

1 Psycholegal Research: An Introduction

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‘Although the roots of law and psychology were planted at the turn of the century, the “tree” has been slow to grow and only has begun to bear fruit recently.’ (Ogloff and Finkelman, 1999:17)

‘In the recent past psychologists’ claims to knowledge and fact finding ability were altogether too forceful, and lawyers’ reluctance to use psychological evidence, insights and sophisticated techniques altogether too irrational.’ (Clifford and Bull, 1978:19)

‘However relevant they may be to each other, the offspring of the relationship between psychology and law is still an infant and doubts are still cast upon its legitimacy.’ (Carson and Bull, 1995a:3)

‘The issues are not the relevance of psychology and law to each other but the extent to which the law and legal system should and are prepared, to embrace psychology and the extent to which psychologists should, and are prepared, to adapt their work to the needs and requirements of the legal system.’ (Carson and Bull, 1995a:4)

Introduction: Development of the Psycholegal Field

The plethora of applications of psychology to law can be differentiated in terms of what has been defined as:¹ (a) '*psychology in law*'; (b) '*psychology and law*'; and (c) '*psychology of law*'. According to Blackburn (1996:6), psychology in law refers to specific applications of psychology within law: such as the reliability of eyewitness testimony, mental state of the defendant,² and a parent's suitability for child custody in a divorce case. *Psychology and law* is used by Blackburn (1996) to denote, for example, psycholegal research into offenders (see Howells and Blackburn, 1995), lawyers, magistrates, judges and jurors. Finally, *psychology of law* is used to refer to psychological research into such issues as to why people obey/disobey certain laws, moral development, and public perceptions and attitudes towards various penal sanctions. As far as the term *forensic psychology* is concerned, Blackburn (1996:6) argues convincingly it should only be used to denote the 'direct provision of psychological information to the courts, that is, to psychology in the courts' (see also Gudjonsson, 1996).³ While there is no generally acceptable definition of '*legal psychology*', the following one put forward by Ogloff (2000:467) is sufficiently broad and parsimonious, as he maintains, to reduce some of the confusion that surrounds this field: 'Legal psychology is the scientific study of the effects of law on people; and the effect people have on the law. Legal psychology also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law.'

Psycholegal research involves applying psychology's methodologies and knowledge to studying jurisprudence, substantive law, legal processes and law breaking (Farrington et al., 1979b:ix). Research into, and the practice of, legal psychology has a long tradition exemplified since the beginning of the twentieth century by the work of such pioneers⁴ as Binet (1905), Gross (1898), Jung (1905), Münsterberg (1908) and Wertheimer (1906). In fact, Münsterberg has been called 'the father of applied psychology' (Magner, 1991:121).⁵ The reader should note in this context that, as Ogloff (2000:461) reminds us, a number of well-known psychologists expressed an interest in applying psychology's findings to law as early as the 1890s. More specifically, Ogloff mentions Cattell's (1895) article in *Science* which was concerned with how accurately one could recall information; Freud's (1906) lectures to judges in Vienna on the merits of psychology for law in establishing facts; Watson's (1913) view that judges could utilise psychological findings and Paynter's (1920) and Burt's (1925) research into trademark and trade name infringements which was presented in court; Hutchins and Slesinger's (1928, 1929b) published work on psychology and evidence law and, finally, the Russian psychologist Luria's (1932) work on the affect in newly arrested criminals, before being interrogated by police, in order to differentiate the guilty from the innocent (Ogloff, 2000:461).

Regarding publications in law and psychology, the following appeared in the early part of the twentieth century: Brown's (1926) *Legal Psychology*:

Even though well-known psychologists expressed an interest in applying psychology's findings to law as early as the 1890s, the truth is the psycholegal field really began to expand in the 1960s.

Psychology Applied to the Trial of Cases, to Crime and its Treatment, and to Mental States and Processes; Hutchins and Slesinger's (1929a) article on 'legal psychology' in the *Psychological Review*; McCarty's (1929) *Psychology for the Lawyer* and Cairns' (1935) *Law and Social Sciences*.

The psycholegal field has been expanding at an impressive rate since the mid 1960s, especially in North America, since the late 1970s in the UK and in Australia since the early 1980s. In fact, on both sides of the Atlantic, research and teaching in legal psychology has grown enormously since the mid 1970s (Lloyd-Bostock, 1994). More recently, the field of psychology and law has also been expanding in Europe, especially in the Netherlands, Germany and Spain (see Lösel et al., 1992a:509–53; Davies et al., 1996:579–601). As the chapters in this volume show, since the 1960s psychology and law has evolved into a single applied discipline and an often-cited example of success in applied psychology. Ogloff (2001:4) maintains that, 'Despite its long history, though, the legal psychology movement has had limited impact on the law, and until recently, it was focused primarily in North America'. However, the contents of this book attest to the fact that the legal psychology movement has had more than 'limited impact on law' on both sides of the Atlantic and, in contrast to Ogloff's assertion, it has not been mainly focused in North America. There appears to be an unfortunate, strong tendency among psycholegal researchers in the United States to be uninformed or, if informed, to avoid acknowledging, relevant work in Britain and on continental Europe – an example of what Ogloff (2001:7–8) identifies as 'jingoism' and one of the 'evils' of the legal psychology movement in the twentieth century. In this context, Haney (1993) points to psycholegal researchers having tackled some very crucial questions in society and, *inter alia*, been instrumental in improving the ways eyewitnesses are interviewed by law-enforcement personnel; the adoption of a more critical approach to the issue of forensic hypnosis evidence in the courts; psychologists contributing to improving the legal status and rights of children; and, finally, generally making jury selection fairer (p. 372ff). Furthermore, the impact of legal psychology has not just been one way (Davies, 1995:187).

Despite the early publications in legal psychology mentioned above, and while most lawyers would be familiar with forensic psychology, traditionally dominated by psychiatrists, it was not until the 1960s that lawyers in the United States came to acknowledge and appreciate psychology's contribution to their work (see Toch, 1961, *Legal and Criminal Psychology*; Marshall, 1969, *Law and Psychology in Conflict*).⁶ Since the 1970s a significant number of psycholegal textbooks have appeared in the United States,⁷ in England,⁸ and some have been written by legal psychologists on continental Europe (Lösel et al., 1992a; Wegener et al., 1989). In addition, following Tapp's (1976) first review of psychology and law in the *Annual Review of Psychology*, relevant journals have been published, such as *Law and Human Behavior* which was first published in 1977 as the official publication of the American Psychology-Law Society (APLS) (founded in 1968) and is nowadays the journal of the American Psychological Association's Division of Psychology and Law.

Other journals are: *Behavioural Sciences and the Law*; *Expert Evidence*; *Law and Psychology Review*; *Criminal Behaviour and Mental Health*. New psycholegal journals continue to be published. The first issue of *Psychology, Crime and Law* was published in 1994 and those of *Legal and Criminological Psychology* and *Psychology, Public Policy, and Law* in 1996 in the UK and the United States respectively.

Despite the fact that in the UK lawyers and psychologists have been rather less ready than their American colleagues to 'jump into each other's arms', the push by prison psychologists and increasing interest in the field (for example, at the Social Science Research Centre for Socio-Legal Studies at Oxford, the Psychology Departments of the University of East London [previously North-East London Polytechnic], the London School of Economics and Political Science and Nottingham University, as well as at the Institute of Criminology at Cambridge) had gathered enough momentum by 1977 for the British Psychological Society to establish a Division of Criminological and Legal Psychology. By the early 1980s empirical contributions by legal psychologists at Aberdeen University added to the momentum. Annual conferences at the Oxford Centre formed the basis for Farrington et al.'s (1979a) *Psychology, Law and Legal Processes* and Lloyd-Bostock's (1981a) *Psychology In Legal Contexts: Applications and Limitations*, and these 'established a European focus for collaboration between the two disciplines, attracting scholars from many different countries' (Stephenson, 1995:133) and paved the way for the more recent annual European Association of Psychology and Law (EAPL) Conferences. These two publications, together with Clifford and Bull's (1978) *The Psychology of Person Identification* and other British works published in the 1980s and early 1990s, have established psychology and law as a field in its own right in Britain, despite the fact that in 1983 the Social Science Research Council, under a Conservative government, ceased funding conferences for lawyers and psychologists (King, 1986:1). Following a suggestion made at the EAPL conference in Siena, Italy, in 1996 by Professor David Carson of Southampton University, a very successful conference indeed was held at Trinity College, Dublin, jointly organised by APLS and EAPL. The conference was attended by over 600 delegates from twenty-seven countries, and produced two excellent books, namely *Psychology in the Courts: International Advances in Knowledge* by Roesch et al. (2001) and *Violent Sexual Offenders* by Farrington et al. (2001).

With its emphasis on law in a social context, sociological jurisprudence has created a climate within law which has been conducive for the development of legal psychology.

Psychological associations outside the UK also set up relevant divisions, for example, in the United States in 1981 and in Germany in 1984 (see Lösel, 1992). In 1981 the American Psychological Association founded Psychology and Law as its forty-first Division (Monahan and Loftus, 1982). A significant development in the United States was the inclusion in 1994 of law and psychology in the *Annual Survey of American Law*. Besides a spate of international conferences on legal psychology that have been held in the UK and on continental Europe, there now exist both undergraduate and post-graduate programs in legal psychology (Lloyd-Bostock, 1994:133). Finally, a number of universities on both sides of the Atlantic have recognised the importance

of legal psychology by dedicating chairs to the subject in psychology departments and law schools (Melton et al., 1987; Ogloff, 2000). It must not be forgotten, however, that while, by the beginning of the 1980s, one-quarter of graduate programs in the United States offered at least one course and a number had begun to offer forensic minors and/or PhD/JD programs (Freeman and Roesch, 1992), few psychology departments offered courses in psychology and law prior to 1973 (Diamond, 1992; Ogloff, 2000).

1 Bridging the Gap Between Psychology and Law: Why It has Taken so Long

The development of sociological jurisprudence (Holmes, 1897), with its emphasis on studying the social contexts that give rise to and are influenced by law, posed a challenge to the ‘black-letter’ approach to studying law which was based on the English common law and had been the linchpin of the legal system in North America. Sociological jurisprudence provided conditions within law that were favourable to the development of legal psychology, as did subsequent movements in law such as ‘legal realism’ (Schlegel, 1970).

In his book, *On The Witness Stand*, Münsterberg (1908:44–5) was critical of the legal profession in the United States for not appreciating the relevance of psychology to its work. However, Münsterberg was overselling psychology and his claims were not taken seriously by the legal profession (Wigmore, 1909; Magner, 1991). In addition, according to Cairns (1935 – cited by Ogloff, 2000: 461), there was opposition from within the discipline of psychology by such scholars as Professor Edward Titchener of Cornell University, who maintained that psychologists should not seek to apply their findings but should confine themselves to conducting pure and scientific research. Not surprisingly, therefore, ‘the initial foray into law and psychology ... did not generate enough momentum to sustain itself’ (Ogloff, 2000: 462).

The rather unfortunate legacy left by Ebbinghaus (1885) and his black-box approach to experimental memory research – best exemplified by his use of nonsense syllables – contributed to the state of knowledge in psychology at the time and was one significant factor that negated the success of Münsterberg’s attempt. Fortunately, the dominance of the black-box paradigm in experimental psychology came to an end with the publication in 1967 of Neisser’s futuristic *Cognitive Psychology* book. In the ensuing six decades, whilst behaviourism (on the one hand) and the experimental psychologists’ practice (on the other) of treating as ‘separate and separable’ perception, memory, thinking, problem solving and language (Clifford and Bull, 1978:5) permeated and limited psychological research greatly, the early interest in psycholegal research fizzled out. As Ogloff (2000) points out, the continuing development of legal psychology after the 1930s was not only prevented by forces within psychology but, also, by a ‘conservative backlash in law which limited the progressive scholars in the field ... The demise of legal realism had a chilling effect on legal psychology ...’ (463).

Ogloff lists the following possible lessons to be learned, and to avoid, from the demise of legal psychology after 1930: a small number of people working and publishing in law; lack of training programmes for students; no identifiable outlet for psycholegal research; that those supporting the psychological status quo did not look favourably upon psycholegal research and, finally, the fact that legal psychologists were not formally organised (p. 462). By the late 1960s, as psychology matured as a discipline and, amongst other developments, social psychology blossomed in the United States, the experimental method came to be applied to problems not traditionally the concern of psychologists. Psychologists began turning their attention to understanding deception and its detection, jury decision-making, the accuracy of eyewitness testimony and sentencing decision-making as human processes. Most of the early psycholegal researchers with a strong interest in social psychology focused on juries in criminal cases, those with an affinity to clinical psychology concerned themselves with the insanity defence, while cognitive psychologists examined eyewitness testimony. These same areas continue to be of interest to psycholegal researchers today, but the questions being asked are more intricate and the methods used to answer them are more sophisticated (Diamond, 1992:vi). More recently, Ogloff (2001:14), like Carson and Bull (1995a: 9), has urged legal psychologists to broaden their research interests to include more areas of law, including: administrative law, antitrust, civil procedure, corporate law, environmental law, patent law, and family law. The somewhat narrow focus of psycholegal research caused enough concern to Saks (1986) for him to remind such researchers that ‘the law does not live by eyewitness testimony alone’ and for Diamond to urge them ‘to explore under-represented areas of the legal landscape’ (Diamond, 1992:vi). It is comforting for psychologists to know that, with the general growth and maturity of their discipline, major industrialised society has come to realise the wide-ranging benefits of psychology (McConkey, 1992:3).

Why, then, has it taken so long for the field of psychology and law to develop when, as some authors would argue,⁹ psychologists and lawyers do have a lot of common ground? Both disciplines focus on the individual (Carson, 1995a:43). Yarmey (1979:7) wrote that ‘both psychology and the courts are concerned with predicting, explaining and controlling behaviour’, while according to Saks and Hastie (1978:1): ‘Every law and every institution is based on assumptions about human nature and the manner in which human behaviour is determined’. Achieving ‘justice’ is the concern of law and lawyers, while the search for scientific truth is the concern of psychologists (Carson and Bull, 1995a:7). Diamond (1992:vi–vii) went as far as to state that ‘on grandiose days, I think that law should be characterised as a component of psychology, for if psychology is the study of human behaviour, it necessarily includes law as a primary instrument used by society to control human behaviour. Perhaps this explains why laws are such a fertile source of research ideas for psychologists’. Similarly, Crombag (1994) argues that law may be considered a branch of applied psychology because the law mainly comprises a system of rules for the control of human social behaviour. Listing law as a

component of psychology, however convincing the arguments put forward for it might be, is not a suggestion that will endear psycholegal researchers to lawyers. A more realistic position to adopt than that of Crombag's is that 'to the extent that every law has as its purpose the control or regulation of human behavior, every law is ripe for psychological study' (Ogloff, 2001:13–14).¹⁰

While the law relies on assumptions about human behaviour and psychologists concern themselves with understanding and predicting behaviour, both psychology and law accept that human behaviour is not random. More specifically, research in psychology relates to various aspects of law in practice (Lloyd-Bostock, 1988:1). As in other countries, the legal profession in Australia, justifiably, perhaps, has been rather slow to recognise the relevance of psychology to its work. Compared to law, psychology is, chronologically speaking, entering its adulthood and, given a number of important differences between the two disciplines, it comes as no surprise to be told that there is tension, and conflict between the two disciplines (see Marshall, 1966) that persists (Carson and Bull, 1995b; Diamond, 1992:viii). Bridging the gap between the two disciplines on both sides of the Atlantic, in Australia, New Zealand and Canada, as well as, for example, in Spain and Italy (see Garrido and Redodo, 1992; Traverso and Manna, 1992; Traverso and Verde, 2001) has not been easy. In fact, there is a long way to go before the remaining ambivalence about psychology's contribution to academic and practising lawyers and ethical issues of such a function will be resolved (Lloyd-Bostock, 1988). Admittedly, 'Different psychologists have different ideas about what psychology should be about' (Legge, 1975:5) and 'Law, like happiness, poverty and good music, is different things to different people' (Chisholm and Nettheim, 1992:1). The simple fact is that there are significant differences in approach between psychology and law. This point is well-illustrated by eight issues which, according to Haney (1980)¹¹ are a source of conflict between the two disciplines, namely:

- The law stresses conservatism; psychology stresses creativity.
- The law is authoritative; psychology is empirical.
- The law relies on adversarial process; psychology relies on experimentation.
- The law is prescriptive; psychology is descriptive.
- The law is idiographic; psychology is nomothetic.
- The law emphasizes certainty; psychology is probabilistic.
- The law is reactive; psychology is proactive.
- The law is operational; psychology is academic.

It can be seen that the two disciplines operate with different models of man. The law, whether civil or criminal, generally emphasises individual responsibility in contrast to the tendency by a number of psychological theories to highlight 'unconscious and uncontrollable forces operating to determine aspects of individuals' behaviour' (King, 1986:76). In addition, 'The psychologists' information is inherently statistical, the legal system's task is clinical and diagnostic' (Doyle, 1989:125–6). As Clifford (1995) has

Psychology and law have a great deal in common but they also differ in a number of significant ways. Furthermore, conflict is endemic in the relationship between the two disciplines.

put it: 'the two disciplines appear to diverge at the level of value, basic premises, their models, their approaches, their criteria of explanation and their methods' (p. 13).

In a submission to the Australian Science and Technology Council in the context of its investigation into the role of the social sciences and the humanities in the contribution of science and technology to economic development (see McConkey, 1992:3) it is stated that: 'Psychology discovers, describes and explains human experience and behaviour through the logic and method of science. Psychological research and application is based in a logical, empirical and analytical approach, and that approach is brought to bear on an exceptionally wide range of issues.'

On the other hand, 'Tradition is important to lawyers' (Carson and Bull, 1995a:29) and, as Farrington et al. (1979b:xiv) put it, law 'is a practical art, a system of rules, a means of social control, concerned with the solving of practical problems'. Furthermore: 'The law is based on common-sense psychology which has its own model of man, its own criteria ... its own values. Common-sense explanation in the law is supported by the fact that workable legal processes have evolved under constant close scrutiny over many centuries. It is in this sense "proven". But this is quite different from explanation in terms of psychological theory backed by empirical evidence of statistically significant relationships' (p. xiii).

Finally, whereas the image of human beings projected by American social psychologists is that of the 'nice person', the law, and especially the criminal law, is characterised by a more cynical view of human nature and this view tends to be adopted by those who work within and for the legal system (King, 1986:76).

Psycholegal researchers (for example, in eyewitness testimony) have utilised a variety of research methods including incident studies, field studies, archival studies and single case studies (see Clifford, 1995:19–24; Davies, 1992). Many psychologists rely a great deal on the experimental method, including field experiments, to test predictions and formulate theories that predict behaviour and are sceptical of lawyers' reliance on common-sense generalisations about human behaviour based on armchair speculation, however ratified by conceptual analysis (Farrington et al., 1979b:xiii). A feature that unifies a lot of psychological research is its preference for subjecting assertions to systematic empirical research and, where possible, testing them experimentally. This will often involve randomly allocating persons to different conditions who, at the time, are normally not told the aim of the experiment. Clifford (1995) provides an excellent account of contemporary psychology's premises and methods. Many psychologists who favour experimental simulation tend not to also consider the issue of values in psychological and psycholegal research in general, and in particular whether psychologists can indeed avoid value judgements by demonstrating the 'facts'.

Theoretical models of man espoused by experimental psychologists have involved man as a black box, a telephone switchboard and, more recently, man as a computer. These models, which are different from the lawyer's notion of

'free will', have been rejected by cognitive psychologists because they do not take into account man as a thinking, feeling, believing totality (Clifford and Bull, 1978:5), as someone who interacts with the environment in a dynamic way.

For many a psychologist, a great deal of information processing is done without people being aware of it; the lawyer, on the other hand, operates a model of man as a free, conscious being who controls his/her actions and is responsible for them. What the law, based on a lot of judicial pronouncements, regards as 'beyond reasonable doubt' is rather different from the psychologist's conclusion that an outcome is significant at a 5 per cent level of statistical significance. One interesting aspect of this, for example, is the lawyer's reluctance to quantify how likely guilt must appear to be before one can say that such doubt as exists is not reasonable. The lawyer in court is often only interested in a 'yes' or 'no' answer to a question asked of a psychologist who is appearing as an expert witness, while, at best, the psychologist may only feel comfortable with a 'maybe' response. It should be noted, however, that the answers of interest to a practising lawyer might vary according to whether it is examination in chief or cross-examination. In the former, the lawyer is interested in a story, whereas in the latter, the lawyer is interested in questions that require a 'yes' or 'no' answer (see chapter 8). Also, lawyers look at the individual case they have to deal with and highlight how it differs from the stereotype; they try hard to show in court that one cannot generalise, whereas psychologists talk about the probability of someone being different from the aggregate.

In addition to significant differences between psychology and law (see Carson, 1995b), there is the fact that the approaches of various branches of psychology differ in the degree to which they are based on what might be called scientific experiments. Furthermore, some psychologists have cast doubt on the practical utility of findings from controlled laboratory experiments that reduce jury decision-making, for example, to a few psychology undergraduates reading a paragraph-long, sketchy description of a criminal case and making individual decisions on a rating scale about the appropriate sanction to be imposed on the defendant (see Bray and Kerr, 1982; King, 1986; Konečni and Ebbesen, 1992; Bornstein, 1999). Rabbitt (1981) pointed out that 90 per cent of the studies quoted in standard textbooks on the psychology of memory then available only tested recognition or recall of nonsense three-letter syllables. More recently, Konečni and Ebbesen (1992: 415–16) have argued that: 'It is dangerous and bordering on the irresponsible to draw conclusions and make recommendations to the legal system on the basis of simulations which examine effects independently of their real-world contexts' (that is, on the basis of invalidated simulations or those that are not designed to examine the higher-order interactions). More recent research on the jury (see chapter 5) includes protocol analyses, in-depth interviews with jurors after they have rendered verdicts in real cases, elaborate simulations involving videotaped trials and juror respondents, and even randomised field experiments (see Heuer and Penrod, 1989). Similarly, eyewitness testimony

Lawyers, on the one hand, focus on their individual client and emphasise how he/she differs from the stereotype and that one cannot generalise. On the other hand, however, psychologists talk about the probability of someone being different from the aggregate.

researchers have been making increasingly greater use of staged events and non-psychology students as subjects, as well as utilising archival data (see chapters 2 and 3).

King (1986) has also criticised legal psychologists' strong reliance on the experimental method, arguing that there is a tendency to exaggerate its importance; that treating legal factors as 'things' and applying to them experimental techniques and statistical methods gives rise to at least four problems, namely, inaccessibility, external validity, generalisability and completeness (p. 31). King has also argued that exclusive reliance on experimental simulation also encourages legal psychologists to focus on inter-individual behaviours without taking into account the social context to which they belong (p. 7); that Karl Popper's (1939) refutability has been shown by philosophers of science to be a questionable criterion for defining whether a theory is scientific. Furthermore, King contends that the real reasons for legal psychologists' continued use of the experimental method as the prime or sole method for studying legal issues is: (a) a belief by psychologists that using the experimental method enables them to claim they are being 'scientific' in carrying out their research; (b) a need felt by psychologists for recognition and acceptability; and (c) a belief by psychologists that they are more likely to be accepted and recognised as 'experts' if they are seen to be 'scientific'. Finally, neo-Marxist critics of the use of the experimental method (see Wexler, 1983) 'see the failure to pay attention to the context of social behaviour as a political act perpetrated by psychologists in order to obscure the true form and content of social interaction' (King, 1986:103). King has advocated a shift 'away from the restrictive and self-aggrandising notions of what constitutes "scientific" research which have tended to serve as a starting point for much of what passes for legal psychology' (p. 82). No doubt many psychologists would disagree both with Wexler's (1983) picture of them as involved in a political conspiracy informed by a particular ideology and with King's (1986) push to get them to use the experimental method less in favour of ethnomethodology as their preferred method of enquiry.

Highlighting the dangers inherent in studying eyewitness testimony under rather artificial conditions in the laboratory, Clifford and Bull (1978) reminded their readers that such research could lead psychologists to advance knowledge that is, in fact, the reverse of the truth, as in the case of the influence of physiological arousal on recall accuracy. A theory of recall, or any other psychological theory for that matter, arrived at on the basis of grossly inadequate research could hardly be expected to be taken seriously by lawyers.¹²

According to Hermann and Gruneberg (1993:55), in the 1990s memory researchers no longer presumed that a laboratory procedure would or would not extrapolate to the real world because the ecological validity issue in memory research had largely been solved. Hermann and Gruneberg proposed that: 'It is time now to move beyond the ecological validity issue ... to the next logically appropriate issue – applied research'. In so doing legal psychologists in the new millennium should heed Davies' (1992) words that: 'no one research method can of itself provide a reliable data base for legislation or