney Law Review* 426, quoted in Leonie Star, *Julius Stone: An Intellectual Life* (1992) 175.

33 Michael Coper, 'Julius Stone — A personal reflection on his influence today' (1997) 20 *University of New South Wales Law Journal* 253, 255.

34 Wayne Covell and Keith Lupton, *Principles of Remedies* (1995).

35 Sir Anthony Mason, 'Book Review for *An Introduction to the Law of Restitution* by Professor P Birks' (1989) 1 *Journal of Contract Law* 265.

Jones, 'Jones and I know very well how fortunate we were to stumble upon this subject, to open an unnoticed and unmarked door and find beyond it virgin territory, unoccupied, untitled, crying out for settlers.'³⁶

In the first Australian text on the subject, the authors, the Honourable Keith Mason, President of the New South Wales Court of Appeal and Professor Carter of Sydney University, point out that only since 1985 have Australian courts 'attempted to investigate and apply a subject termed "restitution"'.³⁷ In fact, they go on to say:

Reports of an unexplored continent called 'restitution' were originally brought to Australia by postgraduate students who studied courses in restitution overseas, for example in England under Professors Gareth Jones and Peter Birks. Local practitioners and legal academics became aware of the standard work for English practitioners by (Lord) Goff and Jones, which provided a more modern source of analysis of case law ... Through this pioneering work, connections were found between similar claims (and claims following a consistent pattern or rationale) in diverse fields of law. ... in about the 1970s an idea arrived that something called 'Restitution' existed, equipped with a capital letter but waiting to be explored and mapped out.³⁸

The decision in *Pavey & Matthews Pty Ltd v Paul*³⁹ ('Pavey') is cited as the breakthrough for restitution in Australia whereby

the obsolete English system of common law pleading ... ceased to be a primary point of reference, and the door was opened to the encyclopaedia of the American *Restatement of Restitution*, to the pioneering work of Robert Goff and Gareth Jones, *The Law of Restitution* ... and to other writings on restitution by scholars such as Peter Birks, Jack Beatson, Andrew Burrows, and George Palmer.⁴⁰

In *Pavey* the High Court broke with the implied contract theory of quasi-contract as the basis of a claim in *quantum meruit*, marking the birth of restitution in Australia,⁴¹ Deane J stating that unjust enrichment was a 'unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of the plaintiff ...'.⁴²

Still, the existence of the subject of restitution is described as 'somewhat controversial',⁴³ as evidenced by the fact that Carter and Mason's text on restitution, the first Australian text on the subject, was only published in 1995.

The House of Lords first clearly recognised a law of restitution, based on unjust enrichment, in *Lipkin Gorman v Karpnale Ltd*.⁴⁴ This took a mere 26 years from the first edition of *The Law of Restitution* in 1966. But, as Lord Goff has noted previously:

36 Lord Goff, 'Foreword', in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) vi, vii.

37 John Carter and Keith Mason, *Restitution Law in Australia* (1995) [105].

38 Ibid [102].

39 (1987) 162 CLR 221.

40 John Carter and Keith Mason 'Restitution' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 603.

41 Carter and Mason, *Restitution Law in Australia*, above n 37, [102].

42 (1987) 162 CLR 221, 256-7.

43 Carter and Mason, *Restitution Law in Australia*, above n 37, [105].

44 [1991] 2 AC 548 — it is worthwhile noting that Lord Goff was a member of the House of Lords.

There is an inevitable passage of time between the formulation and exposition by scholars of a new subject such as restitution, and its recognition, still more a grasp of its scope and nature, by the practising profession, including judges. ... It will probably not be until those who have studied restitution in their student days gradually percolate upwards in barristers' chambers and solicitors' offices, that a true understanding of the subject will develop among professional lawyers.⁴⁵

In fact, some authors seem to be of the view that restitution could not have developed if it had been left in the hands of judges. Sir Anthony Mason has said, '[t]he baneful influence of the historic forms of action and our concentration on precedent rather than principle impeded the prospect of a principled and coherent Law of Restitution evolving as a matter of judge-made law.'⁴⁶

V CONCLUSION

In the time available to me in this lecture I have been able to touch on only a few examples of the unique contribution that the Academy can make to the development of law. To single out so few is to neglect many. In doing so I do not mean to express a preference or greater value for any kind of research. In the Academy, as elsewhere, there is strength in diversity and there will always be value in careful and reflective scholarship. The Academy should value and promote its own unique place in our legal landscape.

45 Lord Goff, above n 36, vi.

46 Mason, above n 35, 265.