

# REVIEWING THE REVIEWERS

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In this article, I seek to reflect on some of my experiences as a law researcher publishing in refereed academic journals, particularly in Australia and to some extent overseas. I believe that some researchers, especially early in their careers, might benefit from hearing some of my experiences attempting to have my research published over a 12-year period. A secondary purpose might be to cause those of us, when asked to act as reviewers, to reflect on the manner in which we conduct our reviews, and the way in which we express our opinions.

I should make some points up-front. First, I have published approximately 80 refereed research articles during those years, the overwhelming majority of which were sole-authored. This is not shared as an exercise in ego-stroking (itself, an all-too-common pastime in some academic circles), but hopefully to give what I say some credibility. What follows here cannot be glibly dismissed as sour grapes from someone who just couldn't write well enough, didn't have sufficient knowledge, or hadn't really done their research. I have had my work reviewed by many different journals, and many different reviewers. Heck, I made the top-50 list of the most prolific authors in Australia's top legal journals.<sup>1</sup> (Again, not a boast, but an indication that I have had a lot of experience with the refereeing process.)

Secondly, I should also state that for me, and I suspect for other academics, the idea of my work being critiqued and evaluated by others was initially extremely confronting. My work is personal to me. It was hard to 'put it out there', not knowing how it would be received, or what reviewers would say. It has become easier over time to deal with this process, but I don't know that I will ever be 100 per cent okay with the publication of my work being dependent on the judgment of another person. (Though I think I can hear some discrete advice from a current Australian senator that I need to find myself a bucket of cement and 'toughen up'.)

I believe in a peer-review system as the least worst method of judging the merit of academic research. I cannot think of a better system. Sometimes, a reviewer who diligently performs the task can provide constructive criticism that improves the quality of the final product. This is how I originally conceived of the peer review system — as a system by which reviewers are genuinely seeking to assist the author to develop a better paper, with well-considered comments that fairly reflect the quality of what has been reviewed, and evincing understanding of the arguments the

author has made. To some extent this has been my experience; on many occasions, work I have submitted has been greatly improved as a result of constructive, fair feedback from a reviewer. When this occurs, the review process can be very valuable. However, in other cases, this has not been the experience.

I have on numerous occasions been asked to be a reviewer for the work of others, and regularly read the work of my colleagues to provide constructive suggestions where I can. I always accept invitations to review the work of others, as I see it as a responsibility of more senior academics to constructively review the work of others. I say this because journal editors often indicated to me their difficulty in obtaining suitable individuals to conduct reviews. While we are all busy, I would encourage anyone with the relevant expertise to undertake reviews when requested to do so. When I conduct a review, I treat the work as I would wish my work to be treated, reflecting that I have read and understood the work, and attempting to provide constructive feedback where I can.<sup>2</sup>

Unfortunately, I have experienced occasions of gratuitous insults seemingly directed at me personally, plain nastiness, or clearly unfair and unsubstantiated comments by a person who evidently did not understand, or (worse) had not made an effort to understand, the work.<sup>3</sup> The literature emphasises that good review practice should summarise the work being reviewed, to reflect that the reviewer understands the work and has considered it in detail.<sup>4</sup> Unfortunately, for some the position of anonymous reviewer is something like a coward's castle, where the work of another can be 'put down' without any need for substantiation, and without any recourse by the author of the spurned work.<sup>5</sup> I would suggest that individuals who approach their refereeing duties in this way could do with some serious self-reflection. They may think they are doing the academic profession a service. They are in fact doing it, and the cause of development in legal thinking, a substantial disservice.

I recall once that an administrative assistant of mine, who had extensive work experience, warned me that the nastiest politics she ever saw in her working life were at university. In my second year as a full-time academic, one of my colleagues said to me that university politics was extremely nasty, precisely because the actual stakes were so low. I didn't believe them at the time. Now, after enduring years of the refereeing process, I am not so sure.

## REFERENCES

1. Russell Smyth, 'Who Publishes in Australia's Top Law Journals?' (2012) 35 *University of New South Wales Law Journal* 201, 241–242.
2. In this regard, I was heartened upon reading Roger Clarke's *Notes on the Reviewing of Papers* (2006), <<http://www.rogerclarke.com/SOS/PaperRev.html>>, that indicators of quality in a review include: 'demonstrated understanding of the paper', 'positive features of the paper, identified briefly' and 'critique, expressed constructively'.
3. Examples include claims that the errors in the paper are such that the reviewer is surprised that I have a law degree (the paper was subsequently published in a highly ranked international law journal with minimal change), and claims that the work is of 'undergraduate standard'. Another was an email from a faculty advisor of an Australian journal that they considered I was lucky that my work was being published in that journal at all, despite two favourable reports from referees, because in the advisor's view the work was marginal. Contrast this with the advice of Clarke, above n 2: 'don't be emotive, aggressive, sarcastic or demeaning'; Michael Bieber, *How to Review* (7 April 2014) <<http://www-ec.njit.edu/~bieber/review.html>>: 'authors deserve detailed feedback in a non-hostile tone ... do the quality of review that you wish others would do for you'. It is doubtful that these reviewers have read either of these papers.
4. Clarke, above n 2.
5. Allen Lee, 'Reviewing a Manuscript for Publication' (1995) 13 *Journal of Operations Management* 87, 87: '(some) reviewers hide behind the anonymity of the reviewing process, offering negative remarks that they would not have the courage to voice in public'.

What follows are some thoughts on particular issues that have arisen for me in the course of having my work reviewed, and published. They are a mix of things that I would like all researchers, but particularly early career researchers, to remember, and for anyone asked to review the work of another to bear in mind. And to clarify, what follows does not reflect at all on the treatment of work I have submitted to the *Alternative Law Journal*. I have generally found the editorial team at this Journal to be very supportive and encouraging, and in many cases the reviewers of my articles submitted here as well.

### Enthusiasm and passion

I am a big believer in passion and enthusiasm. A person who works on something about which they are passionate is very lucky. I am lucky that I have a passion (not shared by all!) for constitutional law and human rights, and so I very much enjoy researching and learning more about these topics, and writing about them in scholarly outlets. I remember Michael Kirby saying once that one had to be careful about passion — that it could get in the way of calm, reasoned argument, and that some of the worst advocates he had seen were those spurred on by passion and zeal, at the expense of cool-headed rationalism. He is right, of course. Nonetheless, I would say that passion and reason are not necessarily strange bedfellows. Passion and enthusiasm can spur a person to research a particular point that bit further, in a bit greater depth. It can improve the extent to which they consider views of others. It helps get you through the hard times, when you have a difficult argument to make, or precedents are against you, or you get bad referee reports. My view is that passion, properly channelled, is a great asset for a researcher.

But, in my experience, some reviewers seem to see it as their role to suck every bit of passion and enthusiasm out of a researcher who has submitted an article for review. My advice to a new researcher? Don't let them.

How does this negative energy manifest? For one, an unwillingness to consider new ideas or new ways of thinking about a given problem. On numerous occasions, I have seen comments in referee reports to the effect that the current High Court would be most unlikely to accept the argument I have made, inevitably a comment leading to the reviewer rejecting the article. Several responses come to mind — first of all, so what? I am not writing for them. I would like it if some judges accepted my arguments, but the fact that current judges would not accept them does not deter me from writing, should not be a black mark against my name, and should not be a reason for declining to publish a paper. What an impoverished society we would be if views not considered 'orthodox' at the time were not aired. It is a pity we have not learned from the experience of Socrates, Galileo and others. (Of course, I am not putting my work in that league — before a critic of this work starts criticising me for that!)

In my view, it is singularly short-sighted to suggest that, because the current High Court would not accept the argument in the paper, then the paper is not worthy of publication. Comments such as this, from apparently intelligent people, ignore that legal principles and accepted wisdom do evolve over the years. An idea that is heretical today might be orthodox in 50 years' time. No reviewer should seek to freeze the current state of the law by effectively censoring work that does not fit with currently prevailing views of the High Court. In that light, one of my most memorable feedback comments was a favourable review that the article was 'sufficiently heretical to be of interest'. Priceless!

As much as I hope authors retain their enthusiasm and passion, I must say that I have generally not experienced a high level of enthusiasm and passion from reviewers. While I am generally sufficiently pleased if my manuscript is 'accepted for publication' or 'recommended to publish', it would be nice sometimes for reviewers, dare I say it, to provide some compliments on the work. In my experience with the 80-odd articles I have published, I could count on one hand the really positive, gratuitous statements made by a reviewer. One memorably said that the author should be congratulated for having made the changes they did. Another said I had written a very comprehensive work (though they criticised me for elaborating on every little point — if only they had seen the reviews to which I have been subject over 12 years, they would have understood why!). These comments stand out because they are so rare. My gentle suggestion to reviewers? It does not cost anything to be nice and to give credit where it is due. People appreciate praise. An author has often slaved away for months on their work. Some recognition of the effort involved would be appreciated. This does not mean that academic standards must be lowered; it does mean that there is a way to express respect for the work and effort of others, even if you don't agree with the substance of it or if you have other reservations about its quality.

In summary, researchers must remain enthusiastic and passionate about their ideas. Don't be afraid to include new ideas, connections between concepts not yet explored, or what some may call radical suggestions in your paper. And don't be discouraged when narrow-minded individuals, hiding behind the anonymity of peer review, tell you that your views are unorthodox and unacceptable to the current judges. To reviewers, please don't discourage original and creative thinking. Today's views and beliefs are not sacred, and we should welcome, not frown upon, critique of the status quo.<sup>6</sup> And if you are reading a well-researched article, please be enthusiastic!

### Hostility toward international material

I am a strong believer in the use of international and comparative material in conducting my legal research. Many of the legal issues we deal with in Australia have significant parallels overseas. Our fundamental legal document, the *Australian Constitution*, was itself

6. Michael Kirby, 'The Graduating Class of Sydney Law School 1962: Talented, Lucky, Unquestioning' (2012) 36 *Australian Bar Review* 189.

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a product of the consideration of the models of two other nations. It is, in my view, an unassailable argument that our legal thinking in Australia can only be enriched by a detailed consideration of equivalent issues in other jurisdictions. Of course, this does not mean that the law in Australia will always, or should always, be the same as elsewhere. Appropriate differences, for example in text and context, must be borne in mind when making any comparisons.

I initially expected, when I entered academia, that an approach to a legal problem in Australia which considered equivalent positions overseas would, all things being equal, be considered a stronger piece of legal research as a result. I would have thought that intelligent thinkers would realise that many legal problems in Australia are shared elsewhere, and that we should at least consider what we can learn from the experience elsewhere. I try to keep an open mind on things as much as possible, and greatly enjoy learning how other legal jurisdictions have dealt with some of the legal challenges we face in Australia. Many of them have had more experience with these issues than we have, and it just makes sense (to me, at least) to see what can be learned from those experiences.

It is a reflection of this reality that law curricula around Australia are increasingly internationalised. The University of Melbourne and the University of New South Wales are examples of law schools with an internationalist approach to legal education, which acknowledges the inevitable forces of globalisation, movement of labour etc.

While some reviewers laud the reference to overseas experience, on a disturbing number of occasions negative comments have been made on my work relating to my use of international material. In my initial years as a researcher, these comments were useful, stating that I had not sufficiently taken into account differences in text or context. As a result of this feedback, on each occasion now where I resort to the use of comparative materials, I seek to make a case for it, pointing out that the textual differences are not particularly great, that the sections compared have a common history, or highlighting examples where the High Court itself has referred to the very same international sources. Having been burned by the earlier comments, I now take particular care on each occasion to justify my resort to the international learning.

To my disappointment, the comments about the inappropriateness of the use of international materials

have continued. Given my care in justifying the use of such materials, I am left to conclude that, rather than expressing a good faith concern on the quality of the article or the helpfulness of comparative analysis in a particular case, these comments reflect the mindset of the reviewer. It smacks of parochialism to assume that the only legal materials worth referring to, or relevant, are those that are of Australian origin, perhaps with some exception made for English materials; that, somehow, Australia's legal problems and challenges are unique to this continent, and we should continue an insular approach to resolving them.

So while I applaud that some law schools have moved to an internationalist approach, there remains a thread of 'anti-internationalism', and downright hostility (a strong word, but the right one) to the use of comparative sources among many of our reviewers, which will take some time to overcome. A similar irrational hostility to some overseas sources has also been seen in High Court decisions of past years.

I would encourage a researcher to make liberal use of international materials in their work, acknowledging differences in text and context. Researchers should think big, and be encouraged by reviewers to do so. Do not be discouraged by the narrow-minded. To the reviewer? You may not have been taught much about international and comparative law — I know I didn't receive a lot of instruction on this as an undergraduate — but please don't close your mind to the potential of comparative law. It is really not intelligent to refuse to consider what can be learned from elsewhere. Closed minds wither.

### Undue, extreme negativity

We come across negative people throughout our lives. Family members, co-workers, friends who will constantly strive to see the negative in any situation. But it doesn't make for a happy life, and such thinking can have a debilitating impact on them, and those around them.

Sometimes I wonder whether there is a disproportionate percentage of such negative people in the ranks of 'academic reviewer'. Of course, you can always find reasons to reject an article if you want to. Maybe the article didn't provide a reference to a particular statement. (One of the 'criticisms' I received on a recent 20 000 word article was that one sentence was not referenced.) I was first taught serious research by the late Professor George Winterton, my PhD supervisor. He taught me in the mid-1990s, and

I remember that you don't have the right to express your view on a matter unless and until you have read everything worthwhile already said and written about it. I have not forgotten that lesson. As a result, I try to read as broadly as I can, before committing pen to paper, as it were, and try to demonstrate that I have read as broadly as my mentor would have wanted. (Professor Winterton was always polite and constructive with his comments.) As were we all, I was taught that plagiarism is the ultimate sin for a researcher. So I will probably 'over-cite' in relation to works of others I have read; in other words, cite where I probably don't need to, but from a sense of it being the right thing to do, an acknowledgment of having gained something on the point I am making from the work of another, one way or the other.

This can either be a positive or a negative, in the minds of others. To a reviewer with a negative mindset, this might suggest 'over-reliance on secondary sources'. There I was thinking it was right to read as broadly as possible and to consider the contribution of others before developing my own thoughts. Apparently not. When I acknowledge that I have been influenced by what others have said, this can be seen as weakness, as having written a 'derivative' article. No doubt if I had minimised my references to the work of others, the article would have been denounced by that reviewer as insufficiently researched, and as not demonstrating familiarity with particular works that I ought to have read. Joseph Heller would be proud.

That is one example of the extreme negativity. The points made above about the rejection of unorthodox views and hostility towards international material should also be understood as further examples of a negative mindset. Twice this year, I received reviews on a paper on which I had spent about two months working, and in which I had confidence as a quality work. *Every single comment made about the paper by those reviewers, and released to me by the editor, was negative.* This ignores some of the literature around valuable review processes, which emphasise that reviews should find at least some positive things to say about a paper.<sup>7</sup> Unfortunately, while we can choose not to be around some people who are unduly negative, or minimise our time with them, we cannot control the use by journals of unduly negative reviewers.

For instance, on two occasions in reviews, I have been told that the standard of work I submitted was, and I quote, equivalent to an 'undergraduate essay'. While no doubt everyone is entitled to express their opinion, the fact that someone is free to say something is obviously different to whether people should as a matter of common decency say something. While I am now quite used to such insulting comments, having been hardened by many years of the review process, I could imagine that such denigration could be extremely distressing and disheartening for someone with less experience in the world of academia and reviewing.

As I said at the start, my original thought regarding the referee process was that it provided a chance for the reviewer to offer constructive feedback, with specific

suggestions as to how the article could be improved. Anonymous put-downs that work crafted over many weeks is of 'undergraduate standard', to a professor and author of 80 refereed articles, or a remark that the paper is so full of errors that the reviewer is surprised the author has a law degree, are not useful at all. As indicated, they tend to reflect much more on the nameless 'hero' who likes to insult people anonymously, akin to the notorious 'twitter trolls', probably because they will not (or cannot) seriously engage in the substance of the work, or they are just bullies. Unlike the 'twitter trolls', however, you can't easily avoid reviewers who resort to petty put-downs. The best escape is to 'delete' these kinds of comments fast from your mind. Otherwise, they can eat away at your self-esteem, and the 'hero' wins.

Research shows that those in the legal profession have more mental health issues than the general population, and also that such issues are worse among the law student population than other students.<sup>8</sup> I am no psychiatrist, but it would be interesting to reflect on the extent to which mental health issues among law students are affected by unduly negative and critical law academics.<sup>9</sup> After all, the same people conducting these extremely negative reviews of the work of colleagues are also the ones assessing students.<sup>10</sup> Anonymous barbs and bullying behaviour can do great damage to the mental state of colleagues. I am not sure whether reviewers who engage in such conduct realise, or care.

### Vague reviews

Another type of review to be dreaded is the vague review.<sup>11</sup> For instance, examples to which I have been subject include comments that my work 'is not sophisticated enough' or 'needs more polish'. Not sure how to resolve this. More holidays in Europe?

Seriously, given that a lot of what I write concerns how the law should and could protect human rights, a cynic might suggest that if such an article is reviewed by an arch-conservative who continues to insist that human rights are best 'protected' by parliament, despite a mountain of evidence to the contrary, they may be unlikely to see the merit of the argument made, no matter how much 'polish' or 'sophistication' is applied.<sup>12</sup> But it would be a lot more intellectually honest if they just said they disagreed with the argument (which they are entitled to do, of course), rather than by trying to dress up their objection as something more than it is. In other words, the 'insufficiently sophisticated' comment is, more often than not, mere 'sophistry'.

### The role of the editor, and guidelines to reviewers

Some of the above issues can be managed by a good editor. Many of my experiences have been with student-edited journals, behind which sit one or two faculty advisors. Most of the communication is with the student editors, who cannot necessarily be expected to know whether review comments are fair or accurate. In my experience, as a result, they tend

7. Clarke, above n 2; Lee, above n 5, referring to the 'most disheartening review he had ever seen' involving a long list of alleged problems with the manuscript, with nothing at all positive.

8. Kelk et al, *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Lawyers* (Report, Brain and Mind Research Institute, 2009); in the judicial context, see Michael Kirby, 'Judicial Stress and Judicial Bullying' (2013) 87 *Australian Law Journal* 516.

9. Larcombe et al, 'Does an Improved Experience of Law School Protect Students against Depression, Anxiety and Stress? An Empirical Study of Wellbeing and the Law School Experience of LLB and JD Students' (2013) 35 *Sydney Law Review* 407.

10. Chief Justice Robert French recently recounted a story of a former academic at one of Australia's leading law schools describing the work of an honours student as being like that of a 'semi-illiterate five year old': Robert French, *Pericleans, Plumbers and Practitioners* (Speech to launch the law school history, Monash University Law School, 28 June 2014) <<http://www.law.monash.edu.au/50th/pericleans-plumbers-practitioners.pdf>> 4. Perhaps tongue in cheek, Chief Justice French added that today such a comment 'would be regarded as a species of emotional abuse'.

11. This is one of the things Clarke suggests reviewers do not do, above n 2.

12. Some of the politics involved in the conduct of reviews is discussed in James Allan and Anthony Senanayake, 'Time and Chance and the Prevailing Orthodoxy in Legal Academia Happeneth to Them All – A Study of the Top Law Journals of Australia and New Zealand' (2012) 33(2) *Adelaide Law Review* 519.

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to go along with the reviewers' recommendations and comments. This means that some gratuitous, nasty and/or unhelpful comments from referees (such as those examples, above) are also passed on to the author. An experienced editor may be more selective about the referee comments they pass back to the author, or temper relentlessly negative reviews with an encouraging word so as to provide some solace, or may avoid some of the issues altogether through the thoughtful choice of referees.<sup>13</sup> It is also considered valuable for journals to provide review guidelines to those asked to conduct reviews, and to ensure that reviews submitted are in accordance with guidelines.

### **Humour, persistence and perspective**

In conclusion, a budding researcher should retain their sense of humour and perspective. The sun will still rise tomorrow, even if your work was not accepted this time. Gain what you can from the reviews, whether they are conducted in a fair and informed manner, or not. Usually there is at least something in there that can be used to improve your work, painful though it may be. Remember, there are many fair and diligent reviewers out there. Submit the article elsewhere; it will be accepted and appreciated eventually.<sup>14</sup> Above all, believe in yourself and the value of your contribution, even if others do not. And keep the cement handy, if all else fails.

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13. David Finney, 'The Responsible Referee' (1997) 53 *Biometrics* 715, 719.

14. Dan Svantesson, 'Truisms about the Australian Publishing Climate for Law Journal Articles, and Some Strategies to Cope' (2011) 10(3) *Canberra Law Review* 4, 18; Ross P Buckley, 'Note: Legal Scholarship for New Law Teachers' (1997) 8 *Legal Education Review* 181, 210.