OPERATIVELY CLOSED SYSTEMS THEORY AND THE OPERATION OF THE POSTMODERN LEGAL SYSTEM IN AUSTRALIA

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Operatively Closed Systems Theory and the Operation of the Postmodern Legal System in Australia

This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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Abstract

The author has extensive experience as a participant and observer in the Family Court of Australia, Local Court of New South Wales, Children's Court of New South Wales and District Court of New South Wales over a period of 14 years. The author's involvement has been as a legal practitioner advising either in the family law/children's care jurisdiction or the personal injury jurisdiction. My extensive experience as a participant and observer has led to the untested assumption that:

(i) Court operations and communications are problematic for their participants.
(ii) Postmodern legal theory cannot adequately explain these problematic communications.

Accordingly, I have set out to design and research a number of critical issues, as perceived by me, in the Australian postmodern legal system. After some effort and re-formulation, the following research problem was devised:

How can operatively closed systems theory (OCST) be used to effectively explain the dynamics of the postmodern legal system in Australia?

Three hypotheses are proposed as a solution to the above research problem.

The hypotheses involve the analysis of various case studies. The case studies will be employed from the following areas:

(ii) Legal aid industry and various qualitative studies and quantitative research studies in the field in Australia.
(iii) Analysing the research results of a King and Piper research effort in 1990 in England involving international jurisdictions.
(iv) Analysis of the Australian court re organisation phenomena in the last 10-15 years.

(v) Analysis of the impact of OCST upon traditional regulation discourse involving the particular analysis of three scholars in the field of regulation discourse.

I employ qualitative research methods which involve primarily the analysis and testing of a number of different case studies with the assistance of OCST. The case studies employ material which is in the form of raw data available from various governmental reports and submissions, as well as published opinions and responses of participants in research. Some secondary material is also resorted to in the case studies.

At the end of each chapter, the findings made with respect to the analysis of each hypothesis against the case study data and material is made. At the end of the research, all of the findings are analysed with respect to whether or not: (i) the hypotheses are confirmed or denied; and (ii) what the parameters and central solution is to the primary research problem outlined above.

In conclusion, I illustrate what implications can be drawn from the findings and the answer to the primary research problem. Avenues for further research are also outlined.
Foreword

Chief Justice Alistair Nicholson of the Family Court of Australia characterised the Australian Law Reform Commission as 'wandering the countryside talking to Uncle Tom Cobley' instead of 'talking to the people in charge of case management in the Court' and stated 'the contradictions, and at times facile observations contained in the paper give little credit to the challenges that face separating families and those in the Court that support them' (Australian Law Reform Commission Report No. 89, 2000, p.528).

In 2000 in Australia, a philosophical and well-publicised controversy engulfed the Family Court of Australia and the Australian Law Reform Commission, as well as the Commonwealth Government. The question is whether the response of the Chief Justice of the Family Court of Australia in Submission No. 348 was merely emotional, or was due in part to structural dynamics not readily apparent.

The purpose of this research is to partly answer the above issue and attempt to understand whether or not OCST can be used to effectively explain the dynamics of the postmodern legal system in Australia. Certain dynamics will be targeted and this will become evident in the research design.
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Dedication

This work is dedicated to Rosemary and my mother and father.
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Part A
Chapter One
Introduction and the Research Problem

1.1 Background to the Research

A question that has occupied the minds of legal scholars over the last 100 years is: *How can scholars explain the dynamics of modern legal systems?* Attempts to answer this question have utilised many different approaches and methodologies. For example, sociological jurisprudence is one approach which has attempted to answer this particular question (Pound, 1959).

A related question of more recent times is: *How can scholars explain the dynamics of postmodern legal systems?* This question has arisen due to the arrival of 'postmodern society' and all of its implications. Indeed, the question becomes even more difficult to answer if 'postmodern society' is understood to be, amongst other things, a plurality of normative designs otherwise described as the 'overproduction of norms' (Ziegert, 1995, p.504).

The difficulty in these analyses is the fact that the varied approaches have not crystallised a solution to the question that is widely accepted. Critical legal scholars in the pursuit of 'political' discourse and standards reject the interpretative community approach of Dworkin in explaining the postmodern legal system dynamic. Another example is when neo-positivist scholars attempt to isolate the legal system from its environment and society when explaining the dynamics of their understanding of the legal system (Hayek, 1982; Posner, 1992).
I believe the approach that would yield the most benefits in explaining the dynamics of postmodern legal systems in society is the sociological jurisprudence approach. This is because it explicitly and implicitly recognises the system interaction between the legal system and society. Early scholars in this field, for example, recognised the 'living law' in society and the consequences that this finding produced (Ehrlich, as noted by Ziegert, 1998). Other scholars in the field of sociological jurisprudence and sociology of law clearly accept that the social sciences have influenced the doctrine of legal scholarship (Pound, 1959). Other scholars in the same field are sceptical of rules in textbooks and are concerned to see what really happens in practice, otherwise known as 'law in action' (American Realists & Holmes, 1897).

Emerging from the sociological jurisprudence and sociology of law fields is the study of open systems. Open systems analysis was particularly prominent in explaining the function of the legal system as a coordinator of social functions (Parsons, 1959). But open systems approaches had limitations in its applicability to postmodern legal systems. In particular, open systems theories and approaches have significant limitations in explaining legal system dynamics in an environment of norm overproduction (Luhmann, 1993b). However, despite certain limitations, the concept of functional differentiation which was crucial to opens systems theory remains important in understanding the dynamics of systems in society.

A more refined approach to open systems theory is operatively closed systems theory (hereinafter OCST or systems theory) (for example, see
Luhmann, 1992; Teubner, 1989). OCST is a development of open systems theory insofar as it insists that communications in each discipline are normatively closed. Furthermore, structures are explained in the theory which refer to internal reference and external reference. The main structural development, however, is the notion of normatively closed communications as opposed to cognitively open reference that reside in programming (Luhmann, 1993b).

In my brief introduction, I have arrived at a possible approach to assessing the question: *How can scholars explain the dynamics of the postmodern legal system in society?* I believe the use of OCST will be productive in answering this question.

1.2 Research Problem and Hypotheses

After I digested the parameters of the field of study mentioned above and the legal case study opportunities in the Australian legal setting, my initial research problem was: *A discussion of Luhmann's interpretation of the legal system in society and legal aid funding in Australia.* The limitations of this problem were: (i) a discussion of interpretation did not solve a research problem; (ii) as such, it was difficult to obtain an appropriate case study to answer the vague question; (iii) Luhmann's interpretation was at odds with a number of other prominent scholars in the field of OCST; and (iv) the overall research design was flawed.

As a result of further study of research design and thought, the present research problem emerged: *How can operatively closed systems theory (OCST) be*
used to effectively explain the dynamics of the postmodern legal system in Australia?

The limits or delimitations of the research problem are not arbitrary and are as follows:

(i) I will restrict the research problem to OCST literature produced by Niklas Luhmann, Gunther Teubner, Michael King, Alex Ziegert and Christine Piper. Whilst these writers, amongst others, are prominent in the field of OCST and its literature, I should state that they do not uniformly agree on all aspects of the research and implications of OCST. Therefore, OCST will not reflect any one particular view of any one of the writers mentioned above. Rather, I will present certain aspects which are notable from my point of view of OCST which have been produced and published by at least one of the writers mentioned above. The divergence in the views of operatively closed systems theorists is unavoidable given the nature of this particular scholarship and the difference in methodological instruments used by each of the above writers (for example, see Teubner, 1992; Sinclair, 2002).

(ii) The term ‘dynamics’ means ‘processes of or pertaining to forces not in equilibrium and resulting in change’ (Lemercier, 2003, pp.6-7). I shall be restricting the research problem to certain dynamics as outlined in the proposed hypotheses later in this thesis. Therefore, I shall be restricting the research problem to certain dynamics, as opposed to all dynamics which could not properly be studied and examined in a thesis of this type.

(iii) I deliberately chose the study of postmodern legal systems as distinct from the earlier modern legal system. I did this to ensure that the research problem and its hypotheses were based in leading edge scholarship and case study. Furthermore, the decision to choose postmodern legal scholarship ensured that the ultimate solution would have immediate relevance to current scholarship concerns, and furthermore the case studies would be readily accessible.

(iv) I chose Australian case studies (except for Chapter Six). This was because I practised in the areas related to the case studies and therefore, I have developed a keen interest and knowledge of the issues in the case studies researched. The case studies are also chosen for their relevance to current legal scholarship.
1.2.1 Research hypotheses

My proposed solution or answer to the research problem is essentially stated in three hypotheses. I chose to construct a hypothesis solution as it provides a useful guide to my thesis statement and research problem. By hypothesis, I mean a set of propositions proposed as an explanation for the occurrence of some group of phenomena asserted merely as a provisional or tentative conjecture to guide investigation or accepted as highly probable (Graziano & Raulin, 1997, p.183).

I shall use the interpretation of hypothesis as understood in the former part of the sentence, namely as a provisional conjecture to guide investigation. At the end of my thesis and after testing of the hypotheses and the research and at the point of making findings, I shall then confirm whether or not they can be converted into highly probable and accepted hypotheses. I shall add that I do not use the definition of hypothesis as one that can be empirically tested. My testing is one of modified qualitative methodology resorting to reinterpreting research data already collected (Chapter Three, Sections 3.1 & 3.2) (Denzin & Lincoln, 1998, pp.3-10).

The solution, as proposed in the three hypotheses are:

(i) **Hypothesis One.** That certain patterns in the Australian case study data will match certain predictor elements in typology of OCST.

(ii) **Hypothesis Two.** That OCST will predict in the case study data the undesirability of attempts of direct steering of the legal system by the political system.

(iii) **Hypothesis Three.** That OCST will predict in the case study data the desirability of attempts of self-steering by the legal system.
Essentially, all the hypotheses involved OCST predicting certain patterns in the case study data. Consequently, by doing so, the hypotheses answer the research problem to the extent of the hypothesised patterns outlined.

Having stated the three hypotheses as a solution to the research problem, I will formulate several specific research questions to analyse and test the three hypotheses with the assistance of OCST (Chapter Two). This approach will ensure the line of the thesis remains focused throughout on the three hypotheses and therefore in turn, upon the research problem. The research questions in Chapter Two will then be allocated specifically to each case study. Each case study will be given its own chapter, introduction, methodology, research findings and conclusion.

Assessing the research problem by analysing and testing the three hypotheses will enable me to comment on contributions that the research can make to legal scholarship (Chapter Five, Section 5.2). The above methodology is consistent with social scientific methodology (Denzin & Lincoln, 1998, pp.3-10).

The major bodies of the parent field scholarship and the immediate field of OCST scholarship relevant to the research problem will be examined in Chapters 2.2 and 2.3. This body of scholarship that will be examined is otherwise more commonly referred to as a ‘literature review’ (for example, see Heide, 1994).
1.3 Justification for the Research Problem

An issue that I had to grapple with was the issue of justification and importance. That is: *Is the research problem merely trivial or important on theoretical and empirical grounds? Is the gap in the field of sociology of law and OCST of sufficient importance?*

After considerable research and thought, I think the formulation of the current research problem can be justified. In fact, there are probably four justifications for the research problem. ‘Justification’ in the sense I use it is in the sense of addressing neglect or addressing utility in the literature (Varadarajan, 1996).

The first justification is the importance of research on the impact of legal aid funding cuts on the legal system. The quantity and quality of the research in this field in Australia has been low on both accounts (Family Law of Australia Report 2000). The case study selected in Chapter Four will hopefully contribute to the understanding of legal aid cuts in the Australian legal system and society at large.

Second, the research problem and hypotheses can be justified on the basis of the relative neglect of research on ‘steering’ in the literature (Luhmann, 1993b). Very few authors address ‘self-regulation’ and embrace it in a new paradigm, and even fewer still refer to OCST vigorously (for example, see Parker, 2002; Sinclair, 2002). Perhaps only Teubner, King and Piper, and to a lesser extent, Luhmann, grapple with the implications of self-steering upon traditional regulation discourse.
A third justification for the research problem and its hypotheses is the relative neglect in the OCST literature to test hypotheses with Australian case study data. For example, one recent research proposal, although attaching significant weight in its argument to OCST, used a United States case study example (Sinclair, 2002). Another recent research proposal was largely theoretical and devoted only one chapter to empirical findings of some unstructured Australian case study research (Lemercier, 2003). Again, other research, although highly influential, is primarily based on Europe case study data (King & Piper, 1990).

Finally, a fourth justification for the research problem and hypotheses is the usefulness of the potential application of the research findings. This is based on my initial assumption and the implications for theory, policy and practice will be clearly outlined in Chapter Nine, Sections 9.4 ‘Implications for Theory’ and 9.5 ‘Implications for Policy and Practice’. Essentially, I will argue that there are significant and useful implications of this research for OCST literature, as well as for policy and practice.

1.4 Methodology

Having decided on my initial research problem, I had to deal with: Which methodology should I employ? By ‘methodology’ I mean the conduct of scientific inquiry aimed at gaining knowledge (Graziano & Raulin, 1997, pp.5-6). I also needed to specifically and critically assess and state my methodology inquiry to ensure that the research design was sound and grounded.
The field of available methodological approaches is almost bewildering. Furthermore, legal scholarship is often merely doctrinal or positivist (Berns, 1993). Traditional legal scholarship often neglects the scientific method and regards it as alien and difficult to apply (Sinclair, 2002).

Accordingly, in the tradition of sociological jurisprudence, I decided to specifically adopt the scientific approach of rational process and qualitative findings matched and tested against each other (Abel, 1973; Graziano & Raulin, 1997). I believe that a necessary prerequisite to a comprehensive understanding of dynamics is the adoption of a scientific explanation (Abel, 1973, p.193). Whilst logico-philosophical legal scholarship is widely accepted, I decided it was inappropriate for the conduct of a scientific inquiry into the dynamics of the postmodern legal system in Australia.

I should clearly state that the theory construction in OCST does borrow from the natural sciences and philosophical branch of knowledge (Luhmann, 1993b; Lemercier, 2003). To test this ‘hybrid’ construction, the case study validation is preferred. Case study validation assures us that the logico-philosophical argument is grounded in a positive sense (Denzin & Lincoln, 1998, pp.25-27).

One issue that arose early was: Are empirical methods appropriate for testing the usefulness of OCST in the research problem? Some scholars suggest OCST could never be tested (Sinclair, 2002). Others suggest that OCST can be tested empirically in the current state of scientific methodology (Lemercier, 2003;
Brans & Rossbach, 1997, p.418). I choose to adopt the argument that a modified qualitative research methodological approach to the research problem is justified and valid for reasons set out in Chapter Two.

As an overview, as opposed to primary field study, I collected good available qualitative data and research in the fields in question. The case study data was collated by eminent researchers, but this data has not been interpreted using OCST. The case study data was collated in response to governmental funded requirements or were responses to government dynamics. Therefore, pressing political issues and traditional doctrines of instrumentality were the agendas when interpretation of the case study occurred. OCST was never employed in any of the case study data interpretations (apart from Chapter Six).

Finally, the case study data is qualitative primarily with some quantitative data. However, the overall approach is one of grounding the research in data which can, with the assistance of a grid of OCST research questions, help us analyse and test the hypotheses. This in turn helps us solve the research problem.

It should be clear from the foregoing discussion that whilst I am attempting the analysis and testing of data with the assistance of OCST, the research is largely qualitative as opposed to quantitative. As opposed to a quantitative researcher, a qualitative researcher has a number of different multiple methodologies to test and obtain clearer analysis of the subject at hand (Denzin & Lincoln, 1998, p.3). I shall carry out the research and use multiple case studies in the sense and manner of a bricoleur (Denzin & Lincoln, 1998, p.3). I shall attempt to use a number of
different tools insofar as whilst the case studies will be employed as qualitative case studies with some quantitative analysis, the subject or nature of the case studies will vary.

The case studies in Chapters Four and Five employed by me will largely be the employment of case studies which involve raw data and submissions already collected by researchers. The material that I will be commenting upon will be the material obtained in relation to the response of various participants in the Family Court of Australia, the legal aid industry and so forth. I shall not be commenting upon secondary material which involves scholars or others interpreting the raw data. In effect, I will be interpreting for the first time material which is largely not interpreted.

The case studies that I shall be presenting in Chapters Six and Eight are of a different nature. They will involve re-interpretation of results published in prior research. Whilst those case studies in part may involve interpretation of the opinions and responses of participants in the courts, some of the other material in the case studies in Chapters Six and Eight will involve my testing research results of other scholars.

I wish to defend the above variable use of case study data and interpretation on the basis that a qualitative researcher is entitled to employ a number of different methods and tools, as well as empirical materials which may be at hand. Unlike the physical scientist, in the social sciences, objective reality cannot be clearly
ascertained. ‘Triangulation’ is an appropriate method available to social researchers when objective validation is not available (Denzin & Lincoln, 1998, p.4).

As opposed to the positivist scientific regime which is available to some disciplines, the regime which I will adopt will be the constructivist paradigm which involves interpretative case studies and some ethnographic experience (Denzin & Lincoln, 1998, p.27).

My involvement as a participant of the following courts have also influenced my selection of case studies and the type of case studies employed. My experience involve the following jurisdictions:

(i) Family Court of Australia
(ii) Local Court of New South Wales - Family Court jurisdiction
(iii) Children’s Court of New South Wales - specialist court (The author is an accredited specialist of the Children’s Court.)
(iv) Workers Compensation Commission
(v) Compensation Court of NSW
(vi) District Court of New South Wales - various personal injury jurisdictions

I shall comment further upon the effects and influence of my experience as a participant of 14 years in the above jurisdictions upon the case design and case study selection in Chapter Two, Section 2.5 and below.
1.4.1 Participant experience and methodology

My own experience as a legal practitioner practising in the following areas has had both a decisive and profound effect upon my research design and methodology.

I have practised in the following areas for 14 years:

(i) Family law residence/contact proceedings in the Family Court of Australia and Local Court of New South Wales.

(ii) Property proceedings in the Family Court of Australia and Local Court of New South Wales.

(iii) Accredited specialist in Children’s Law practising in the Children’s Court of New South Wales.

(iv) Practising in personal injury in the District Court of New South Wales, Compensation Court of New South Wales and the Workers Compensation Commission.

The primary research design and the selection of case studies have been influenced by the extensive experience and data cognitively acquired whilst participating in the above areas of practice. My participant status for six years as a doctoral student has been heightened by the fact that my research design was relevant to my practice.

While I have not reproduced in the research the specific data (for ethical reasons), my status as a participant and informal observer has produced valuable results for my research problem design.

Whilst practising and prior to this research, I put on another ‘hat’, and sought to assess the process of court operations. I also tried to achieve the balance
of involvement with detachment, familiarity with strangeness and closeness with distance (Denzin & Lincoln, 1998, pp.84-85).

As a result of extensive participation and informal observation1 of the court processes over 14 years, I was able to formulate certain hypotheses:

(i) Legal operations in the Courts were problematic for participants.
(ii) Political and court relations were problematic.
(iii) Postmodern legal theories of legal construction could not adequately explain the court operation I was participating in and observing.

The selection, consequently, of the various case studies arose out of my familiarity with and concern for certain legal jurisdictions and their participants in which I had participated in. These include the legal aid industry, the Family Court of Australia and the Children’s Court of New South Wales.

Furthermore, I would submit that my participation in various court jurisdictions depicted in the case studies has had a profound effect upon my formulation of the specific research questions employed within. I have sought to formulate research questions (as opposed to the central research problem) with the input of what particular issues are most problematic in court operations in Australia today. Hence, the problematic phenomena of litigants in person observed by me in the Family Court of Australia and the Children’s Court of New South Wales has

1 I informed the sitting Children’s Court Magistrate in NSW, for example, that I was conducting research and that my informal observation and participation was valuable in research design.
influenced me. I have accordingly sought to design specific research questions which may help elucidate the dynamics of this troubling phenomena.

In addition, my observation and participation in the Compensation Court of New South Wales and the District Court of New South Wales in relation to personal injury proceedings, and the subsequent phenomena of court reorganisation has left very specific experiences with me. I have sought to design the case studies and specific questions in Chapters Six, Seven and Eight in an effort to help elucidate the complex dynamics behind these troubling developments.

1.5 Outline of the Research

This chapter is used to introduce and set the primary research problem and its three hypotheses which attempt to solve the primary research problem. Other aspects of setting and design are introduced. By ensuring Chapter One is set out as it is, the structure of the thesis is unified and focused on solving the one research problem in a scientific manner (Nightingale, 1984; Perry, 1998).

Chapter Two will introduce the parent research literature and immediate research field literature of OCST. It will then examine gaps in the literature which deserve attention, and which help construct the research problem. A model of three hypotheses will then be constructed (Perry, 1998). Research questions will then be formulated to test the three hypotheses. Further, the methodological foundations of the research will be fully laid out.
Chapter Three will introduce additional methodological issues of the research which I had to address. This Chapter provides depth to the discussion and strategy of the methodology employed. It builds upon Chapter One, Sections 1.4 and 1.7, and Chapter Two.

Chapter Four will introduce the first case study. This will consist of the Australian Law Reform Commission Discussion Paper 62 and its Report No. 89. It will also consist of the Family Court Submission to the said Discussion Paper 62 in Submission No. 348. This data will be analysed, using certain research questions formulated in Chapter Two. Ultimately, I will test whether certain predicted elements in OCST typology match certain patterns in the case study data.

Chapter Five will introduce the second case study. It is a qualitative case study from four different sources within the Australian legal aid industry. They are:


(ii) Family Court of Australia Research Report No. 20 regarding litigants in person in the Family Court of Australia

(iii) Senate Legal and Constitutional References Committee Enquiry Into the Australian Legal Aid System Reports 1, 2 and 3

(iv) Griffith University Legal Aid Report Into Funding Cuts in Australia.

Again I will test whether certain predictor elements in OCST typology match certain patterns observed in the case study data.

Chapter Six will introduce a United Kingdom case study. King and Piper’s important research on steering is introduced and assessed. I will use OCST to
predict in the case study the undesirability of attempts of direct steering of the psychological research subsystem by the legal system. OCST will also predict in the case study data the desirability of attempts of self-steering by the social psychology professional subsystem.

Chapter Seven will introduce an Australian case study of court reorganisation. It will again collect and assess qualitative secondary data. I will use OCST to predict in the case study the undesirability of attempts of direct steering of the legal system by the political system. I will use OCST to predict in the case study the desirability of attempts of self-steering by the legal system as well.

Chapter Eight will introduce the final case study. It will introduce the works of Parker and Black, as well as test the influence of OCST on traditional regulation discourse. The aim of the chapter is again to use OCST to predict in the case study the undesirability of attempts of direct steering of the legal system by the political system and other systems.

Chapter Nine will be fundamental in this thesis. It will introduce the conclusions about the research problem and its solution proposed in the three hypotheses. Findings from each research question will be summarised. The hypotheses will be finally assessed for their validity and accuracy in answering the primary research problem. The implications for theory and practice will be presented, and the limitations of the findings will be presented. Finally, implications for further research will be discussed and assessed.
1.6 Definitions

As definitions employed by researchers and scholars are not uniform, key and controversial terms need to be defined here (Perry, 1998). In doing so, ambiguity is hopefully avoided for the purposes of the research problem.

**OCST.** OCST or 'operatively closed systems theory' will be, as indicated earlier in this chapter, confined to the scholars in the literature such as Teubner, Luhmann, King and Piper, Sinclair, Ziegert and Lemercier. As indicated previously, some of these writers disagree on some aspects of OCST and therefore I will take final responsibility for the model of OCST which is presented in this thesis.

**Steering theory.** Steering theory refers to the more general discourse of 'regulation discourse'. To 'steer' is to guide the course of anything in motion, be steered or guided in a particular direction, or the reduction of a difference (Luhmann, 1997, p.42).

Such a definition I will adopt insofar as it applies to the dynamics between and within the legal system in Australia and the political and other systems in Australia.

**Autopoiesis.** Autopoiesis is not a term defined in any mainstream dictionaries. I shall therefore use a definition provided by Luhmann:

The description of a system as autopoietic, as autonomous, as operationally closed, refers to the network of its operations and not to the totality of all empirical conditions, that is, the world . . . rather, it is what kind of operations enable a system to form a self-
producing network that relies exclusively on self-generated information and is capable of distinguishing internal needs from what it sees as environmental problems. (Luhmann, 1992, p.1420)

This definition should also be read in conjunction with the cybernetic understanding of autopoiesis (Higgins, 1973).

**Legal system.** A ‘system’ can be defined as an assemblage or combination of things or parts forming a unitary whole with a boundary (Post, 1991; Lemercier, 2003, p.9; Baxter, 1998). I propose the legal system will be therefore understood for the present time as an assemblance or combination of legal communications which constitute legal discourse and therefore the legal system in society. Furthermore, by defining the legal system with reference to legal communications and legal discourse, its understanding is one as understood by OCST scholars and not traditional Hobbesian scholars. A better definition will be explained in Section 2.3.

**Overproduction of norms.** The overproduction of norms is one of the many features of postmodern society. Postmodern society is notoriously difficult to define (Freeman, 1994, p.1147) but there is some agreement by commentators that it signifies the stage beyond modern society as understood by modern writers such as Weber and Durkheim. The overproduction of norms is also described as the constitutive plurality of normative designs or the necessarily pluralist constitution of lifeworlds in postmodern society at the end of the 20th century and the beginning of the 21st century (Ziegert, 1995, pp.504-505). Norm overproduction will therefore mean for my thesis the multiplicity of lifeworlds and the lack of any
mechanism to determine which particular lifeworld corresponds to a ‘objective social reality out there’ (Teubner, 1989).

**Relative autonomy.** Relative autonomy means that while law establishes its own particular kind of cultural discourse, it does so by drawing in part on the cultural resources of other social spheres. That is, law is thus not something apart from the rest of society and is structurally related to its environment (Baxter, 1987; Post, 1991).

### 1.7 Limitations and Key Assumptions

An issue arises: *What are the boundaries of the research problem?* Good legal research requires a scientific design with boundaries and limitations clearly enunciated (Abel, 1973; Perry, 1998). I therefore had to grapple with what were the appropriate selected limitations and key assumptions in the research problem.

Firstly, I have selected a model of OCST which is restricted to a handful of writers who have positively argued it over the last 20 or so years. They are, inter alia, Luhmann, Teubner, Paterson, Lemercier, Ziegert and King and Piper. They have embraced autopoietic theory as a powerful means to explain the dynamics of the postmodern legal system. They have also described the postmodern legal system in terms of sociology of law discourse, and at least all agree that communications of the legal system constitute the legal system and nothing else. In choosing indicated scholars, I automatically exclude Habermas, Beck and others.
who are postmodern scholars, but do not accept autopoietic legal theory in their scholarship.

Secondly, I have confined the research problem to the postmodern legal system. I could have studied the modern legal system predating 1970, but the selection would have resulted in only a marginal contribution to the body of scholarship and literature.

Thirdly, I have selected case study data which is largely Australian in origin and collection. This is true for all case studies except for the King and Piper case study in Chapter Six. I have done so because differences between constitutional settings and legal system dynamics in different countries would have made testing the hypotheses scientifically more difficult. I have included the King and Piper case study as it is not only a qualitative analysis, but it also incorporates a comprehensive treatment of steering theory unavailable elsewhere.

I have confined the solution of the research problem to three hypotheses, two of which are concerning ‘steering theory’. There are naturally other areas in which OCST could have explained effectively the dynamics of the postmodern legal system, such as those explanations found in Lemercier or Ziegert. However, given the relative inadequacy of the use of OCST’s implications for traditional regulation discourse, I chose this particular gap as one which deserves research as in this thesis.
1.8 Conclusion

This chapter has laid the basic design and boundaries of the research problem and its solution. It introduced a research problem and three hypotheses. The research questions required to analyse and test the hypotheses with the assistance of OCST and the research problem, in turn, will be introduced in Chapter Two.

The research was justified and definitions were then presented. The methodological approach was briefly described and justified, and an overview of the research was then provided. Finally, limitations were outlined.

Upon these foundations, I will now detail the research design and methodology (Chapter Two).
Chapter Two
Research Issues, Tools and Methodologies

2.1 Introduction

In Chapter One, I introduced the research problem and three hypotheses proposed as a solution to the research problem. I introduced justifications for the research, methodology of the research and limitations. But it was only an introduction.

In Chapter Two, I will aim to build a theoretical foundation upon which the research problem is based (Perry, 1998).\(^1\) It will review and analyse the relevant literature. Only worthwhile research issues will be identified as possible bases for the formulation of the research problem.

Therefore, the traditional method of literature review will be incorporated in Chapter Two. However, the purpose of this review of literature is not merely descriptive. Its important aim is to analyse and discover issues or gaps within the literature which are worthy of research.

An issue arose as to how I would set limits to the literature review. A wide-ranging and unfocused literature review would be of little use in the pursuit of a controversial research issue or gap. Furthermore, an unfocused review would not provide the needed theoretical justifications for the research problem formulated (Perry, 1998).

\(^1\) Perry's (1998) work was very useful in designing my methodological approach.
Accordingly, first I will review the ‘parent’ disciplines or fields of the research problem (Phillips & Pugh, 1987, pp.57-59). I will attempt to restrict the review to no more than two parent fields. In doing so, a more focused analysis of the controversial research issues can emerge and be dealt with.

Then, I will review the immediate scholarship and literature pertaining to OCST. This field of literature will be a narrower field of literature than that assessed in the parent field above. The boundaries of the research problem will, to a large degree, be reflected in the boundaries of the literature review which emerge.

I will then attempt to crystallise gaps or issues in the immediate field of literature relevant to OCST. These gaps or issues will then form the basis of a research problem and hypotheses, which are worthy of testing. In turn, I will propose research questions which will test the three hypotheses.

**Figure 1: Parent fields and immediate fields of scholarship**

<table>
<thead>
<tr>
<th>Parent Field</th>
<th>Open Systems Sociology and Structural Functionalism</th>
<th>Autopoietic Theory in Science</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate Field</td>
<td>OCST - Example: Teubner, Luhmann, King and Piper, Ziegert, Paterson, Lemercier, Baxter, etc.</td>
<td></td>
</tr>
</tbody>
</table>

Guiding Chapter Two will be a concepts figure (Figure 1), which will assist in demonstrating key concepts and possible dynamics between them. In doing so, I
will create classification models which will assist me in analysing the concepts and issues more clearly.

2.2 Parent Field and Classification Model

In this section, I will outline the significant scholars in the parent field as diagrammatically illustrated in the diagram on the previous page. As outlined in the previous diagram, the parent field is restricted to two fields. This approach was chosen to ensure the presentation of only direct influences upon the immediate field of inquiry.

2.2.1 Open systems theory

The first parent field in the literature relevant to the research problem is open systems sociology. This field is a sub-field of sociology and is largely associated with 'structural functionalism'. It is also referred to as 'open systems theory' (Baxter, 1997).

Structural functionalism, or open systems theory, is largely the product of intellectual sociological thought during and post-World War II in the United States. Professor Talcott Parsons (1902-1979) lectured at Harvard University and wrote several major treatises including The Structure of Social Action (1968) and The

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This approach helps to better crystallise the different influences upon OCST without losing precision.
Social System (1951). In these, he outlined basic concepts of his thoughts which led US sociologists for some decades.

Structural functionalism, or open systems theory, is the movement away from action theory or voluntarism. Parsons in Action Theory, a pre-War writing argued that Weber, Durkheim and others converge in the idea of members of society collectively selecting ultimate goals or values (Waters & Crook, 1990).

Instead, structural functionalism posits the idea of systems of social life having certain needs. These needs must be met or fulfilled if the system is to continue to evolve and survive. Each subsystem develops certain structural features which lends the name of ‘structural functionalism’ (Waters & Crook, 1990).

Structural functionalism, therefore, describes four subsystem functions which are contained within every social system. They are: (i) the famous adaptive function found in economic systems; (ii) the goal attainment function found in political systems; (iii) the integrative function found in social systems; and (iv) latency or pattern maintenance functions found in other determinant systems (Parsons, 1951).

The ideal of an ‘open’ system was inherent in structural functionalism. That is, in open systems theory, social subsystems are systems or input/output systems with respect to their environment (Parsons, 1951; Abercrombie, 1988). Boundaries are ‘porous’ with respect to information transferred to the system from the environment (Baxter, 1997). The subsystem and environment interchange and
exchange information across boundaries leading to system homeostasis or
equilibrium due to feedback loops (Baxter, 1997, p.1997).

Structural functionalism was also complicated by the use of certain media
such as ‘power’ or ‘money’, influence and value commitment. Parsons identified
these as residing in the political, economic, integrative and pattern maintenance
subsystems. A relationship between two subsystems involves input/ output for both
systems as two media (Baxter, 1997).

At what level does structural functionalism operate? Certainly, the four
function model could apply no higher than at the societal level. But it could in
theory operate at lower levels by simply dividing any system into its four functions
and divide this again into a lower four-function strata. But at some point, would it
not become senseless? (Baxter, 1997) With respect to social differentiation of
subsystems, however, how does structural functionalism or open systems theory
operate? If relations between different subsystems are simply direct input/output
interchange using certain media, how is social differentiation maintained
particularly if each system has its own coordinating standards? Further, the
question arises: How can the actual interchange be governed by the coordinating
principle in contrast to social differentiation? These are problems for an open
systems sociology (Luhmann, 1993b).

The valuable features of structural functionalism or open systems theory is
the result of the tendency of the economy, politics, law and so on to become
increasingly separated from each other (Parsons, 1951). They would then develop
their own partial rationality (Michailakis, 1995) or then their own relative autonomy (Baxter, 1997).

Despite the weaknesses of open systems sociology, particularly the model of Parsons, the strength of structural functionalism in functional differentiation has had a profound influence upon OCST (Michailakis, 1995).\(^3\) Indeed, some write that OCST is the synthesis of functional differentiation and autopoiesis (Michailakis, 1995, p.326; Nelken, 1988, p.200). That is, OCST is a theoretical fusion of structural functionalism and autopoietic theory in science.

### 2.2.2 Autopoietic theory in science

*What is autopoiesis in the parent field?* Autopoiesis is not defined in the Macquarie Dictionary. However, ‘poiesis’ is defined, meaning ‘word element meaning making creation’. Therefore, combining ‘auto’ and ‘poiesis’ means ‘self-making or self-creation’ using these two root words.

Autopoietic theory has been employed in recent decades primarily by biologists. Maturana and Varela have claimed that all living systems are organisationally closed, autonomous and make reference to themselves (Michailakis, 1995; Maturana & Varela, 1980). Self-systems, in particular, therefore are operatively closed and autonomous.

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\(^3\) Ziegert (1995) finds the use of ‘AGIL’ particularly helpful in examining human practice and legal practice.
The interesting research carried out by Maturana and Varela has been centred upon the process of 'cognition' and the impact of their epistemology. The traditionally prevailing positive epistemology in brain theory was the notion of the environment impacting the brain directly and the resulting match between the environment and the impression in the brain. This is an external observational paradigm which is largely consistent with open systems theory in sociology.

In contrast to the external viewpoint in brain theory, Maturana and Varela argue that an internal closed understanding of brain process is more accurate (Bailey, 1997). That is, the internal viewpoint as opposed to external viewpoint is the functional paradigm at work in living systems. Living systems are therefore closed, self-referencing and recursively generating (Bailey, 1997). If the brain is a closed self-referencing system apart from its environment, how does this impact the notion of cognition and truth construction? If the role of the observer within the system is stressed, subjectively a constructed notion of social reality becomes far more important in the understanding of its functioning. Subjective interpretation and circular reasoning becomes a real problem that must be grappled with (Michailakis, 1995).

*Is this biological theory applicable to societal functions and societal processes?* Maturana & Varela do not expressly claim that their epistemology is transferable to the social sciences. Afterall, they are biologists concerned with primary research in brain function.
Luhmann, however, claims that social systems, whilst not biological living systems, are living systems nevertheless (Luhmann, 1989). But his argument is not based on a simple transfer of closed autopoietic theory from biology to social science. His aim is far more general and abstract (Luhmann, 1989, p.137). He writes:

The challenge is rather to construct a general theory of autopoietic systems that can be related to a variety of bases in reality and can register and deal with experiences deriving from such diverse domains of life, consciousness and social communication. (Luhmann, 1989, p.137)

He concludes from the internal closed viewpoint that an autopoietic system is a system that produces and reproduces its own elements by the interaction of its own elements. Meaning therefore becomes a product of this living closed system and its constituent communications.

In conclusion, I have demonstrated that OCST appears to be at a basic level, the attempted synthesis of open systems structural functionalism and general autopoietic theory in science (Luhmann, 1989, p.138). These two constitutive elements are the basis for a theoretical grounded sociology of law according to OCST scholars (Luhmann, 1989, p.138; Nelken, 1988, p.200; Michailakis, 1995).

As I have now outlined the parent field concepts, and how they tend to influence OCST, I need to turn to OCST itself. Indeed, what exactly is OCST for the purpose of this research? This question will be pursued in the next sub-section.

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4 Whilst some scholars may dispute my approach, this approach is a model which I adopt as a possible platform for the examination of the legal system.
2.3 Immediate Field of Research

The previous section outlined the parent fields of the research problem and OCST. The two parent fields I chose were open systems structural functionalism and autopoietic theory in science. I attempted to outline the concept that two parent fields in union directly influence a grounded sociology for legal systems. If OCST is grounded by the application and development of these two parent disciplines, what do we have as a result?

If OCST is grounded and directly influenced by the application and development of two parent disciplines outlined above, what is the resulting immediate field or what is ‘OCST’?

I wrote earlier in Chapter One that I will not rely or draw from one OCST writer or scholar to explain OCST. Rather, I will draw from a number of representative OCST scholars. They are Teubner, Luhmann, King and Piper, Ziegert, Bailey, Paterson, Lemercier and Baxter, amongst others. By drawing from a number of OCST scholars, I can ensure the following:

(i) I draw from a broader and more representative area of an OCST scholarship.

(ii) I can take into account the most recent developments in OCST. (Luhmann regrettably died in the late 1990s.)

(iii) The size of an OCST scholarship is relatively small, therefore, my representative approach is valid and useful.

(iv) The community of OCST has undertaken significant research, but have left some areas neglected, thereby permitting ‘gap’ research.
Consequently, a broad outline of the immediate field is reasonable and necessary before I can properly examine the gaps or neglected areas in OCST literature. This question will be pursued in the next sub-heading.

2.3.1 What is the immediate field of scholarship?
A broad outline of the immediate field of the scholarship is now appropriate.

2.3.2 A broad outline of OCST: Modernity and ‘postmodernity’ background to OCST

Modernity and postmodernity forms the backdrop to OCST. Hence, it is useful to discuss the basic concepts which characterise modernity. Max Weber is generally regarded as the father of the description of modernity. Modern societies typically have industrial capitalist economies, democratic political organisations and a social structure which is founded on a division of various social classes (Abercrombie, 1988, p.270).

Weber describes modernity as one of a master trend towards rationalisation (Weber, 1922). That is, where sociology was concerned with the metaphysical pathos whereby the process of rationalisation would convert capitalist society into a meaningless ‘iron cage’ (Abercrombie, 1988, p.452; Waters & Crook, 1990, pp.13 & 174). However, interestingly, Weber denied that sociology could discover

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universal laws of human behaviour comparable with those of natural science, and more importantly, he denies that there is any evolutionary progress in human society (Abercrombie, 1988, p.451).

Furthermore, characteristics of modernity can be summarised as follows:

(i) Modernity had arrived at a system of social classes as a result of the synthesis of industrialisation and the economic system of capitalism.

(ii) Economy in modern societies were dominated by Fordist methods of production and marketing, that is, large companies produce goods by mass production involving semi-skilled labour for mass markets and scientific management techniques are used in collaboration with large national trade unions and collective bargaining.

(iii) In the political arena, modern societies are characterised by large governments and well-established welfare states, public ownership of important utilities and service providers and significant government intervention in the national economy.

(Abercrombie, 1988, p.327; Waters & Crook, 1990, pp.359-362)

Postmodernity, however, has arrived at a different set of demonstrable characteristics. I shall attempt here to merely describe some aspects of postmodernity. Whereas in the foregoing discussion, Weber and the concept of rationalisation or the 'iron cage' were predominant in society and the legal system, postmodernity involved values which arose out of the movements in the arts, literature and film (Freeman, 1994, p.1147). The main features of postmodernism are pastiche or elements of style, reflexivity, relativism of truth and a lessened importance of the author as a creator of the text (Freeman, 1994, p.1148; Ireland, 2002, pp.129-130). Postmodernity, having embraced the features of postmodernism, has gradually tended towards fragmentation of boundaries
(Ireland, 2002, p.129). Furthermore, cultural factors and aestheticisation of everyday life is now more central (Ireland, 2002, p.129). In the political arena, postmodern states have reversed the modernity trend and encouraged the virtues of self-reliance, competition, private enterprise and deregulation (Arup, 1997, pp.19-21). The implications for interpretation of the legal system in society are significant (Black, 2002, pp.4-8).

2.3.3 OCST, Paterson, complexities and ‘postmodernity’

It will now be useful to analyse a number of complexities which arise out of the postmodern legal system. I shall briefly refer to Paterson’s work in analysing postmodern legal systems.⁶

In a most illuminating thesis, Paterson, an OCST scholar, writes about the impact of regulation in health and safety in Britain’s offshore oil and gas industry. In attempting to unmask the complexities of regulation and regulatory caps, he attempts to employ ‘unmasking’ strategies. Regulatory capture is the idea; it is difficult to empirically test as to whether or not the regulator is captured by the regulated due to relational interactions over a period of time.

Paterson notes the limits of bureaucratic rationality and seemingly economical rational choice in the dangerous practice of subcontracting in offshore oil production (Paterson, 1997, p.37). He notes and refers to the multiplication of

⁶ A description of ‘postmodern’ legal systems is problematic and disputable (Douzinos & Warrington, 1991). Nevertheless, a brief description is appropriate before my research examines components within the postmodern setting.
rational discourses which are prevalent in postmodernity. He notes that in postmodernity there is still the overhang of regulation strategies in modern society which predate postmodernity. In particular, he refers to what Ziegert refers to as the 'light switch model' of law (Paterson, 1997, p.38). This 'light switch model' of regulation assumes that once a particular problem has been discovered, the passing and implementation of certain regulations will bring about a solution of the original problem targeted. If regulation in turn does not provide a good solution to the targeted problem, then regulators refer to better enforcement strategies as opposed to regulation failure (Paterson, 1997, p.38). I shall refer to, in particular, the notions of traditional regulation discourse and alternatives to traditional regulation discourse in Chapters Six, Seven and Eight.

The point that Paterson wishes to make, however, is that complexity in postmodernity is largely shielded behind a 'mask'. This mask is the traditional regulation discourse and its unquestioning faith in its ability to deal with the problem in hand (Paterson, 1997, pp.37-39). As the shift of the condition of law occurs in the transition from modernity to postmodernity, there have been signs that the attempt or capacity of Government to instrumentally and rationally implement programs of purposive regulation are exceeding their thresholds (Paterson, 1997, p.39). Furthermore, there is a suggestion that as law produces only one legal text of events, it fails to accommodate the overproduction of norms, plurality and the inherent conflict in postmodern life (Goodrich, 1986, p.219, as referred to by Paterson).
Another inherent conflict in postmodernity is the apparent observation that the ultimate application of principles of science to science itself has brought about a crisis of confidence in the great enlightenment and hope for the scientific method would provide the ultimate and irrefutable measure of truth (Paterson, 1997, p.40). The attempt by writers in the scientific method to project a objective truth is under attack, particularly in postmodernity. Science no longer has the ability to provide a final or irrefutable answer, and this spills over into the multiple competing discourses of postmodernity (Black, 2002, pp.4-8).

The legal process of reconstructing scientific provisional truth leads to inherent uneasy relationships between the discourses of law and science in postmodernity (Paterson, 1997, p.41; King & Piper, 1990). What lies behind the traditional reconstruction and interpretation of competing discourses is the assumption of causal connections in the world, that is, the relationship of cause and effect (Ladeur, 1989, as referred to in Paterson, 1997, p.44).

Instrumental rationality which was largely championed by Roscoe Pound in his grand theory of social engineering, strongly supported cause and effect relationships of the legal system in this environment (Pound, 1951). Furthermore, Talcott Parsons embraced the input/output model of subsystem exchange which is by its very nature a cause and effect model (Luhmann, 1992, p.1419). What Paterson notes is that in the postmodern setting with the greater complexity of problems under consideration, simple input/output or cause and effect models are less able to describe and prescribe actions under investigation (Paterson, 1997,
p.44). In short, stable models upon which rationalised and disciplines have previously been founded are now much more foundationally suspect, writes Paterson (1997, pp.47-49).

I must stress at this point that in the postmodern setting, the analysis of the operation of the legal system is complicated by models of change in the legal system (Lemercier, 2003). Change and the evaluation of the legal system are models that I accept implicitly in my analysis and research. Chapter Two, Section 2.3.8 further explores this phenomenon. However, the research problem does not explicitly seek to resolve change or evolution issues. The hypotheses are otherwise constrained. This is due to the fact that the study of change of evolution in the legal system would require a thesis in its own right.7

In summary, OCST has as a project the unmasking of the complexity of the dynamics of law in a certain setting (Luhmann 1993b, Chap.1; Teubner, 1989; Paterson, 1997, Lemercier, 2003). Postmodern legal systems present certain challenges as a result of the fragmentation and decentring of discourse, change and the multiplicity of norms (Black, 2003, p.4). Whilst OCST gives rise to a difficult and complex process of argument and discussion, it nevertheless promises benefits when analysing legal systems in postmodern settings. Regulatory capture and regulatory failure motivates us to find better ways of discussing and describing processes which whilst adequately explained in modern settings, are now finding

7 To study change or the evolution of the legal system has been the subject of a thesis in its own right. See Lemercier (2003).

2.3.4 Autonomy, internal reference and codes in OCST

OCST scholars regularly and repetitively use the phrase ‘operative closure of the legal system’ ‘reflexivity’, ‘autonomy’ and ‘internal reference’. Therefore, the reader needs to have some basic understanding of these terms.

Firstly, communications are the basic elements of subsystems in society. Luhmann argues this strongly in his departure from actor sociological theory which was embraced, for example, by Max Weber. If this idea is accepted, the processes of communication between parts of a subsystem become the meaning of that subsystem. That is, recursive communications construct the meaning of social operations, and the system is simply every communication (Baxter, 1997).

These processes are also described as ‘operations’ (Luhmann, 1993b, p.35). The ‘operative closure of the legal system’ or ‘autonomy’ is the normative closure of the legal system or any other subsystem for that matter. In this sense, communications are self-referencing and recursively closed. In part, this necessity for operative closure of the legal subsystem is necessitated by the increasing normative overproduction (Ziegert, 1995). Faced with an increasing pluralist normative complexity, a means for distinguishing and differentiating norms of greater and lesser relevance is required if the subsystem is to: (i) proceed with greater differentiation; (ii) be successful in certain operations; (ii) acquire meaning
in a overly complex normative environment; and (iv) evolve with greater selectivity of normative demands (Luhmann, 1993b).

Luhmann (1993b, Chap.3) argues that one of the special functions of the legal system as opposed to other subsystems is that the legal system is a second-order entity. That is, it interprets first-order operations of, for example, science and economics and then internalises the discourse. This constitutes on oscillation between autonomy and heteronomy. 8

OCST scholars argue that the normative or operative closure of the legal system is in contrast to the cognitive openness of the legal system. That is, the legal system observes other subsystems, and in doing so, this is a cognitive operation (Luhmann, 1992, p.1430). However, the extent to which the legal system allows itself to be normatively influenced by its observation of the scientific or economic subsystem is a function of normative closure. To that extent, normative closure implies that the extent to which the legal subsystem allows itself to be normatively influenced is prima facie, very selective and very restricted (Luhmann, 1992). OCST argues that the legal system's self-referential mode of operation with regard to what has been written in communications is most constructive in understanding the unity of the legal system, not as the unity of text, but as a social system comprised of social operations in various functional capacities and having selected memories (Luhmann, 1993b, p.49). Consequently, if the basic operation which

8 Also see Teubner (1989) for an excellent examination of this dynamic.
defines social systems in their environment is communication, this defines the concept of society as a comprehensive system of self-referencing communication in an environment in which there are multiple communications (Luhmann, 1992). Self-recursive operative closure of a system should also be called ‘autonomy’. The notion of ‘relative autonomy’ also arises when self-referencing operative closure or autonomy of the legal system is contrasted to ‘structural coupling’, an element which will be introduced later in this discussion.

What needs to be borne in mind is that the above OCST outline regarding normative or operative closure is a significant adjustment from Parsons’ notion of a ‘open system’. The conceptual basis for Luhmann’s paradigm change is the simultaneous notion of ‘closure and openness’. This simultaneous openness and closure of systems with a strong accent on closure is a significant shift from input/output systems (Baxter, 1997, p.2004).

Because OCST focuses upon communications as opposed to human beings in society and subsystems, this has significant consequences for systems analysis. In a tautological sense, if communications are operatively closed, this would infer that the system’s boundaries are constituted by the extent of communication in a particular subsystem (Baxter, 1997, p.2005). It is in this sense that society or a subsystem is operatively closed, insofar as its boundaries are established by operations called ‘communications’ (Baxter, 1997, p.2005).

What is particularly new, however, with respect to the notion of operative closure is the argument that the boundaries which are constituted by a systems
communications are not 'porous'. Luhmann rejects the idea, which is open to Parsons and open systems theory, that social subsystem boundaries are points of connection through which information generated in another system may be exchanged for information generated in the target system (Luhmann, 1989, p.139; Baxter, 1997, p.2005). Therefore, the boundaries are not porous and do not exchange information. Rather, they act as specific boundaries constituted by communications which are significant in their ability to resist the transference of environmental 'noise' to an internal subsystem (Luhmann, 1992).

OCST argues that a code such as legal versus illegal in the legal system operates as a systems specific operation. Therefore, from the perspective of the legal system all operations outside the legal system in the environment do not constitute information but constitute 'noise' (Baxter, 1997, p.2006). To what extent this 'noise' may be processed as information depends upon the systems specific code and the extent to which it resonates within that system (Bailey, 1997, p.96).

OCST argues that in place of input/output interchange programs which Parsons describe, there is instead a 'recursive' closure of communicative subsystems (Baxter, 1997, p.2006). In this sense, norms are then purely internal creations serving the self-generated needs of the system for decisional criteria within any corresponding similar items in this environment, and to that extent, it is recursive (Luhmann, 1992, p.1428). It is this recursive bifurcation which necessitates decisions and therefore further operations in a recursive and circular process (Luhmann, 1992, p.1428). There is nothing else meant by autopoiesis.
except for that historically there is no beginning except an always renewed reconstruction of the past. Logically, therefore, there are no apriorities but simply a circular reciprocal conditioning of the code (Luhmann, 1992, p.1428).

Associated with this recursive process and recursive closure in operative closure are the associated notions of self-production, self-reproduction and self-reference (Baxter, 1997, p.2006). The operatively closed system is self-producing in the sense that it produces its own elements through its own operations. It is self-reproducing in the sense that its operations reproduces a system as a network of communications, as is self-referential in the sense used above with respect its recursive nature9 (Baxter, 1997, p.2006).

Perhaps it is now appropriate to describe how the system is able to operatively select and maintain its ‘recursive closure’. It does so with the use of a ‘specific code’. Each subsystem will have its own specific code and the legal system has a code of legal and illegal (Luhmann, 1993b). The code is always binary and operates in a binary selective sense. Because the system’s specific code establishes the system’s specific boundaries with respect to communications, then the communications define the boundary. However, communications are systems specific and therefore all legal communications are systems specific, and all political communications are systems specific to those respective subsystems (Luhmann 1992, pp.1425-28). For example, all legal communications are systems

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9 In this sense, the system or subsystem is preoccupied with internal reference and is to that extent ‘autonomous’.
specific and belong to the legal subsystem, and all other communications reside in
the legal subsystem’s environment (Baxter, 1997, p.2006). The systems specific
code of legal versus illegal therefore establishes the boundaries of the
communications and relegate non-legal communications to its environment. Its
environment necessarily may constitute other subsystems such as the political
subsystem and the economic subsystem. Furthermore, there is the fact that by its
very nature, the systems specific code determines what is not legal communication,
for example, and therefore, by this very process achieves the operation of
‘distinction’ of communications from systems specific communications such as
legal communications. The code, therefore, closes the system off from other
systems in its environment by serving as a systems specific rejection value (Baxter,

Furthermore, with respect to what communications are legal and illegal, the
systems specific code does allow for postmodern fracturing. Therefore, the legal
system does not consist of a set of rules, nor a set of institutions such as courts and
legislatures, but rather is simply invoked by legal communications (Baxter, 1997,
p.2007). If the question arises as to whether something is legal or illegal, the
communication belongs to the legal system and there is no further sanction nor
institution which constitutes the legal system (Luhmann, 1992, p.1428). An
example provided by Baxter is one where a neighbour may say, ‘Get off my
property’. To the extent that it invokes a legal right to exclude this communication
within the legal system though it is stated well outside the conventional understanding of the legal system (Baxter, 1997, p.2007).

If as I have discussed above, there is such a thing as a boundary constituted by legal communications which does not allow the transfer of information across the boundary, how does the legal system relate in any way to other subsystems in its environment? For example, does Luhmann’s operative closure mean that legal communications and the legal subsystem in no way take into account influences within the environment from other subsystems such as the political or economic system? Is this an absolute concept of ‘autonomy’ and does this concept of operative closure and closed boundaries exclude the possibility of ‘relative autonomy’? (Baxter, 1997, p.2008).

The answers to these questions are that there is a mechanism by which the legal subsystem can be influenced or influence its environment and other communicative systems. OCST answers this question by stating that systems are both operatively closed and cognitively open simultaneously. This notion of ‘cognitive openness’ will now be discussed in the next sub-heading to enable us to see how operatively closed subsystems relate to their environment.

2.3.5 Cognitive openness, external reference and programming in OCST

The daily problem of closed social systems is how to connect internal and external references by internal operations (Luhmann, 1992, p.1429). Does operative closure isolate the legal system from its environment? The answer is ‘No’ insofar as an
autopoietic or operatively closed legal system does not operate as if the world only consisted of legal communications marked by its own systems specific code (Baxter, 1997, p.2009). Because a subsystem needs to distinguish itself from its environment, this very operation of distinction has a binary function and a binary result. This results in the operations of ‘self-reference’ and ‘external reference’ as well (Baxter, 1997, p.2009).

Our foregoing discussion regarding boundaries and legal communications noted that whatever was not legal communication was allocated by the specific system code as part of the environment. This notion of self-reference must necessarily invoke the notion of external reference or identification of its environment simultaneously\(^\text{10}\) (Luhmann, 1992, p.1431).

The above notion of the legal system allocating and identifying this environment through the process of external reference is described as cognitive openness (Baxter, 1997, p.2009). In this sense, the legal system ‘observes’ well beyond the legal system’s boundaries in its environment (Luhmann, 1992, p.1421). Nevertheless, the operations by which the legal system or legal communication observes its environment are always conditioned upon its own recursive procedure and systems specific code (Baxter, 1997, 2010). There is no contradiction in using both internal and external references at the same time and the task of the system is simply to distinguish interests protected by the law from interests to be suppressed

\(^{10}\) The ‘boundary’ referred to in systems theory is highlighted by the process of external reference. Boundaries continue to appear throughout open and closed systems theory, but are understood differently.
and combated (Luhmann, 1992, p.1430). The legal subsystem and legal communications construct its environment with respect to its own systems specific code. The concept of constructive reality and constructivist processes are inherent in this notion of legal communications observing its environment (Teubner, 1989).

However, OCST does require an additional mechanism to describe how the legal system is indeed open to its environment and how this can occur in terms of operations at all (Baxter, 1997, p.2010). The simple concept of a binary legal code is invariant, and does not offer any way for the system to adapt to a changing environment (Baxter, 1997, p.2010). Indeed, the code ensures that all non-legal operations are ‘noise’ from the environment as interpreted by the legal subsystem (Luhmann, 1992, p.1433). Noise as such do not become resonance or irritations except for the channelling and processing of ‘structural coupling’ (Luhmann, 1992, p.1433). That is, the environment does not contain irritations or perturbations unless they are registered as such by the legal system’s own specific coding. In this particularly narrow construction, how does the legal subsystem communicate and relate reciprocally with its environment and other subsystems?\footnote{See also Post (1991) who engages this question under the notion of relative autonomy.} OCST’s solution is the coupling of the system’s internal distinction between coding and programming (Baxter, 1997, p.2010). In other words, the ultimate problem always consists of combining external and internal references and the real operations which produce and reproduce such combinations are always internal operations.
which comprise external and internal references (Luhmann, 1992, p.1431). The external reference component is linked to programming, and the internal reference component is linked to coding.

A program guides the allocation of those code values in particular situations (Baxter, 1997, p.2010). Examples of programs are constitutions, laws, regulations, court decisions with official precedents and contracts (Baxter, 1997, p.2011). Therefore, legal communications are comprised of both codes and programs and those programs such as laws, regulations and contracts are communications within the domain even though they form a different part of the legal internal operation (Luhmann, 1992, p.1434).

It is important to now differentiate in OCST as follows:

(i) A systems specific code is related to the concept of operative closure and is related to the concept of self-reference.

(ii) Programming within the legal subsystem is related to cognitive openness and is related to external reference. (Baxter, 1997, p.2011)

The above distinction is most helpful in understanding how the various elements of coding, programming, operative closure, cognitive openness, self-reference and external reference interrelate or are opposed in some sense. It is important to remember that they all constitute legal communications but that: (a) refers to self-reference and operative closure; and (b) refers to external reference and observation in terms of cognitive openness. Notwithstanding their distinctive operational flavours, both of the above elements are legal communications and both of the
above elements, when coupled with each other, help us explain how operatively closed systems can mutually relate to its environment.

Some more detail, however, is required with respect to how programs assist in reciprocal communications between the legal system and its environment. Programs can be both conditional and purposeful. A conditional program is one where ‘if (a) then (b)’ where ‘(a)’ is some past fact and ‘(b)’ is one of the code values, either legal or illegal (Baxter, 1997, p.2011). The purposeful program is a program whereby the standard is set by the legislation in terms of ‘best interest of the child’ or other similar general standard.

The nature of programs are such that they are not invariant. Programs are able to make themselves variable and responsive to irritations and perturbations which are presented by the legal system’s environment. As indicated previously, information cannot enter through the boundary of the legal system and its communications. However, as the legal system can observe, by external reference, over its boundaries, when the legal system resonates greatly enough, the legal system’s own programs of regulations, laws, court decisions and so forth, can in an ad hoc manner transform and learn from its environmental perturbations and irritations (Luhmann, 1992, p.1433). Indeed, Luhmann argues that programs are necessary to ensure that the system can build up regularities and develop when it constructs order from the noise of its environment (Luhmann, 1992, p.1433). Therefore, external reference and programs are the mechanisms by which a
continuous influx of noise and disorder can result in internal system maintenance and improvement of its structure through learning (Luhmann, 1992, p.1433).

Therefore, a system’s programming is the basis for its openness to its environment and its capacity for external reference (Baxter, 1997, p.2011). Programs which are therefore variable and not necessarily bound by internal recursive operations as well as strict specific coding are more able to ‘observe’ beyond its boundaries and internally construct or resonate noise into perturbations and irritations which need to be responded to within the legal system and its communications (Luhmann, 1992).

The above so far has provided us with a brief and general mapping of the simultaneous concept of normative closure and cognitive openness and its related concepts of coding and programming. This combined concept of internal reference and external reference is a foundation upon which systems mutually reciprocate and relate to their environment and other systems of communication whilst acknowledging that they operate in a recursive manner.

2.3.6 The function of the legal system in OCST

In the context of the overproduction of normative demands on the legal system in postmodern society, how does OCST conceive the function of the legal system?

12 At this point, I acknowledge the demands and challenges imposed on the legal system by change and evolution (Lemercier, 2003).
OCST scholars argue that the function of law is primarily to bring about the 
certainty of normative expectations, especially in anticipation of unavoidable 
disappointment (Luhmann, 1993b, p.145). Given the courts cannot refuse a dispute 
at the core of its operations, certainty of expectation and certainly the expectations 
of sanctions have an effect. If the mechanism of the legal system is geared to 
operate 'without fear or favour', they need time to prepare an immune response to 
the environment. This environment which is an increase in the overproduction of 
norms reaches a point at which destabilisation of normative expectations is a 
necessary operation for the continued differentiation and success of the legal 
subsystem (Luhmann, 1993b). Society operates in the horizontal sense, not the 
vertical hierarchical sense.

Expectations can take on various forms in a legal subsystem. It does not 
refer to an actual state of consciousness of a given individual human being, but to 
the temporal aspect of the meaning of communications (Luhmann, 1993b, p.118). 
Furthermore, when phrases are used such as 'expectations' normative stabilisation 
of expectations is what is proposed. Norms and expectations in a temporal sense 
are linked, and therefore consequently link them to operations via communications.

However, the stabilisation of normative expectations requires some 
certainty as well as some congruence. This congruence is certainly not uniform but 
can be sought to be uniform in basic notions of sanction expectations and the non- 
refusal of dispute resolution by the courts (Luhmann, 1993, Chap.3).
In summary, the function of law is to reduce anxiety and reduce the effects of contingency in a complex risk society.

OCST scholars are careful to argue and discuss the distinction and differentiation of the function of law with respect to the difference and differentiation of the function of politics. Politics uses the medium of power, and power is articulated as superior authority coupled with the threat of force and sanction. The difference between law and politics since Hobbes has been formulated as the opposition between state and individual rights in nature. With the recognition of the freedom of contracts, disposable property and the recognition of the legal capacity of corporations in the 18th century, the objectification of subjective rights emerged (Luhmann, 1993b, Chap.3). This resulted in a symbiotic relationship of the legal system and the political system.\textsuperscript{13} In order for law to be enforced, it needs politics, and without the prospect of enforcement there is no stability of norms which convinces or which is expected by everybody within the environment (Luhmann, 1993b, p.143). Politics uses law to diversify the access to politically concentrated power. Politics uses the medium of power, and it has paths of success in enforcing binding decisions collectively. However, its success is only partial which results in the function of the legal system in arriving at a number of performance indicators for the function of law.

\textsuperscript{13} This may have cemented the apparent perception that the ‘state’ was an amalgam of the political sovereign and the legal jurisdiction. This unitary perception, however, is strongly discounted by Parsons and OCST in their concept of separate functional systems.
The ‘performances’ of law which arise out of the primary function of law, are (i) behavioural control; and (ii) conflict resolution (Luhmann, 1993b, p.150). Therefore, for example, the coordination of behaviour in everyday life depends upon the fact that one can expect that individuals actually behave in a way which is described by law, for instance, that every guest shall pay their hotel bill on checking out or that the drivers observe rules of the road. However, the interaction of other subsystems in society also have a symbiotic relationship with the law to ensure the functional equivalent of securing the desired behaviour from members of society. For example, credit cards preclude legal control but nevertheless modify and regulate the behaviour with respect to the provision of economic services such as the renting of a motor vehicle (Luhmann, 1993b, p.151).

It can be therefore seen that the function of law arrives out of the normative character of the legal system. There are consequences of this closed normative character in the postmodern legal system upon the new law in a radically different environment. By redefining the function of law in this radically new environment, a more adequate description of the modern legal system in postmodern society is possible.

2.3.7 Notion of justice and contingency in OCST
In the discussion of ‘function of law’ the function of law and the performances of law were hardly described in terms of ‘justice’. How does OCST conceive the process of ‘justice’?
Justice has been defined with some lack of success through the centuries by commentators. Aristotle conveniently distinguished between *distributive justice* and *corrective justice*. Distributive justice concerns questions of who should get what and corrective justice concerns the treatment of individuals in social transactions, as well as punishing individuals for offences so defined (Abercrombie, 1988, p.223).

Rawls, on the other hand, in *A Theory of Justice* (1971) broadly defined it insofar as that all social values, which include liberty, opportunity, income, wealth and self-respect, be distributed equally unless an unequal distribution of any is to everyone’s advantage (Abercrombie, 1988, p.223).

OCST has an even different view of ‘justice’ and importantly, Luhmann’s notions of justice do not fall within his discussion of the function of law. Nor does the notion of ‘justice’ fall within his discussion of coding and programming. Coding refers to the law and non-law schematic which is a positivist construction and is essentially ‘internal reference’ of the legal system in its centre. Conditional programming refers to contingency collaborations or the fleshing out of the basic law versus non-law structural operation within the legal system and is effectively ‘external reference’ of the legal system in its periphery (Baxter, 1997, p.2009). OCST argues that if ‘justice’ is to be incorporated in the discussion of structure, it should be incorporated not at the level of code, but at the level of a conditional program (Luhmann, 1993b, p.209). He argues that if justice is recognised in its most general form with ‘equality’, it needs to be reduced to something like
regularity or consistency (Luhmann, 1993b, p.214). Justice is a norm in this context, but it is contingent in that it may or may not be achieved in a particular setting. Whilst it is a normative expectation of society, because it operates at the level of program it is not invariant as the code is.\textsuperscript{14} Because programs are conditional, this subsequently means that justice is conditional and contingent in society. That is, in practical terms, the notion and content of ‘justice’ will increase or decrease or redefine itself over time. Furthermore, this explains partially why notions of ‘justice’ vary in content and effect in different legal subsystems in different societies.

Furthermore, the notion of justice in the era of the postmodern society suffers from pluralistic interpretations. Accordingly, OCST argue that as justice cannot be defined at the level of code in the legal system, at best it can be one conditional program in the legal system that is contingent although desirable (Luhmann, 1993b, pp.215-17).

In this context, justice can only mean an adequate complexity of consistent decision-making such as the consistent decision-making with respect to the right to legal protection and the prohibition of the denial of justice (Luhmann, 1993b, p.217). To preserve the consistency of decisions and decision-making and to ensure that they are regular is the characteristic of ‘justice’ in the conditions programming of the legal system.

\textsuperscript{14} The question, ‘How does the openness of justice relate to the closure of the legal system?’ is put and examined by Schlink (1992). Schlink’s analysis is an interesting challenge to OCST’s interpretation of justice in the legal system.
The definition of justice as the principle of consistency in decision-making is separate from other value judgements in society, for example, the desirability of a moral impeccable life or desirability of rich or poor participants\textsuperscript{15} (Luhmann, 1993b, p.218). Justice has shifted from its preoccupation with distributive justice to whether or not the performance of the system in a dispute process is treated alike or differently in the recursive network of the reproduction of the decision in the legal system over a period of time. Because the principle of consistency in decision-making is objective as opposed to the content of justice which is subjective, controversy in the application of justice is minimised (Luhmann, 1993b, Chap.5).

2.3.8 Evolution of law and OCST

*How does OCST conceive the evolution of the legal system, if at all?* Parsons synthesised individual actions and large-scale social systems. This was explained along the lines of the organic analogy or evolutionary theory (Parsons, 1951).

This evolution in sociology came to be known as structural ‘functionalism’ and it was, as earlier discussed, useful in describing amongst other things the need for society to have basic social needs or functional prerequisites met (Abercrombie, 1988, p.176). It tended to be more horizontal than vertical in the scheme of society.

Describing the evolution of individual legal institutions is most difficult and lacks precision (Luhmann, 1993b, p.228). The features of the legal system

\textsuperscript{15} Therefore, in this sense, ‘justice’ is not a moral normative principle, but an expectation. It also begins to have a superficial correlation to ‘procedural fairness’ as outlined by John Rawls.
which makes evolution possible are various conditions of variation, selection and maintenance and stability of the system. A variation is the condition whereby there needs to be a variation of one element compared with the existing pattern of reproduction in the system (Luhmann, 1993b, p.230). Selection is the selection of a structure which is now possible as a condition for further reproduction. The maintenance of the stability of the system is the continuation of the autopoietic structurally determine reproduction of the system. These three conditions in combination are necessary for the ‘evolution’ of a system (Luhmann, 1993b, pp.232-44).

‘Evolution of law’ is imprecisely defined but has been referred to by various commentators including Hume, Ferguson and Selznick, amongst others (Luhmann, 1993b, p.228). The notion of ‘evolution’ is important because it reflects the reality that operations in a legal system take on a more specialised and functionalised character as society ages. The coupling of the political system with the legal subsystem would necessarily result in irritations and attempted influences. This relationship also changes in character and depth with the growth and increasing specialisation of the systems. This aspect which can be interpreted through the method of variation, selection and maintenance, amongst other tools, is helpful in understanding one aspect of the dynamic growth and/or stability of the legal system as a method of evolution (Luhmann, 1993, p.228).

I must point out that my description of the postmodern legal system is just that, a description. But the notion of an evolving legal system is very real and
underlines the complexities of operations in the postmodern setting (Luhmann, 1993b, pp.230-232; Lemercier, 2003).

As I pointed out in Chapter Two, Section 2.3.3, the research I undertake will not examine in any real depth the 'evolution' of the legal system or change. The research problem and its three hypotheses are constrained by different subjects of analysis. Namely, self steering and the typology of OCST. The analysis of change or evolution of the legal system, if it was to be examined by me, would have required the design of a different research problem and hypotheses. For reasons outlined in Chapter One, I chose not to design a research problem or hypotheses that would have incorporated the research or analysis of change or evolution of the legal system.\textsuperscript{16}

2.3.9 Position of courts in the legal system and its periphery in OCST

OCST devotes considerable attention to a micro-analysis of the legal system. Far from arguing that the legal system is a homogenous system, OCST argues that internal differentiation of the legal system into a centre and a periphery is appropriate and necessary (Luhmann, 1993b, Chap.7). Parsons was of the view that social systems tend over time towards equilibrium or homeostasis because they are boundary maintenance systems (Abercrombie, 1988, p.392). But he did not elaborate on internal subsystem components, just system functions.

\textsuperscript{16} See Lemercier (2003) for a thesis which examined 'change' or evolution of the legal system in a comprehensive fashion employing OCST.
The central position of the court and its relationship with other elements of the legal system are crucial to the distinction of coding and programming (Baxter, 1997). The courts and the legislature are the organised decision system of the legal system (Baxter, 1997, pp.2 & 18). Other elements in the legal system are the 'periphery'. Legislation and the courts' operations are distinguishable and distinct and are required to be differentiated. There are several distinctions but one of those is the distinction between legislation by the legislator which represents the State, and the conditioning of the exercise of the jurisdictional power by the relevant magistrate (Luhmann, 1993b, p.284). This, therefore, leads to the understanding that legislation and jurisdiction are two variants of a uniform task, namely, the 'jurisdiction' which pertains to the political state and sovereign. In this sense, Luhmann's differentiation internally is not hierarchical but functional. That is, it is a horizontal differentiation, not a vertical differentiation. This functional form of differentiation is a consequence of the adoption of structural functionalism.

Another feature of the position of the courts in the legal system, amongst many others, is the nature of decision-making of the courts. The courts are *compulsory* decision-makers in the legal system and they are not at liberty to refuse dispute put to it (Luhmann, 1993b, Chap.7). That is, there is a prohibition of the denial of natural justice. The consequence is that judges *have to* grant decisions on the basis of the settled law, and they are freed from the supervision of the political administration (Luhmann, 1993b, p.294). In contrast to Roman law or even Medieval law, modern law judges cannot refuse the decision-making which the
cours afford. Under Roman law, the availability of the service of the decision of the court or the tribunal was only available for a limited number of well-defined actions, such as Actio and the Writ (Luhmann, 1993b, Chap.7).

In contrast to the courts, the periphery of the legal system performs a very different function. The periphery constitutes all other areas of law which do not involve the court’s periphery (Luhmann, 1993b, p.304). That is, activities which are usually called private such as contracts, or legislation, or the participants in the periphery such as in the legal profession belong to what is known as the ‘periphery’ (Baxter, 1917, p.2075). Whereas laws and contracts may be forced to change for political or economic reasons, these are pressures of a different kind and when faced with these pressures, the legal system is free to decide whether or not it wishes to respond to such pressures and internalise them. Courts, however, are in an exceptional position whereby they have to decide each case which is submitted to them for legal reasons (Luhmann, 1993b, p.303). Therefore, by exclusion, the periphery is not subject to compulsory operation or compulsory decision-making. The periphery of the legal system is particularly suited as a zone of contact with other functional systems of society, be it economy, family life or politics (Baxter, 1987, pp.2 & 22; Luhmann, 1992, pp.1432 & 1433).17

In relation to the special position of the courts in the legal system as conceived by OCST scholars, there is some similarity with the work of Ronald

17 But this ‘zone of contact’ should not be mistaken as a type of ‘porous boundary’ as employed by open systems theory (Luhmann, 1992, p.1432).
Dworkin. In his impressive work, Law’s Empire (1986), Dworkin regards the courts as the capital of law’s empire and the judges as its princes (Baxter, 1997, p.2018; Dworkin, 1986, p.407). Accordingly, the notion of a centre of the legal system and a periphery is not without some precedent. However, OCST’s explanation for the centre of the legal system is somewhat different. Luhmann argues for a functional differentiation which is internal and horizontal. Courts alone are under the legal obligation to render decisions. Neither legislatures nor contracting parties are ordinarily legally obliged to reach decisions, although they may be under economic or political pressure (Baxter, 1997, p.2022). Furthermore, legal communications which are not court communications have a special characteristic. Whilst court communications are solely recursive and rendered legal by their self-reference without any reference to other subsystem communications, communications in the periphery of the legal system have a dual nature. They can at the same time have a dual characteristic, for example, the enactment of a statute is from the point of view of legal communication a legal decision (Baxter, 1997, p.2022). But from the point of view of the political system, a statute is an operation of politics and a product of legislative manoeuvring (Baxter, 1997, p.2022). Similarly, contracts can be regarded at the same time by the legal system and the economic system as two different functional products or communications. Therefore, OCST argues that the legal periphery is peripheral in the sense that at the same time they can be observed or operated within two different systems in their communications simultaneously (Baxter, 1997, p.2022).
OCST goes to great lengths to describe the courts as central insofar as they are more insulated from their environment or indeed the periphery from pressures originating from the environment of the legal system. This insulation or immunity helps solidify the special position of the courts (Luhmann, 1993b, Chap.7). No such special immunity or insulation is afforded to the communications in the periphery of the legal system. In this sense, the periphery contains communications which are more prone to environmental pressure or noise (Luhmann, 1992, p.1433).

The OCST concept of legal periphery, as described earlier in this chapter, is one which accords generally with the notion of programs and external reference. It also accords with the notion of cognitive openness. The communications within the legal periphery, due to their ability to be seen at the same time in different subsystems lends credibility to the notion that in legal periphery real dynamism and activity can occur (Baxter, 1997, p.2035; Luhmann, 1999, pp.1433-34). When a periphery acts as a contact zone between the legal system and other subsystems in society, I see the beginnings of the possibility for contact and reciprocal communications between the legal system and its environment. In particular, if legislation and contract can operate simultaneously in the periphery of the legal system and the periphery of the political system and economic system respectively, real opportunities for a theoretical understanding of reciprocal relationships between different subsystems is possible.
The periphery is constituted by numerous communications including legislation and contracts as has been described. It is also constituted by the legal profession, positive law, constitutions, regulations, court decisions and other delegated legislation. The legal periphery and its particular communications engaging external reference, and in doing so allow themselves to be responsive in due course and only when internally accepted. This potential responsiveness in the legal periphery due to external reference is a vital ingredient in ensuring immunity and special protection for the court centre as well as immunity adaptation and structural differentiation of the periphery over time allowing evolution. The legal periphery is an important conduit for the mutual influences running through the legal system and its environment (Luhmann, 1993b, p.305-308).  

However, whilst at this point I have been able to discuss the mutual concepts of internal reference and external reference, coupled with the court and the legal periphery, I have yet to describe how in detail the legal periphery as a contact zone can allow for the mutual influence amongst the legal system and its environment. ‘Structural coupling’ is required to describe this and this will be discussed below.

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18 In many ways, the legal periphery is the richest site for research, and my research will focus upon the legal periphery in Chapters Four and Five.
2.3.10 Structural couplings in OCST

*How do systems in society mutually influence each other?* OCST argues the need for the description of the mutual relationship between a system and its environment. This is particularly evident when operative closure of the system, which is relatively autonomous, is necessary.

So far I have described the notions of operational closure and systems specific coding as such. Furthermore, I have described cognitive openness and programming. We have outlined the notion that coding is internal reference and programming is akin to external reference. Furthermore, most programs operate in the legal periphery of the legal system. Such programs such as legislation and contracts can be seen simultaneously as two different operations in two different subsystems. This is how such legal communication in the periphery is constituted as external reference. What is yet left to determine is how the internal distinction in the legal system between the centre and the periphery, and the parallel distinction between internal reference and external reference can give rise to mutual relationships between different subsystems in society. For example, mutual relationships between the legal system and the political system.

To discuss this I need to turn to the legal periphery again. In particular, I need to turn to the concept of 'structural coupling' which the OCST scholar Luhmann has devised to describe the operation of mutual and reciprocal relations between different subsystems in society (Baxter, 1997, p.2036). *How does OCST account for the responsiveness of the legal system to environment risks or*
changing perceptions in minorities in the community? My discussion so far has centred around code versus program, and the distinction between internal and external reference is the foundation upon which OCST then outlines the 'structural coupling' at subsystems. It should be noted that Luhmann did not employ structural coupling as a process to account for environment reciprocal relations until well after his well-known debate with Habermas had commenced.\(^{19}\) Habermas challenged the notion of autopoietic theory on the basis that it did not account for the environment and the important influences that emanate from the environment (Habermas, 1981).

First, it must be remembered that the environment consists of all non-legal communications including the communications of the political system and the economic system, amongst others (Baxter, 1997, p.2036). Furthermore, to the legal system, all communications in its environment are not information but rather perceived as 'noise' (Luhmann, 1993, p.76). Noise is not regarded as an irritation or perturbation generally by the legal system. However, some noise may irritate or resonate within the system which is selected by the legal system to do so. The legal system in its normal dealings does not perceive its structural couplings but it has to contend with perturbations, irritations and surprises once perceived and filtered from environmental noise (Luhmann, 1992, p.1433). The environment generally as indicated does not contain perturbations or information but is simply in a sense,

noise. The twin concepts of closure and structural coupling exclude the idea of information, therefore, entering the system from its environment (Luhmann, 1992, p.1432).

Some irritations which actually enter the boundary of the legal system may be easily be converted into legal information and processed within the system. However, more problematic irritations may not be as easily transformed and as such, constitute a challenge to the legal system and its structures (Baxter, 1997, p.2037). Indeed, such difficulty and unpredictable perturbations and irritations allow the internal system the chance to learn and transform its structures. A continuous influx of disorder against which a system maintains or changes its structure is a favourable system process and structural coupling helps achieve this (Luhmann, 1992, p.1433). In this sense, noise which is allowed into the internal legal system as an irritation in certain cases becomes a variety inducing phenomena which is constructive to the transformation of learning the legal system (Luhmann, 1992, p.1433). In this sense, autonomy of the system is not complete but there is a ‘relative’ autonomy insofar as the closed system does adapt to its environment in certain selected cases (Baxter, 1997, p.2038). However, one must recall that consistent with closed systems theory as opposed to open systems theory, Luhmann contends that the transformation of noise into irritation and then stimuli is not a simple cause and effect phenomena but rather a complex internal construction which may take some time and is not easily predictable (Baxter, 1997).
Furthermore, the system is internally orientated and internal construction is the primary operation in a closed system (Luhmann, 1992, p.1433).

More importantly and more precisely, \textit{what is 'structural coupling'?} Coupling can be a momentary coupling such as a payment in the economy or a legal decision (Baxter, 1997, p.2038). However, structural coupling as opposed to momentary coupling connects legal subsystems through system structures as opposed through a single transitory event (Baxter, 1997, p.2038). Therefore, structural couplings are permanent even though their structural content may change or drift over time or extended periods of time. Furthermore, structurally, it is the link between the periphery of the legal system and another system periphery in its environment which continues and encourages external reference for the legal system, for example (Luhmann, 1992, p.1432).

From a more general level, structural coupling is applied by Luhmann at numerous levels. For example, he argues that there is a structural coupling between the individual or psychic system and the societal system (Luhmann, 1992, p.1433). Furthermore, there is structural coupling between subsystems within societies, for example, law and political systems and law and economic systems. Unlike Parsons, however, he does not abstract infinitely in either direction. Luhmann presupposes that structural coupling between systems in society as opposed to individuals in society are the most important and functionally productive structural couplings.
2.3.11 External reference and the structural coupling of law and politics in OCST

In the previous section, I discussed generally the notion of external reference and structural coupling in OCST. Structural coupling was perceived as a more permanent coupling of the peripheral structures of various subsystems in society. Through the notion of structural coupling, the legal system periphery could be involved in the process of external reference with its environment in a non cause and effect process. Furthermore, ‘noise’\(^\text{20}\) in the legal system’s environment could be allowed selectively into the legal system periphery and be transformed into an irritation and resonate as an irritation selectively. Some irritations could be converted into information but other irritations were shown to be stimuli which would give rise to learning and change within the structure of the legal system.

It is now appropriate to briefly describe an important example of structural coupling, namely, the coupling of law and politics.

The traditional conception of the ‘state’ as a Hobbesian solution is one where the state is conceived as a unitary entity (Luhmann, 1992, p.1436). The unity of political and legal sovereignty traditionally has clouded the distinctive operations of the political and the legal system as closed autopoietic systems (Luhmann, 1992, p.1436). The legal realists under Holmes have sought to blur the distinction between law and politics when they insist on the rhetoric ‘law is

\(^{20}\) ‘Noise’ is employed by Luhmann as a term to denote environmental disorder as opposed to ‘information’ (Luhmann, 1992, pp.1432-1433).
politics' (Baxter, 1997, p.2040). Ultimately, the vertical solution which centred upon the state is no longer suitable nor satisfactory for explaining legitimacy and authority in a postmodern and fragmented society.

It the political system is closed and separate from the legal system, how does OCST describe the political system's internal workings? All subsystems use the same domain which is the domain of communication. Legal communications, however, are quite separate from political communications. The notion of a boundary applies and the political system is bounded by the extent of its political communications. All communications which fall outside political communications constitute the environment for the political system. In this sense, it is closed. In this sense, it is self-referencing. However, external reference is constituted by the periphery of the political system and its ability to 'refer' to noise or communications across the boundary.

Code is invariant, and the code for the political system is unique in that it has two closely correlated codes. There is a code distinction between Government and Opposition, and there is a code distinction between governing and governed (Baxter, 1997, p.2040). It is important to note that within the political systems the legislature does not form a component of the political system. Rather, the legislature forms a component of the legal system and in particular, as with legislation falls within the periphery of the legal system (Baxter, 1997, pp.2015 & 2017).
Legislation in the legal system periphery is a prominent and well-known example of the phenomena of ‘structural coupling’. Legislation can be viewed simultaneously as an act that has both political and legal relevance at the same time (Luhmann, 1992, p.1437). For example, an observer may view the statute enactment as a political success. However, the observer may also view the statute of legislation as a decision that changes validity or position of the law (Baxter, 1997, p.2041). Viewed from the perspective of the political system, legislation has emerged from a political process of governmental manipulation and public opinion. On the other hand, from the legal system’s point of view, statute appears simply as valid law at a particular point in time which remains valid until either judicially amended or legislatively amended (Baxter, 1997, p.2041). When a peripheral program such as legislation is simultaneously interpreted from two different systems, the notion of structural coupling emerges. A reciprocal relationship between the periphery of the legal and political system is observed by their respective communications, both legal and political. In this sense, structural coupling is a parallel mechanism which couples the legal system and the political system which allows it to structurally learn (Luhmann, 1992, p.1436).\footnote{Luhmann opines the ‘socialisation’ and ‘evolution’ of systems is dependant upon the irritations produced by structural coupling (Luhmann, 1992, p.1433).}

The legal system and the political system have different modes and operational time sequences. That is, modern political systems are under enormous pressure to perform and respond to their environments in a timely manner. Legal
procedures by contrast are relatively slow and as indicated previously, insulated against political pressures which are different in terms of temporal demand (Baxter, 1997, p.2041). Legislation offers a way of closing the inevitable time gap but at the same time maintain an external reference and reciprocal peripheral relationship between the legal and political system (Luhmann, 1993b, p.404). In this sense, the structural coupling of legislation between the political and legal systems allows for a reciprocal perturbation or perturbations of political and legal operations which are both constructive and stimulating for each system (Luhmann, 1992, p.1437). In this sense again, structural coupling enables external reference for both the legal and political subsystems. External reference, therefore, is enhanced by both the foundational concept of a periphery of each system, and then completed by the notion of structural coupling such as the coupling of legislation between the political and legal systems peripheries (Luhmann, 1993b, p.404).

In the sense that structural coupling is a device which enables external reference for both the legal and political systems, and in the sense that they employ the periphery of each system, the periphery is the ‘contact zone’ between law and politics (Baxter, 1997, p.2042).

Another example of structural coupling and a parallel coupling between the legal and political systems is the structural coupling in the form of the ‘constitution’ which is written (Luhmann, 1992, p.1436). The constitution is a robust and foundational example of structural coupling of the legal and political systems peripheries. The institutional justification for constitutions cannot be
reduced to either a political or a legal function, but rather serves a dual function of including and excluding reciprocal perturbations of political and legal communications (Luhmann, 1992, p.1437).

Another form of structural coupling which perhaps has more intermittent concerns in the legal system are legal judgements (Baxter, 1997, p.2042). Luhmann writes that only unenforced judgements would threaten the legal system’s long-term stability. Enforcement of judgements as performed by the political system is a reciprocal parasitic relationship that is relied upon both by the political and legal systems (Luhmann, 1993b, Chap.9).

However, OCST scholars devote the most weight in terms of structural coupling between a legal and political system to the ‘constitution’. Provided legal communications and political communications are not hybridised but are understood as being involved in a process of external reference emanating from the periphery of each subsystem, the constitution can operate to cement communications from each periphery, to cement the intended internal reference of each subsystem. Therefore, structural coupling can operate to provide a continuous influx of disorder against which the system maintains or changes its structure to learn and transform its structures (Luhmann, 1992, p.1433). In this sense, the legal system is able to reciprocate relations with the political system.

With respect to examples of structural coupling between the legal system and the economic system, OCST does propose that the examples of property and contract are modern example of structural coupling between such systems.
However, I do not have space here to discuss these particular examples of property and contract. Indeed, they are not particularly relevant to my discussion later in this thesis.

This concludes my broad outline of OCST literature. Particular disagreement among OCST scholars will be outlined below.

2.4 Previous OCST Research

2.4.1 Introduction

In the previous section, I outlined broadly the nature and claims of OCST and the immediate field of the research problem. It was an outline comprised of basic claims of OCST with respect to communications, meaning and operations of systems. It also outlined the basic operations of the legal system in postmodern society and its environment.

It is now appropriate, having established the basic claims of OCST in the immediate field, to analyse the specific completed research in the immediate field of OCST literature. This will comprise of an analysis of the previous completed research in the OCST literature. It will analyse specific research which applied empirical data for testing purposes.

In turn, I will also briefly comment on other research of a non-empirical nature in the immediate OCST field. In doing so, I will attempt to complete the outline of the literature in the immediate field of the research problem. This will
then be analysed in an attempt to provide a summary model of the completed research in the immediate field.

The purpose of the outline and analysis of the immediate field in OCST is to establish the gaps or neglected areas in the immediate field. An analysis of the completed research will make obvious areas of neglect or controversy. Such an approach has the advantage of ensuring that I engage in original research of value.

Furthermore, other advantages of mapping the previous completed research are as follows:

(i) I delineate the nature and quality of the existing OCST empirical research.

(ii) I delineate the nature and quality of the existing OCST theoretical research.

(iii) I ensure the research problem is properly grounded in a gap or neglected area of the OCST field.

(iv) I consequently ensure that the research problem is original in its scope and aim.

Another feature of mapping previous research in the OCST field is to analyse controversial or interesting areas in the field. Quite often controversial areas in the field can yield productive sources of research problems (Perry, 1998).

In the literature analysis below, five minor aims will be attempted with each completed research source (Perry, 1998; Heide, 1994):

(i) I will identify specific law topics or systems analysed in the research.

(ii) I will outline the method of research employed.

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22 Perry (1998, p.20) discusses the importance of this approach.
(iii) I will concisely outline the major findings.

(iv) I will analyse the limitations of the research.

(v) I will analyse the contributions of the research to the OCST field relevant to my research problem.

By attempting the above literature field analysis, I will strive to ensure that the analysis of the literature in the OCST field is usefully managed. Then I will attempt to construct a classification model from the resulting analysis. 

2.4.2 Some completed research in OCST

A grid approach will be used to map some of the previous research in OCST. There has been criticism of OCST. It is not the task of this thesis to deal with every scholarly study of OCST. Rather, selected examples of research will be dealt with.

A grid approach will be employed to better illustrate some completed research in OCST. The grid approach will address the following criteria:

A Topic of research covered by relevant author.
B Methodological issues.
C Findings.
D Limitation of the research method.
E Contributions made to OCST that is relevant to the research question.

The grid will demonstrate various different topics employing the above criteria.

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23 By no means will the model be complete or indeed indisputable. My aim is to construct a foundation departure point for the research (Perry, 1998, p.19).
Figure 2: Ecology and communications, and US Courts

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<th>Ecology</th>
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<th>US Courts</th>
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**Figure 3: Regulation of Industry**

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<td><strong>A</strong> UK regulation of British offshore oil and OCST research.</td>
<td><strong>A</strong> Effective corporate self-regulation, the ‘open corporation’.</td>
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<tr>
<td><strong>B</strong> Qualitative comprehensive analysis of internal and external industry reports</td>
<td><strong>B</strong> Qualitative empirical analysis of corporate self-regulation. Analysis of industry</td>
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<tr>
<td>and research in the UK offshore oil industry. Use of cognitive mapping, analysis</td>
<td>research and regulation of corporations and attempts of self-regulation by corporations.</td>
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<td>of responsiveness in the industry to industrial accident enquiries. Justification of</td>
<td>Comparative regulatory research. Case study analysis throughout.</td>
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<td>a new rationality based on OCST.</td>
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<td><strong>C</strong> Several findings, primary of which was the usefulness of OCST as a new</td>
<td><strong>C</strong> Primarily, traditional regulation discourse not up to the task of the modern</td>
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<td>rationality in unmasking the complexity behind the mask of determinism in the UK</td>
<td>corporation and its dynamics. The ‘open corporation’ informed by OCST scholarship is a</td>
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<td>offshore industry. OCST is useful in mapping a ‘new rationality’ for postmodern</td>
<td>better model for ensuring a better compliance outcome for government and self-</td>
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<td>industries. The research challenges the traditional regulation discourse.</td>
<td>regulated corporations. Corporate social responsiveness is internalised and result in</td>
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<td><strong>D</strong> Few limitations.</td>
<td>better outcomes in accordance with OCST scholarship.</td>
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<td><strong>E</strong> Substantial and important contribution to OCST scholarship (more in Chapter</td>
<td><strong>E</strong> Significant contribution to understanding OCST influence on regulation discourse</td>
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<td>Eight).</td>
<td>in the corporate industry (more in Chapter Eight).</td>
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Figure 4: United States abortion law

Mathieu Deflem (1998)

A  Boundaries of US abortion law.
B  A historical examination of US abortion law restricted to constitutional rulings of the US Supreme Court since 1973 and Roe v. Wade. The research also undertakes a theoretical discussion of politics of abortion law in United States. Little qualitative or quantitative empirical work, however.

C  There is some evidence of closed systems behaviour in the historical survey.
D  The research contrasts Habermas model of analysis and interpretation and gives Habermas priority over OCST. It also criticises OCST for ignoring extra legal factors such as politics and culture. It appears to mis-apply OCST.
E  It provides some historical evidence for the autopoietic behaviour of US abortion law, namely, some positive corroboration of OCST in United States legal system.

Figure 5: The child in the legal system

King and Piper (1990)

A  The construction of the child in the legal system (also see Chapter Six).
B  Qualitative empirical research and documentary research.
C  Numerous, but primary findings support major claims of Teubner and Luhmann in OCST.
D  Few limitations.
E  A significant and primary research contribution in relation to the child in the postmodern legal system.
**Figure 6: Australian judiciary**

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<td><strong>A</strong> OCST and changes in legal systems.</td>
<td><strong>A</strong> Courts of first instance and legal research methodology of OCST, the day in Court.</td>
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<tr>
<td><strong>B</strong> Six chapters of discussion of science, philosophy and sociological explanation of systems change, then an empirical qualitative survey of structured interviews of the Australian judiciary.</td>
<td><strong>B</strong> Students in ethno-graphic Local Court studies in Sydney. Structured interviews with members of the public using the court system and the legal officers, as well as a paper discussing the findings of a pilot study.</td>
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<td><strong>C</strong> Numerous findings but primarily OCST is observed to explain studied change in the legal system. Using ‘context of discovery’, OCST explains cognitive openness and normative closure, co-drift of legal system with society, paradox is inescapable and structural coupling effects on the economic subsystem. Internal reference and external reference found to work in studied findings. Scientific and philosophical doctrines agree with OCST according to the research, and empirical testing of OCST is capable and valid.</td>
<td><strong>C</strong> An objective of the research was to determine through empirical research the structure and operation of legal communications, and how they relate to societal communications (1990). The actual operation of Local Courts in a closed communication process, as predicted by OCST. Production of knowledge is socially constructed. Local courts operate in the centre of the legal system.</td>
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<td><strong>D</strong> Limitations were few, except too much focus on philosophy and science analysis at the expense of the empirical work.</td>
<td><strong>D</strong> Few limitations.</td>
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<td><strong>E</strong> A focused and highly informative contribution to OCST and change in the legal system using qualitative empirical findings.</td>
<td><strong>E</strong> Provides a unique analysis of Local Court communications, operations in New South Wales using OCST. The impact of norm overproduction on communications is expertly portrayed.</td>
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Economic steering through the banks

D. Baecher (1991)
Structural coupling of law and economic systems

M. Hutter (1989)
Societal culture and semantics and romantic language, education and art

Figure 7: Legal operations in general, contract and corporations operations

<table>
<thead>
<tr>
<th>Gunther Teubner (1993)</th>
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<tr>
<td>A Corporate governance - case study.</td>
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<td>B Case study analysis of self-reference and corporate governance - a regulation analysis of corporate governance.</td>
</tr>
<tr>
<td>C Only the operative function has created independent institutions for the group network. Flexibility in the controlling network yields best results for corporate governance, e.g. collective bargaining strategies.</td>
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<tr>
<td>D Data collection is limited. It draws from different jurisdictions, but is limited in terms of data analyses and exposition.</td>
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<tr>
<td>E It makes a contribution to self-steering and corporations scholarship. Network preference over hierarchy is useful.</td>
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Figure 8: Juridification of social spheres

**Gunther Teubner (1987)**

A Juridification of social spheres such as Labour Law and Social Welfare Law.

B Examination of rise and limitations of juridification in various jurisdictions. Theoretical, but limited to works of other scholars engaged in qualitative research.

C Instrumental regulation and material legal rationality leads to regulatory trilemma and epistemic traps for autonomous legal systems and other systems. Solutions are limited to ongoing implementation theory or, better still, control of self-regulation, not deregulation.

D Data collection is limited, though its linking to other scholars in his 1987 work overcomes this limitation.

E The qualitative research presented in Teubner’s edited work is highly probative, e.g.

   (i) Labour Law
       - Simitis, S.: Labour relations
       - Clark, J.: London juridification
       - Giugni, G.: Labour relations in Italy

   (ii) Corporations Law
       - Kubler, F.: Corporate structures
       - Buxbaum, R.: American Enterprise Law
       - Corsi, F.: Italian Corporate Law

   (iii) Antitrust
       - Hofst, K.: A comparative case study
       - Markovitz, R.: Delegatisation alternatives

   (iv) Social Welfare
       - Zacher, H.: Social welfare juridification
       - Partington, M.: British experience
2.4.3 **Theoretical research in OCST**

Much of the research in OCST is smaller in scale than the research outlined above. Despite the prolific output of Luhmann and Teubner amongst others in OCST scholarship, other OCST scholars have provided limited output to date in both scope and number. Much OCST scholarship is theoretical. There are some exceptions such as Ziegert and King and Piper.

I will present below a select review of 10 scholars in the field of OCST, including some critics of OCST. The purpose of such a review of the theoretical literature is to balance my review of OCST research literature in the field. Whilst the previous sub-section outlined the empirical research in OCST, the current sub-section will outline selected theoretical scholarly works in OCST.

**H. Baxter (1997)**

Baxter makes a contribution insofar as he provides an expert review of Luhmann's seminal legal system work, *Das recht der Gesellschaft or Society's Law*. Baxter is attracted to OCST because it provides a theoretical formulation that grounds 'relative autonomy'. He then embarks upon a limited criticism of OCST and discusses problems with binary coding and notional structural coupling. Ultimately, however, he does accept that structural coupling combined with autopoiesis provides a theoretical structure for the contemplation of relative autonomy in the postmodern legal system. Furthermore, he concedes that OCST or
certain aspects of it at least correlate to certain aspects of postmodern legal jurisprudence.

M. Brans and S. Rossbach (1997)

Brans and Rossbach undertake very important research in administrative systems and autopoiesis. They comment that empirical studies have been fruitful in the OCST field, contrary to the view of critics that empirical research is futile. Their research spends considerable time analysing the possibility of steering and self-steering. They also correctly postulate that there are fundamental objections to the adopting of the internal logic of the economic subsystem in the public sector or the political subsystem. Their finding is that centralist steering theory violates internal binary codes of different subsystems which ultimately may lead to a collapse of the viability of the violated subsystem. Their research in particular will underpin one of the hypotheses of my research.

A. Beck (1994)

Beck is primarily a critic of OCST. However, his research is useful in that he outlines approximately four major criticisms of OCST in attempts to justify each criticism. Firstly, he critiques the concept of ‘communications’ in OCST. He focuses upon the sender and receiver as opposed to the communication dialogue itself. Secondly, he critiques the system as ‘subject’. Thirdly, he critiques the closure of the legal system. However, a criticism of Beck in this regard is that he
appears to ignore the structural coupling element of OCST which overcomes the isolation of closure. Fourthly, he critiques the social context of OCST and its closure. Again, Beck appears to ignore structural coupling and external reference in combination with autopoietic theory.

C. Larmore (1992)

Larmore is of the view that OCST, and Luhmann in particular, has a gross suspicion of morality as opposed to normative content. Larmore is of the view that it is misleading, for example, to distinguish cognitive expectations as opposed to normative expectations. He engages in metaphysical reasoning to explain his view of the content of cognitive attitude. He argues that ‘knowledge’ itself is a normative concept as opposed to a strictly cognitive concept. He therefore concludes that morality in a normative domain generally is a weak spot in the work of OCST and Luhmann in particular. My view is whilst Larmore may be correct in philosophically objecting to the normative cognitive dichotomy, the primary and prioritised function of the normative cognitive dichotomy is a useful tool in constructing OCST. Indeed, Larmore comes to the same conclusion whilst having reservations.
N. Luhmann (1985-1995)

The works and research of Luhmann were explored in much depth in the earlier part of this chapter. His works as an OCST scholar are substantial and occurs over a lengthy period of time.


Perhaps interestingly, as Luhmann has focused upon abstract or historical research, his body of qualitative research is largely left to others. Hence, my placing much of Luhmann’s research under the category of ‘theoretical’.

R. Munch (1992)

Munch believes that OCST artificially conflates the analytical and empirical differentiation of subsystems in society. He believes that empirical differentiation cannot be conceived in terms of OCST and autopoiesis. He argues that the theoretical pursuit of OCST is difficult to criticise as it exists independent of reality. On the other hand, the empirical differentiation of subsystems in his view when viewed in reality takes into account matters that include cultural frameworks, economics and political power of relations that may converge in a system that is observed or studied. Ultimately, due to the combined concepts of internal and external reference, Munch argues that the different perspectives inherent in the
internal and external views of OCST results in a paradox. This paradox he argues is not resolved by way of empirical observation. Furthermore, he resorts to micro analysis and actor theory to justify empirical observational processes. The paradoxes which face OCST and Munch are resolved differently. I am of the view that OCST handles the paradox adequately by embracing the paradox and internal reference in closed systems. On the other hand, Munch is unable to acquiesce actor theory which drives him to argue that structural coupling in OCST is based on false premise. Until Munch concedes that actor theory is incapable of addressing postmodern conundrum, his attitude towards paradox remains problematic.

M. Rosenfeld (1992)

Rosenfeld is a most constructive critic of OCST. He begins his analysis by attempting to define the traditional conception of justice according to law as opposed to justice against the law and justice beyond the law. In his conception, justice according to law is when each person is treated according his or her legal rights. Justice against the law, on the other hand, is justice which entitles a judicial officer to claim that a law is unjust. To be able to do so, that judicial officer must be able to resort to 'justice that lies beyond the law'. This involves resorting to traditional criteria such as normative ethics, religious norms or different conceptions of justice and law. Rosenfeld argues that there is a contemporary struggle for justice. This contemporary struggle is between justice according to law and a contemporary movement towards the reconceptualisation of justice beyond
the law. This reflects the underlying divergence and dichotomy of 'horizontal unity' and 'vertical unity'. The competing dichotomies divergence therefore lead Rosenfeld to argue that paradox leads to a simultaneous drive towards system differentiation such as described in OCST and unification. Ultimately, he concludes that these dual drives are a product of pluralistic normativity which should be embraced, not discarded. Rosenfeld remains positive that OCST has a role to play in describing the postmodern conundrum and paradox. I agree with Rosenfeld that OCST has a real role in explaining the dynamics of the postmodern legal system. Ultimately, his explanation of justice beyond the law has some reference to structural coupling inherent in OCST.

B. Schlink (1992)

The central question for Schlink is: How does the openness of justice relate to the closure of the legal system? Schlink incorporates natural law as well as moral and political theory as content of 'open justice'. He argues that open justice does not have a place within the so-called 'closed legal system' as understood by OCST. He is of the view that the closure of the legal system stands in direct opposition to the openness of justice. He strongly argues for the opening of the closed legal system to enable it to take in account criteria of open justice such as political and moral theory. His approach is consistent with Habermas and some other writers such as Rosenfeld and Larmore. However, Schlink makes little reference to structural coupling and the cognitive programming of subsystems. He views OCST as
primarily a closed legal system or a closed political system as the case may be. He makes little reference to the periphery of each system and its explicit dynamic of programming and external reference. This external reference within the programs of the periphery of each system ensures that each subsystem is not isolated or autistic. This notion of external reference and variable programming constitutes the paradox of each subsystem insofar as it constitutes a relative autonomy. Structural coupling completes the notion of relative autonomy understood by OCST.

A. Wolfe (1992)

Wolfe is concerned with the lack of human input or actor theory in OCST. He believes that the lack of such human input or actor theory necessary limits the effectiveness of OCST and therefore deprives OCST of a more comprehensive effect and influence. He acknowledges that the concept of system differentiation and autopoiesis in an abstract sense is superior to centralist Hobbesian political solution for the State and its conception. He also correctly notes that OCST is a horizontal conception as opposed to a vertical conception. This is because hierarchy and stratification has given way to system differentiation and functionalism in modern and postmodern society. I look to my left and my right as opposed to up and down. However, he does question a number of assumptions of OCST and Luhmann in particular. He questions the reduction of information to binary codes, and he questions the code of information as a process. Finally, he questions the ultimate notion of autopoiesis even by scientists. Like other critics,
he criticises the tautological definition of communication and autopoiesis. This self-reference is problematic for Wolfe. Ultimately, Wolfe sees a pathological obsession in OCST to enhance systems in the world at the expense of individuals. Wolfe is primarily concerned for the actions of real people in the process of communication and cultural formation. He sees autopoietic systems as an enemy for the preservation and enhancement of human action. In this regard, he has an alignment with Habermas. I am of the view that whilst Wolfe has justifiable concerns for human action, these concerns cannot displace the descriptive power of OCST in the postmodern setting. If indeed my research problem can be answered in the affirmative for OCST, then there is some value in OCST notwithstanding its apparent reconceptualisation of human action in a pluralistic society.

_G. Wagner (1995)_

Wagner strongly argues that postmodern theory must move beyond foundational thinking and focus upon the conception of difference. The distinction of ‘difference’ is OCST’s use of internal and external reference or system and environment. This reference to internal and external reference or relative autonomy is a development which distinguishes itself from foundational thinking or actor central theory which was prevalent in early Parsons theory and embraced by most critics including Wagner. Wagner, however, is critical of the claims of OCST in its attempts to conceive difference. Wagner argues that whilst internal and external reference may appear to be difference in claim, it collapses into a foundational
mode. Wagner's philosophical criticism of Luhmann of OCST has merit from a philosophical point of view. However, it does not discard the value of OCST in explaining the dynamics of the postmodern legal system. Ultimately, Wagner attacks the premises upon which OCST operate. He argues that these premises are metaphysical premises characteristic of rationalistic thought of 'old Europe'. However, Wagner’s criticism is theoretical and not empirical in nature. Wagner also gives little reference to external reference and structural coupling. This notion of external reference would overcome a significant part of Wagner’s criticism of metaphysical assumption that he sees in OCST. Certain features in OCST such as self-reference and environment are empirically observable.

K. Ziegert

I have already referred to the significant work of Ziegert in the OCST literature. His empirical work has been a significant contribution to the understanding of the Australian judiciary and in particular, courts of first instance. Ziegert has also written a significant number of theoretical works in the field of OCST. I shall be referring to Ziegert frequently throughout this thesis. His classification of the 'overproduction of norms' and its effect upon the legal system and other systems in everyday life are most helpful in understanding pluralistic dynamics in postmodern society. Ziegert clearly embraces limited aspects of Parsonian functionalism when

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24 See Figure 6 of this thesis outlining Ziegert's empirical research.
he refers to the differentiation of communication and the legal system as human
practice. He does employ pattern maintenance, goal attainment, adaption and
integrative systems in his analysis (Ziegert, 1995, p.501). With this, he employs
autopoiesis in closed systems as well as external reference which are the basic
claims and instruments of OCST. However, Ziegert’s primary contribution is his
empirical work based upon sound grounded theory. His mapping of
communication is also significant in that he carefully analyses the various levels of
legal communication at different systems levels (Ziegert, 1995, pp.500-510;
Ziegert, 1992, p.207). These have implications for the operation of the legal system
and the lifeworld construction which help us analyse operations.

2.4.4 The gaps or neglected areas of the OCST field

The previous section attempted to map the relevant OCST literature. It covered
both empirical research and theoretical research. It was by no means exhaustive but
I intended to analyse major scholars in OCST as outlined in Chapter One.

Some patterns have emerged from the literature survey, and they are
discussed in the following diagram. The classification model demonstrates an
number of interesting patterns. First, it demonstrates a pattern of research which
primarily occurs in the overseas setting. Australian OCST research is, apart from
Ziegert and Lemercier, relatively new and emerging. OCST research originates
overseas and is largely European in nature.
Second, the model demonstrates the relatively neglected topic of self-steering in OCST. Whilst regulation discourse is well established, self-regulation or self-steering discourse in OCST is relatively under-studied and little research in an empirical setting has occurred. Taking into account the above patterns and neglected areas, a proposed research problem is as follows: How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia?

**Figure 9: Previous OCST research and gaps in the research**

<table>
<thead>
<tr>
<th>Previous OCST completed research</th>
<th>Gaps or neglected areas</th>
<th>Controversy in OCST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Empirical or quasi empirical</td>
<td>A. Steering theory dynamics except King &amp; Piper UK Child Study and except Paterson UK</td>
<td>A. Whether an empirical methodology can be designed to utilise OCST or its components</td>
</tr>
<tr>
<td>• Ecological communication (Bailey &amp; Harrison)</td>
<td></td>
<td>B. Is OCST sterile or too mechanical?</td>
</tr>
<tr>
<td>• US Courts (Sinclair)</td>
<td></td>
<td></td>
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<tr>
<td>• UK Regulation of North Sea Oil (Paterson)</td>
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<td>• US Abortion Law (Deflem)</td>
<td></td>
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<tr>
<td>• Australian judges (Lemercier, Ziegert)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Child in the Legal System (King &amp; Piper)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Corporate governance (Teubner)</td>
<td></td>
<td></td>
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<tr>
<td>Mini research and theoretical research</td>
<td></td>
<td></td>
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<tr>
<td>• Brans &amp; Rossbach</td>
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<td>• Baxter</td>
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<td>• Beck</td>
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<td>• Larmore</td>
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<td>• Michailakis</td>
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<td>• Wagner</td>
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<tr>
<td>• Ziegert</td>
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</tbody>
</table>
Having determined the main research problem, a number of hypotheses should be determined. These hypotheses are the specific questions that I will gather data about in order to satisfactorily solve the main research problem (Perry, 1998).

A ‘hypothesis’, as outlined in Chapter One, can be defined as follows:

A proposition proposed as an explanation for the occurrence of some defined group of phenomena or as a tentative statement (Graziano & Raulin, 1997, p.183).

I took into account the neglected areas of research in OCST. I also took into account the controversy in OCST. I did so to formulate the three hypotheses in an attempt to solve the main research problem. They are:

(i) **Hypothesis One.** That certain patterns in the Australian case study data will match predictor elements in the typology of OCST.

(ii) **Hypothesis Two.** That OCST will predict (in the case study data) the undesirability of attempts of direct steering of the legal system by the political system.

(iii) **Hypothesis Three.** That OCST will predict (in the case study data) the desirability of attempts of self-steering by the legal system.

Each hypothesis uniquely attempts to answer the main research problem in an area identified in the OCST research field as neglected or relatively under-studied. In doing so, the research could be seen as original and as a contribution to the OCST literature field.

### 2.5 Conclusion

In this very important chapter, a number of tasks have been completed. The parent fields of OCST were introduced and briefly outlined. Open systems structural
functionalism was introduced along with autopoietic theory in science. The way they have been drawn together was illustrated and the resulting immediate field of OCST was then outlined in some detail.

I then analysed the basic claims of OCST. Whilst descriptive, these basic claims were vital to understand what indeed ‘OCST’ purports to mean. Once this was completed, I undertook a basic and selective literature field analysis of the major scholars in OCST.

This literature field analysis yielded a number of patterns in the OCST research. These were the relatively neglected areas in the OCST field, or ‘gaps’. The patterns identified are: (i) relative neglect of self-steering theory; and (ii) relative neglect of analysis of the legal system and judges in the Australian setting.

The main research problem was then formulated to take into account the said patterns. Then three hypotheses for solving the research problem were formulated. They will be used as the basis for specific research questions in Part B of this research. The aim of this research is to analyse and test the three hypotheses, which in turn help solve the main research problem. The research problem is: *How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia?*

Other difficult methodological issues will be discussed in Chapter Three.
Chapter Three
Other Methodological Issues

3.1 What Method of Inquiry?

Various approaches can be taken to the study of a topic or field of inquiry. From the theoretical point of view, there are several which can be adopted.

One major methodology suits my particular research problem and the associated research gaps. This research methodology is the qualitative research model. The research problem is framed in the 'how' or 'why' framework. The literature review is exploratory and the constructs are not neat and quantitative. The paradigm which is associated with the qualitative research model is interpretative and critical realist (Perry, 1998; Graziano & Raulin, 1997). The methodology which is most often associated with the qualitative model is the case study. I therefore will be using a number of case studies to answer the hypotheses outlined above. These in turn will attempt to answer the research problem.

Clearly, a legal thesis written in a law school, which this is, could not adopt any significant quantitative analysis. Social action surveys can use regression variables or statistical instruments, however, the case study methodology and its associated critical realism does not need to employ such instruments.

The ethical considerations of the research were considered initially when I was proposing to conduct my own field research. However, I noted that there was a significant body of data which had not been interpreted in a certain manner. For
example, the data in Chapters Four and Five had not employed OCST models of interpretation or analysis to date. Accordingly, I felt that I could avoid some of the traps of fieldwork and its associated ethical dilemmas by re-interpreting the well-gathered data available in the public domain.

What should be made clear at this point is that the reinterpretation of data method is not primary fieldwork, and as such, does not involve ‘classical’ social science methodology (Denzin & Lincoln, 1998, p.8). Furthermore, I am not primarily attempting to test OCST itself. Rather, I am attempting to resolve a central research problem by analysing three hypotheses with the assistance of systems theory or OCST, employing a modified qualitative research method (Denzin & Lincoln, 1998, pp.3-7).

The research problem was initially constructed as a qualitative research problem. The literature review in this chapter was exploratory. The interpretative paradigm is critical realism and interpretative. Therefore, the adopted scientific methodology is case study research or action research mode (Perry, 1998; Denzin & Lincoln, 1998; Graziano & Raulin, 1997).

The interpretative paradigm can also be understood as the constructivist paradigm which is consistent with OCST at a foundational level (Teubner, 1989). Interpretative case study methodologies have the advantage of employing a substantive formal theoretical position whilst at the same time employing certain critical aspects. I will strive to maintain the critical realist interpretative paradigm
when attempting to test the hypotheses with the case study data (Denzin & Lincoln, 1998).

The question could be asked: *Is the research less valid due to the fact that the thesis collects publicly available research results rather than employ fieldwork and interview research?* There are several connected answers to the above question.

First, the research is qualitative research, not quantitative research and as such certain consequences flow from such research.

Second, qualitative research is multi-method and multi-paradigm. But broadly speaking, it involves a distinct phase in its process. Part 1 is *data collection*, and Part 2 is the evaluation and *interpretation* of the data (Denzin & Lincoln, 1998). Whilst some of the data collection in my thesis has been carried out by other competent scholars, this does not mean I cannot use the data collected. Part 2 of the qualitative research process of interpretation of the data is perhaps the most important part of the research process. This is where my case study interpretations of the case study data fits in and can be most original.

Third, the data collected and studied in each case study, apart from Chapter Six, involves new OCST interpretation. The case study data has not hitherto been subject to OCST interpretation. In this respect, my research involves the novel
Fourth, original and valid qualitative research can involve the use of already known material or data but with a new interpretation (Phillips & Pugh, 1994, p.61). My research needs to be original in some incremental way. My selection of certain case study data, already competently collected in the field or collected by me (Chapter Seven) and then interpreted for the first time with the use of OCSST is, I would argue strongly, valid original qualitative research.

Fifth, qualitative research data collection is not limited to field interviews. Methods can also include ethnographic prose (Ziegert), historical narratives (Chapters Four & Five), first person accounts (Chapter Five & Seven), life histories, biographical data, archival material, semiotic analysis and statistics (Denzin & Lincoln, 1998, pp.5-13). That is, the access to data can be multi-faceted and yet valid. Because postmodern scholarship depicts social truth as ‘constructed’ and not objective, the attainment of truth using singular methods collapses.

Therefore, ‘triangulation’ is valid (Flick, 1992).

Sixth, my already explained role as an active member and participant in the various jurisdictions which form part of the case studies has a useful purpose. In addition to the benefit of formulating the research design, my long-standing status as participant in court operations has another useful role. I can corroborate and

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1 Chapters One, Two and Nine layout draws from Perry (1998).
internally test the data collected by other researchers which I employ in some of the case studies. That is, I observe the qualitative research data and perform a quick truth test by comparing the data to my own participant experiences. If there is a broad consistency between the data in the case study and my participant observations, I accept the data as valid and representative of the field in question.

If the answer is 'no' to the consistency test, I reject the case study data. Accordingly, my extensive participant experience in the various jurisdictions has a positive role to play in the research process (Denzin & Lincoln, 1998, p.84 onwards).

3.2 Additional Limitations

I emphasise that I do not attempt a number of tasks in the research. This section should be read in conjunction with Sections 1.4 and 1.7.

First, I do not 'test' OCST or systems theory as a whole. Rather, I am analysing or testing three hypotheses with the use of systems theory to resolve a research problem.

Second, the research is not classical field social science research, but modified qualitative research, employing 'bricoleur' techniques (Denzin & Lincoln, 1998, pp.3-6). The validity of such research is justified in Section 3.1 and elsewhere in the thesis.

It is now appropriate and timely to investigate the case studies and the three hypotheses.
Part B

Case Studies

and

Hypothesis Analysis

and Investigation
Chapter Four
A Systems Theory Analysis
of Australian Law Reform Commission
Report No. 89
and Family Court of Australia
Submission No. 348

In Part A of this research, the foundations and formulation of the central research problem and the proposed three hypotheses to solve it were explained and justified. At this point, it is conceded that the analysis and discussion so far is based upon a theoretical discussion without, as yet, a testing or analysis of the three hypotheses set out in Chapter Two. That is, at the conclusion of Part A, I was able to demonstrate the positive features of OCST in attempting to understand the postmodern environment of the overproduction of norms. The research will now enter the analysis and testing phase with the assistance of OCST.

It is time to return to the research problem and three hypotheses at hand.

They are:

**Research Problem:** How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia?

(i) **Hypothesis One.** That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST.

(ii) **Hypothesis Two.** That OCST will predict in the case study data the undesirability of attempts of direct steering of the legal system by the political system.

(iii) **Hypothesis Three.** That OCST will predict in the case study data the desirability of attempts of self-steering by the legal system.
4.1 Participant Experience and Methodology

My own experience as a legal practitioner practising in the following areas has had both a decisive and profound effect upon my research design and methodology.

I have practised in the following areas for 14 years:

(i) Family law residence and contact proceedings in the Family Court of Australia and Local Court of New South Wales.

(ii) Property proceedings in the Family Court of Australia and Local Court of New South Wales.

(iii) Accredited specialist in Children’s Law practising in the Children’s Court of New South Wales.

(iv) Practising in personal injury in the District Court of New South Wales, Compensation Court of New South Wales and the Workers Compensation Commission.

The primary research design and the selection of case studies have been influenced by the extensive experience and data cognitively acquired whilst participating in the above areas of practice. My participant status for six years has been heightened by the fact that my research design was relevant to my practice.

While I have not reproduced in the research the specific data (for ethical reasons), my status as a participant and informal observer has produced valuable results for my research problem design.

Whilst practising and prior to this research, I put on another ‘hat’, and sought to assess the process of court operations. I also tried to achieve the balance of involvement with detachment, familiarity with strangeness and closeness with distance (Denzin & Lincoln, 1998, pp.84-85).
As a result of this extensive participation and informal observation of the court processes over 14 years, I was able to formulate certain hypotheses:

(i) Legal operations in the Courts were problematic for participants.
(ii) Political and court relations were problematic.
(iii) Postmodern legal theories of legal construction could not adequately explain the court operation I was participating in and observing.

The selection, consequently, of the various case studies arose out of my familiarity with and concern for certain legal jurisdictions and their participants in which I had participated in. These include the legal aid industry, the Family Court of Australia and the Children’s Court of New South Wales.

Furthermore, I would submit that my participation in various court jurisdictions depicted in the case studies has had a profound effect upon my formulation of the specific research questions employed within. I have sought to formulate research questions (as opposed to the central research problem) with the input of what particular issues are most problematic in court operations in Australia today. Hence, the problematic phenomena of the litigants in person observed by me in the Family Court of Australia and the Children’s Court of New South Wales has influenced me. I have accordingly sought to design specific research questions which may help elucidate the dynamics of this troubling phenomena.

In addition, my observation and participation in the Compensation Court of New South Wales and the District Court of New South Wales in relation to personal injury proceedings, and the subsequent phenomena of court reorganisation
has left very specific experiences with me. I have sought to design the case studies and specific questions in Chapters Six, Seven and Eight in an effort to help elucidate the complex dynamics behind these troubling developments.

4.2 Methodology

This Chapter is concerned with testing Hypothesis One. A useful vehicle and case study to test Hypothesis One is the controversial response of the Family Court of Australia in its submission to Australian Law Reform Commission Report No. 89 (hereinafter referred to as ‘ALRC Report No. 89’) known as Managing Justice, a Review of the Federal Civil Justice System, prepared and presented to the Parliament in January 2000 and its relevant Discussion Paper No. 62.

The introductory chapters of this paper outlined the broad methodological techniques of the research problem.


The body of data collected by ALRC for ALRC Report No. 89, Managing Justice, a Review of the Federal Civil Justice System, was extensive and timely. It was collected over a four-year period and valuable empirical data was collected by professional investigators in the field. To the extent that data is not analysed, it is

¹ I could have chosen, for example, other submissions.
useful to interpret. Indeed, most of the unanalysed data by Matruglio is obtained by accessing a separate appendix, which is not attached to ALRC Report No. 89.

Furthermore, I chose Discussion Paper No. 62 and ALRC Report No. 89 because it represents communication in the public domain on a topic which hitherto has received little systemic attention by government or non-government agencies alike. A rare opportunity was therefore available to employ a case study which was timely and relevant to court development in an important Federal setting. The case study is also tempting because it offers an opportunity to interpret data and communication in the public domain with OCST. ALRC Report No. 89 and the Family Court response has not been interpreted using Luhmann's perspective as far as I am aware.

**Assumptions:** The question of the nature of ALRC Report No. 89 communication is relevant. *Is it legal communication or political?* For the purposes of this Chapter, I have had to assume it is largely political in *origin* and *nature*. This choice is based upon the observation that whilst the ALRC appears to operate in the periphery of the legal system from time to time, as understood by OCST, its communications in ALRC Report No. 89 are *not legal* programs and originate from a task and requirement set specifically, with rigid constraints by government. As will be detailed in the next section, ALRC is required to consider and report to government regarding specific and constrained numbers of carefully worded references. Some of these references are to be considered *with regard to* government concerns and policy agendas such as 'recent and proposed reforms to
courts and tribunals’. Such reforms are certainly not proposed by the legal system itself, particularly at the centre. They originate from government policy and the political system and are constructed with reference to code efficient/inefficient. For these reasons I have assumed that whilst the ALRC itself appears to operate in the legal system periphery from time to time, these communications are non-legal in origin (and are not code legal/non-legal communications). To this extent, they will be shown to be non-legal communications when interpreted by the centre of the legal system. I will attempt to show how, in this case study, the non-legal communications of Discussion Paper No. 62 and ALRC Report No. 89 are not mere ‘noise’ in the environment of the legal subsystem, but are communications which resonate as irritating and disturbances in the centre of the legal subsystem. This ALRC ‘duality’ of apparent function is a paradox not uncommon in structural coupling, such as legislation. It is also possibly characterised as temporal coupling.

Furthermore, it needs to be stated expressly that Family Court of Australia Submission No. 348 (hereinafter referred to ‘Submission No. 348’) by the Family Court represents legal communication by the Court which do not strictly reflect its usual role of deciding disputes at the centre of the legal system. In this sense, Submission No. 348 may be characterised and constructed as communications in the periphery of the legal system. This is possible when OCST describes the

\[2\] The Family Court of Australia often writes submissions to inquiries, but they do not often get much public airing.
periphery as containing all legal communication which do not belong to the centre, such centre comprising code operations of legal/non-legal (Baxter, 1997, p.2035).

In this way, I can properly construct Submission No. 348 by the Family Court as an operation belonging to the periphery of the legal system, i.e. a peripheral operation and communication, in the zone of contact.

4.2.1 Research questions

Before I effectively analyse Hypothesis One, I need to develop a qualitative tool of analysis which approximates the basic features of operatively closed systems theory (OCST). This is a tool not replicated in the literature. It will be termed ‘our analytical grid’ or ‘typology of OCST’. It is not comprehensive but appears to cover the substantive features of OCST. I am confident of its accuracy given I have drawn from major theorists in the field, as opposed to any one single theorist in the field. It is a diagnostic tool of analysis. By ‘typology’, I mean a ‘systematic classification’ (Macquarie Dictionary, 1987).

The central research questions in this chapter are contained within the typology of OCST. The research questions are for this chapter:

(i) Is there evidence of subsystems in the case study?
(ii) Is there evidence of overproduction of norms in the case study?
(iii) Is there evidence of operational closure in the case study?
(iv) Is there evidence of structural coupling and peripheral operations in the case study?
(v) Is there evidence of an epistemic trap and self-description in the case study?
(vi) Is there evidence of irritation registered internally in the case study?

If the answer to these questions are largely affirmative, Hypothesis One will be tested as affirmative. Namely, 'That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST'.

4.3 Background of the Case Study

In August 1999, a discussion paper was prepared and distributed by the Australian Law Reform Commission (hereinafter referred to as ALRC) known as Discussion Paper No. 62, *Review of the Federal Civil Justice System*. It formed the foundation for ALRC Report No. 89. ALRC is headquartered in York Street, Sydney. It requested submissions no later than 30 September 1999, allowing approximately five weeks for submission to be prepared and submitted by interested institutions and/or individuals. The terms of reference were issued by Michael Lavarch, the then-Commonwealth Attorney-General, on 29 November 1995. It is worth quoting some part of the terms of reference to enable the reader to more fully comprehend the task and background of this important process and report.

Terms of reference are provided as follows:

I, Michael Lavarch, Attorney-General of Australia, having regard to:

- the need for a *simpler, cheaper* and more accessible legal system;
- the justice statement; and
- *recent and proposed reforms to courts and tribunals*,

(emphasis added)
refer to the Law Reform Commission for inquiry and report under the *Law Reform Commission Act 1973* the following matters:

(a) the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before court and tribunals, exercising Federal jurisdiction;

(b) whether any changes should be made to the practices and procedures used in those proceedings; and

(c) any related matter

It went on to say, importantly:

In performing its function in relation to this reference, the Commission shall:

(i) consult widely among the Australian community and with relevant bodies, and particularly with:

the High Court of Australia, the Federal Court of Australia, the *Family Court of Australia* and other courts and tribunals exercising Federal jurisdiction (emphasis added)

It is apparent to the reader that this an extremely broad and wide-sweeping investigation into the operations, advantages and disadvantages, and economic accessibility of the entire Federal justice system, including the courts and the specialist Federal merits review tribunals. In relation to Federal merits review tribunals, the investigation was to focus upon the Administrative Appeals Tribunal, the Society Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal, all of which were about to be amalgamated into the new Administrative Review Tribunal.

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3 The consultation issue was to prove, particularly important in the submission by the Court.
The reader should note that in Australia and as a consequence of the structural coupling of the political and legal system in the nature of the written constitution, Federal tribunals, unlike courts exercising judicial power of the Commonwealth, possess no power to make determinative findings of law, and therefore decisions of Federal tribunals insofar as they affect existing legal rights can never be definitive. This was an outcome of the *Brandy v Human Rights and Equal Opportunity Commission* (1995 CLR 245) case. In contrast to the states and territories in Australia which may establish determinative tribunals which do not offend their written constitutions, the Federal constitution limits Federation tribunals in the way discussed.

ALRC held numerous consultations across Australia and consulted widely in the community and the legal profession in particular. It also received approximately 400 written submissions, some of which were most extensive. The Family Court submission, for example, was without annexures approximately 43 pages.

Discussion Paper No. 62 set the agenda and structure of ALRC Report No. 89 insofar as it looked at each of the aspects outlined in the terms of reference, such terms of reference being issued in November 1995. The process ultimately took four years and two months in its preparation and submission to Federal Parliament and the government, and the formal ALRC Report No. 89. Discussion Paper No. 62 centred around the following chapter headings:
(a) Change and continuity in the Federal civil justice system

(b) Education, training and accountability

(c) Litigants, dispute resolution and cost in the Federal civil justice system

(d) Lawyers and practice standards

(e) Assistance with legal costs

(f) Legal aid

(g) Federal Government as a litigant

(h) Issues in case management

(i) Case and hearing management in the Federal Court of Australia

(j) Case and hearing management in the Family Court of Australia

(k) Case and hearing management in a Federal merits review tribunal

(l) Expert evidence

Ultimately, ALRC Report No. 89, following Discussion Paper No. 62, provided extensive discussion and recommendation with respect to the majority of chapters in Discussion Paper No. 62 but excluded the Federal Government as litigant, issues in case management and expert evidence. These issues were spread throughout the report ultimately in a much more fragmented style.

On 2 September 1997, the then-Attorney-General the Honourable Daryl Williams AM QC MP, amended the terms of reference to focus the inquiry upon the Family Court and its relationship to the Federal Court of Australia.

Furthermore, it discussed the possible establishment of a Federal Magistrates Court which would have a complimentary Family Law jurisdiction. This was the first
sign which indicated that there was a growing divergence of attitude of ALRC and the Family Court.


In Chapter Seven of Discussion Paper No. 62, legal aid and assistance with legal costs are discussed. In Australia, the Federal Government provides legal aid funds in a budget each year to state legal aid commissions. The state legal aid commissions are then tasked with the administration of these Federal funds to legal aid applicants in family law matters which involve the Federal family law jurisdiction. On the other hand, the various state legal aid commissions administer state legal aid funds for state jurisdictional matters such as care and protection of children proceedings, state discrimination complaints and state criminal children proceedings.

One of the main proposals of Discussion Paper No. 62 was that legal aid commissions should employ the use of non-lawyers and law students under supervision in straightforward areas before tribunals and courts. Furthermore, it was proposed that legal aid commissions should provide annual reports on a wide variety of data and statistics in relation to the duration and outcomes of legal aid cases.

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4 This has met great resistance so far by the courts and legal aid commissions.
The report noted that in Australia and overseas, public funds for legal aid have been steadily and significantly reduced. It also noted that the legal profession in Sweden, United States, England and Australia are having to constantly reinvent legal aid commission schemes to ensure that citizens who qualify may still have access to legal services. Furthermore, the report noted that lord chancellor in the United Kingdom is reported to have said:

There is simply not enough money available to boost the legal aid scheme to meet everyone’s needs. We have to look at facts in the face. We have to accept that this has been the case for many years . . . Legal aid is a valuable public benefit but the public purse is not limitless. Legal aid has to compete for resources against education, health, transport. (ALRC Report No. 89, p.300)

With this prevailing international decline of legal aid, the report then proceeds to note with some concern that there is some recent qualitative research which suggests that cuts to legal aid funding have led to an increase in the number of unrepresented parties before Federal courts and tribunals, and a reduction in the number of skilled lawyers undertaking legal aid work (ALRC Report No. 89, p.301). Indeed, the Law Reform Commission’s own research, with the assistance of Matruglio in 1999, was able to determine that 41 per cent of all family law cases which involved applications for final orders involved at least one unrepresented party. This is a startling statistic which cannot be ignored by governments and professions alike.

The report then concluded at page 303 of ALRC Report No. 89:

The presence of unrepresented parties is credited with making litigations slower, settlements less likely, and increasing costs to the
other party and the court of tribunal. *There has been little empirical research to test these propositions.* (emphasis added)

ALRC appears to be somewhat confused with the status of the presence of unrepresented parties. Whilst it concludes later in page 303 of ALRC Report No. 89 that:

The Commission’s empirical research concerning representation demonstrated that in the Family Court and AAT, cases where both parties were represented were more likely to be resolved by consent.

On page 304 of ALRC Report No. 89, ALRC then said: ‘However, the additional costs attributed to the presence of unrepresented litigants remains unsubstantiated and unquantified.’ It is this ambivalence that will be highlighted later as an issue for the Family Court to consider in its communication with ALRC and the Federal Government in terms of structural coupling and environmental irritation resonance.

In ALRC Report No. 89, ALRC’s recommendations were largely focused upon urging legal professional associations to ensure that their members provide free pro bono work each year. This particular proposal or recommendation is rather unusual insofar as few other professions are required or strongly urged to provide pro bono work. This also is an addition to the *fact* that the Legal Aid Commission of New South Wales concedes that legal aid funding is at a rate which is significantly less than the market rate for legal services. For example, the standard legal rate for family law services in New South Wales in 2004 is $200 per hour plus GST. The legal aid rate for the identical case is $120 per hour plus GST.
Furthermore, recommendation numbers 39 and 40 of ALRC Report No. 89 encourage the legal aid commissions of the states and the Federal courts and tribunals to publish standardised data on an annual basis with respect to applications, duration, statistical trends and outcomes in all legal aid funded matters. Furthermore, at recommendation number 44, the report urged and recommended that the legal aid commissions establish panels of lawyers who would receive legal aid funding. Lawyers who are not members of the panels would not receive legal aid funding according to recommendations. Other recommendations with respect to caps and uniform caps of legal aid funding to ensure the avoidance of over-payment and excessive funding were also recommended.

The setting in which these recommendations are made is an environment in which preferred supplier legal firms have pulled out of the legal aid system for family law.\(^5\) According to the *National Legal Aid Survey* and a Queensland legal aid survey known as the *Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland* produced by the Griffith University Faculty of Law in 1998, there has been a significant and noticeable exit from legal aid work by private legal practitioners in Queensland and the Commonwealth.

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\(^5\) In NSW, the preferred scheme is employed under the name of 'Legal Aid Panel'.

Chapter Eight of ALRC Report No. 89 provides us with a most interesting discussion. Of the discussion and recommendations outlined in the nine chapters, Chapter Eight and its 105 pages provide a most illuminating insight into the relationship between ALRC, Federal Government, Family Court and the legal profession. The proposals and topics review family reports, counselling services, primary dispute resolution events and modification of the case management system, as well as data analysis.

ALRC consulted several hundred lawyers in all of mainland states of Australia and Law Council of Australia. ALRC also had extensive discussions with various community centres around Australia. They were extensive discussions involving the perception of community legal centres in the operation of the Family Court and its relationship with its customers and clients.

ALRC also conducted the most comprehensive field analysis to date of Family Court files, analysing data from 1,288 of 4,345 cases recorded as finalised during May and June 1998. It also conducted other analysis of case duration statistics and the cost of litigation in various survey responses in 1999 with the assistance of Matruglio. I shall be referring to this useful Matruglio empirical data report later in this chapter. ALRC’s research serve as a snapshot of the case-flow profile at a particular point in time and is most useful as a analysis of some of the
comments made by practitioners and the various legal aid commissions in relation to efficiency and case management.

ALRC was careful to note that there are recognised and common difficulties associated with the family law jurisdiction, both here and internationally. They noted there is no simple and easy way to deal with all family disputes which are aggravated by immature relationships, lack of trust between the parties, domestic violent, substance abuse and partisan involvement of relatives or friends (ALRC Report No. 89, p. 532). Furthermore, ALRC noted the disposition of parties and the circumstances which generally involved litigants in person. Furthermore, the skills of legal practitioners do vary and this is particularly noted by the Family Court in its submission. Finally, ALRC correctly noticed that the family law jurisdiction is a stressful one for judges, registrars, counsellors and lawyers, and is a jurisdiction which is prone to burnout of professionals involved in it.

Unlike other jurisdictions, this jurisdiction is prone to frequent changes in legislation and practice, has potential for repeat litigation and there is an increase in numbers of unrepresented litigants.

A further important matter provided by Chapter Eight of ALRC Report No. 89 is its observation of the competing visions of the role of the Family Court by the court itself. It summarises this as ‘an identity crisis as to whether it is a court of law with non-judicial processes or primarily a social service’ (ALRC Report No. 89, p.534). This is one matter which does not assist the communication or dialogue
between the Family Court and the various segments of the subsystem in the legal subsystem periphery such as the legal profession. Furthermore, it creates difficulties with respect to the self-description of the Family Court as the centre of the family legal system (see later in this chapter).

ALRC noted that in terms of case duration, the Family Court duration figures have a shorter median and duration to finalisation than other courts in the Federal civil sphere. However, there has been some staunch criticism by members of the legal profession and certain vocal interest groups that represent unhappy users of the family legal system. The main criticism is delay and repeated attendances at the Family Court. These criticisms, however, should be contextualised with the background provided earlier in this chapter with respect to the nature of family law jurisdiction and its stressors.

ALRC recommended that there should be a simplification of the repeated case event nature of case management in the family law system. That is, the Family Court should reduce the number of court attendance events and should remove the initial directions hearing with a case conference initially. This indeed did occur in 2003.

Furthermore, ALRC spent considerable time in Chapter Eight discussing its proposal and recommendations with respect to the amendment of case management in the Family Court.\(^6\) Whilst it agreed that the Family Court had to make findings

\(^6\) Since 2003, a further attempted simplification, in the amendment of the Family Law Rules (2004) has occurred, which has led to reported increased legal costs in the legal profession.
with respect to social facts as encompassed in family reports under section 68L of
the *Family Law Act*, it was more concerned with case management and the
‘docket’ system. This system is sometimes referred to as the American system
whereby certain difficult cases are allocated to a particular judge for the life of the
case. Furthermore, ALRC highlighted the need for flexibility within the system to
allow the system to adapt to the specific needs of individual cases without the
requirement for a rigid case event system. ALRC also recorded the rather negative
response of the Family Court with respect to this and also the response of the
Family Court and its description of its very poor relationship with the legal
profession in all states.

Interestingly, at page 326 of Chapter Eight, ALRC devotes some pages
discussing ‘communication’. ALRC noted that most of the submissions made were
broad and enthusiastic in their support for Discussion Paper No. 62. The Family
Court submission, it noted, was formal and extensive and was extremely critical of
ALRC and its processes. For example, ALRC noted that practitioners indicated to
ALRC that ‘if you make any criticisms however mild and well-intentioned, it’s
World War III’ (Submission by the Law Institute of Victoria, Family Law section,
24 August 1999).

Furthermore, a former judge was reported to have said:

The Court itself is unnecessarily defensive when people do criticise
it, the Court’s hierarchy . . . Now it seems to me that this sort of
response to well-meaning criticism would stifle the debate rather
than encourage it, because what is required is debate from lawyers
from the Law of Reform Commission, from the litigants and from the Court. (Judge T. Graham, 31 August 1999)

ALRC noted that the very poor relationship and communication between the Family Court, practitioners and ALRC was a fact of some concern. As was noted by the submission by the Family Law section of the Law Society of South Australia:

There's a lot less camaraderie between practitioners and Family Court judges than 15 to 20 years ago – it's very sad. They think we're always complaining and we think they don't ever listen... The Court is very cynical about practitioners. The basic problem is that the Court does not trust practitioners. They think lawyers are only orientated to make more money.

ALRC went on to note that the *Ontario Civil Justice Review* had described a process in their jurisdiction whereby the judiciary, the bar and the administrators do not communicate or cooperate and rather blame each other for the faults in the civil justice system. These individual institutions or 'solitudes' do not encourage communication or discourse which can help resolve some of the problems that are chronic in the civil justice system. ALRC rightly noted that the 'solitudes' must begin to dialogue in a much better fashion if progress is to be made with respect to reform in the family law system.

Ultimately, Chapter Eight is an important dialogue and defence by ALRC with respect to the Family Court submission. Submission No. 348 dated 19 October 1999 is mentioned quite early in Chapter Eight. The remainder of Chapter Eight is an attempt to diffuse and defend ALRC's proposals and recommendations
and also point out the apparent flaws in the Family Court's own world view and interpretation of its role in the legal system.

The next section will analyse in greater detail the Family Court submission and response before I turn to testing Hypothesis One.

4.6 Response of the Family Court of Australia to Australian Law Reform Commission Discussion Paper No. 62

The Family Court provided Submission No. 348 dated 19 October 1999. Although it was numbered as one amongst a huge number of submissions, potentially it is one of the most important documents which was submitted to ALRC in its preparation for ALRC Report No. 89.

Submissions were sought as a result of the dissemination of Discussion Paper No. 62, which was used as a forum for discussion prior to ALRC Report No. 89 being produced by ALRC after taking into account its own investigations and research, as well as responses to Discussion Paper No. 62.

In the case of the response by the Family Court, the submission numbered a specific response of 64 pages, and appendix and enclosed documents of 42 pages, totalling 106 pages. It would be fair to say that it would be one of the most extensive submissions made to ALRC. The size and magnitude of the submissions

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7 The Family Court of Australia at the same time commissioned Research Report No. 20 in an attempt to counter the perceived bias in ALRC Discussion Paper No. 62.
can also be translated to the importance of the submission in terms of the different competing visions of ALRC and Family Court of Australia respectively.

The value of analysing in detail the response of the Family Court to Discussion Paper No. 62 will be its usefulness as a demonstration of an apparent conflict in the communication style and communication rhetoric of competing legal and political entities in their respective subsystems. Whilst ALRC may appear to be an element of the legal subsystem periphery from time to time, it can perhaps more properly be regarded as an instrument of executives (in relation to its communications in this case study). That is, the Attorney-General in his capacity as a member of the Cabinet of the Executive Government pursuant to the Federal Constitution appoints ALRC to provide a report with respect to the terms of reference as indicated earlier in this paper. ALRC can then, in accordance with the Australian Law Reform Commission legislation provide the report in response to specific terms of reference. This is a report directly to the Attorney-General as a member of the Executive Government as opposed to a report to Parliament. Accordingly, the preparation of the report by way of the reference to ALRC pursuant to the *Law Reform Commission Act 1973* dated 29 November 1995 could be characterised as a specific act of the Executive Government. Furthermore, the provision of the report in January 2000 by Professor Weisbrot and Dr Cronin to the Attorney-General, the Honourable Daryl Williams AM QCMP is again a provision of a report to the Executive Government and therefore could be interpreted as non-legal communication. However, this does not deny the fact that ALRC work is
most valuable as anticipated by Parliament when it drafted the *Law Reform Commission Act 1973*.

Furthermore, as I am concerned in my paper with the discussion of Luhmann’s contribution and interpretation of the legal system in society, I believe that the Family Law Court’s response to Discussion Paper No. 62 is a most useful vehicle for demonstrating Luhmann’s interpretation of the legal system in society.

It would be fair to assume that there is no clear demarcation line between the political system and ALRC which is statutory body set up by Parliament. From time to time it operates in the legal periphery, except when a specific task renders it an agency which constructs specific and constrained political or non-legal communication. Such a construction may readily occur from time to time. On the other hand, it is fair to say that the Family Court of Australia is the centre of the legal subsystem insofar as the family legal subsystem is concerned. The Family Court of Australia is also one of a number of courts that form the centre of the legal subsystem in Australian society. To that extent, ALRC communications and Family Court of Australia do not reside within the same part of the same subsystem at the same time but are processes which reside within different subsystems. I shall discuss this at greater length in the interpretative section of this chapter.

The response of the Family Court, otherwise known as Submission No. 348, started out with the following:

The Court is of the view that the Discussion Paper is fundamentally flawed in a number of respects insofar as relates to the Family Court of Australia... The Court considers as this response will
demonstrate, that the Discussion Paper overall lacks professional balance and contains significant and frequent inadequacies... A major weakness of the Discussion Paper's treatment of the Federal and Family Courts is in its lack of even-handedness and balance when considering important issues associated with case management.

This, no doubt, is a particularly strong and critical submission directed at ALRC.

One of the prime concerns of the Family Court was the lack of consultation by ALRC with respect to the Family Court. The reader may recall that the terms of reference required ALRC to consult directly with the Family Court. However, the Family Court at page 1 indicated:

Commission failed to consult with the Court to the required extent, despite having numerous opportunities and a period of four years in which to do so.

Furthermore, the Family Court had real concerns regarding the methodology of ALRC recommendations. In a general way, the Family Court indicated:

It also raises real questions about the evidentiary basis for the opinions expressed so publicly by the Commission in releasing the Discussion Paper.

The Discussion Paper was required by the terms of reference to review the advantages and disadvantages of the present adversarial system of litigation in its Federal sphere. However, as the Family Court submitted, ALRC dismissed the adversarial versus non-adversarial construct as too elusive to base an analysis of the problem or formulate changes to the current system. The Family Court rightly was critical of the ALRC’s dismissal of this important aspect of the terms of reference and concluded:
The Commission by avoiding its primary task has missed what would have been a significant opportunity to examine the adversarial nature of the system in a family law context. (Submission No. 348, p.2)

The Family Court was also significantly concerned about the source of evidence which the ALRC relied upon.⁸ As indicated in my earlier discussion, ALRC did resort to a very far and wide-ranging potential source of data. A significant source was the inviting of submissions of which there were thousands. However, numerous submissions are in brief form and it is likely that Submission No. 348 of the Family Court was the largest, extending over 100 pages. However, Discussion Paper No. 62 reported material which was not clearly identified or appeared to be anecdotal. Therefore, the Family Court wrote:

There are concerns about the style of the Discussion Paper which leans heavily towards reliance on unweighted and often unthought anecdotal material, which fast distinguish between informed and uninformed comment. (Submission No. 348, p.4)

As indicated earlier, consultation or the lack of it was extremely disconcerting to the Family Court. The terms of reference were quite specific. The Family Court has an executive branch, including a Chief Justice, a Deputy Chief Justice who is responsible for administration and litigation, and an extensive chief executive office with support officers and resources. Therefore, unlike other federal courts, the Family Court of Australia has a statutory resource executive office which is able to collate statistics and provide data to the ALRC which would be a highly

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⁸ Matruglio’s quantitative evidence, contained in three parts was valid, but its interpretation has been challenged by the Family Court of Australia.
valuable source of data. Furthermore, the opinions of the Court and its executive office would be, I would have thought, critical to the success of the law reform exercise. Notwithstanding the above, the Court said:

A troublesome feature of the paper is the total lack of consultation with those responsible for the management of the Family Court. This is particularly surprising considering the nature of the criticisms contained in the Commission’s media release that accompanied the paper and in the paper itself. (Submission No. 348)

Furthermore, with respect to the apparent lack of consultation between the ALRC and the Family Court executive, ALRC went on to say:

No attempt was made to hold discussions on case management issues with either the Chief Justice, or the former Deputy Chief Justice, the Honourable Allen Barblett . . . The omission of the Honourable Allen Barblett is surprising since he only recently retired from the Court after spending 10 years as Deputy Chief Justice of the Family Court of Australia.

Also missing from those consulted is the present senior administrative judge and former Judge Administrator for the Northern area, Justice Neil Buckley . . . Another omission was the failure to consult Justice Sally Brown who apart from being one of the Court’s administrative judges and having been the convenor of the Court committee that evaluated simplified procedures, is a former Chief Magistrate of Victoria.

Furthermore, the Court wrote:

Again, if any real and bona fide attempt at consultation with the Court had been intended, it is surprising that no attempt was made to consult with the Court’s case management consultant, Professor Ian Scott of Birmingham University, who is a world authority on case management systems. (Submission No. 348, p.5)

Again, with respect to the issue of the lacking of consultation between ALRC and the Family Court, the Family Court finally said:

For its own part, the Commission was content to consult with the wide range of unnamed people whose views are given equal
prominence with others who might be expected to have more knowledge, a highlight of this consultation process being the transcript of the remarks of an anonymous participant on talk-back radio program. (Submission No. 348, p.5)

The Family Court therefore is highly critical of the consultation process as indicated above.

The Family Court also considers ALRC had failed to take into account the specific nature and parameters of the Family Court jurisdiction. It says:

The Commission has failed to appreciate that family jurisdiction is an area of considerable controversy about which opinions vary widely and where they are not always supported by reason or logic. (Submission No. 348, p.5)

The Court goes on to say:

There is no recognition . . . Is there any attempt at understanding the resource pressures under which the Court operates. (Submission No. 348, p.5)

This particular aspect is a junction at which ALRC and the Family Court have irreconcilable differences.

In relation to the previous paragraph, the Family Court was particularly critical of ALRC (p.6) and it may be said that the criticism is particularly significant given it is made in a public forum by the Family Court of Australia with respect to a properly constituted terms of reference. It demonstrated this when it said:

It is very disappointing that the Commission has taken four years to come up with suggestions which add little, if any, value to the quality of debate of the appropriate processes required to meet the needs of families in dispute. (Submission No. 348, p.6)
It would be difficult for the Family Court to make a more negative or disparaging remark about ALRC.

Counselling is an initiative that the Family Court has taken with great enthusiasm and has allocated significant resources towards. The Family Court, however, felt that ALRC had not given due credit to the significant counselling service within the Family Court. The Court wrote:

Although no part of its terms of reference to consider the issue, the Commission was dismissive of the efficacy of the Court's counselling service in effecting the resolution of disputes, treating it as only effective in resolving the details of disputes. (Submission No. 348, p.17)

It went on to say:

The basis of this assertion appears to have been again purely anecdotal and it runs contrary to all of the experiences of those associated with the Court since its commencement. (Submission No. 348, p.17)

Again, the Family Court has directly attacked a line of argument and conclusion of ALRC in blunt terms.

With respect to the litigation versus the alternative dispute resolution (ADR) programs, the Family Court is of the view that ALRC has dismissed ADR.

The Court said:

The Discussion Paper seems to dwell upon promotion of the litigation process at the expense of other means of dispute resolution. The Commission shows no semblance of treating the

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9 ALL proceedings have built in counselling near the beginning of the time scale, per S.62f and the 2004 Family Court Rules amendments.
Court's attempts to resolve disputes without resorting to litigation seriously. (Submission No. 348, p.17)

The Family Court is apparently concerned that the great initiatives it has taken with respect to ADR are regarded by ALRC as 'ineffective and a waste of resources'.

Therefore, the Family Court concluded:

What the Commission appears to be saying is that the Court has got its priorities wrong and what the families that it serves really want is to have the disputes determined by a Judge. (Submission No. 348, p.19)

It should be said that ALRC Report No. 89 differs little from Discussion Paper No. 62 insofar as it does make recommendation with respect to the Family Court at Recommendation No. 107. However, it primarily focuses upon case management as opposed to ADR as an effective strategy.

Throughout its submission, the Family Court addresses ALRC's preoccupation with attempting to compare and draw lessons from any perceived similarities of the Family Court of Australia and the Federal Court of Australia. The nature of the case loads and the actual quantities involved are quite different however. The Family Court wrote:

The contrast with the Federal Court's objectives again suggests that the Commission has no real understanding of family law and has simply equated the two courts in a simplistic and wholly unrealistic fashion. (Submission No. 348, p.17)

The Family Court believes that the Court's mission statement of 'resolving or determining family disputes' is specific and hierarchical. That is, the Court's
primary concern is to resolve family disputes, and if they are unresolvable, to then
determine them by judicial case management.

With respect to resource issues and workload issues, again the Family
Court has a significant disagreement with ALRC. The Family Court was of the
view that ALRC focused, almost exclusively, upon the tool of comparing or
contrasting the Federal Court and Family Court of Australia. The Family Court
wrote:

As can be seen by Appendix 6 which contains a comparison of the
funding of the Federal Court and the Family Court, solutions
appropriate to the former are unlikely to be available to the latter,
even if they were appropriate. It also shows the proportionately low
level of funding available to the Family Court having regard to its
much higher case load and a greater geographical spread of its
activities, to say nothing of its ADR services, which are often far
less comprehensively used by the Federal Court. (Submission No.
348, p.20)

Appendix 6 of Submission No. 348 indicates that of the matters filed the Family
Court from 1997 to 1998 had a total of 104,000 matters or applications filed. In
contrast, the Federal Court had only 3,496 matters filed for the same year.

Notwithstanding the extraordinary difference, the Family Court has 48 judges
whilst the Federal Court also has 48 judges. Amazingly, the Family Court has only
seven judicial registrars whilst the Federal Court has 13 judicial registrars. Finally,
it indicates that for the same period, the Family Court was funded to a level at the
1999 to 2000 year in the amount of $116,790,000. In contrast, the Federal Court
was funded to the extent of $64,895,000.
Furthermore, there is significant reference to the ‘docket system’ by the ALRC. The docket system is described as a system whereby particularly difficult matters are allocated to a single judge who case-manages the file from its application stage to its determination stage. However, the Family Court indicated that the docket system cannot work in the Family Court. It said:

This also makes it clear why all relevant case management experts, including Dr Maureen Solomon and Professor Ian Scott, agree that a docket system cannot work in the Family Court. (Submission No. 348, p.22)

The Family Court uses deputy registrars for most interlocutory and interim work. Deputy registrars are in fact used for final property matters and interim residence matters. Judges are used for all matters which are unresolved, primarily residence and contact matters.

The Family Court was also concerned with the failure by ALRC apparently to take into account the fact that repeat events in case management and also repeated applications are the norm in family law matters. The Family Court wrote:

In these circumstances, repeat applications are to be expected and indeed often occur when there has been a speedy determination of the original dispute because circumstances have changed. This has little or nothing to do with a case management system but a lot to do with the dynamics of relationships. (Submission No. 348, p.23)

The Family Court, furthermore, was concerned with the use of statistics by ALRC. The Family Court wrote:

There are also examples throughout the paper of the wrong use of statistics to support questionable assertions that have apparently been made by persons whom the Commission has interviewed and
which have been accepted by the Commission and used for its own proposals. (Submission No. 348, p.23)

This misuse of statistics allegation reflects the criticism made by the Court in relation to ALRC evidentiary processes and procedures.¹⁰

Perhaps a most contentious area for the Family Court and ALRC is the issue of legal aid and unrepresented litigants (hereafter litigants in person). The reader may recall that Discussion Paper No. 62 is required to consider legal aid and unrepresented litigants at Chapter Seven of Discussion Paper No. 62. Furthermore, in ALRC Report No. 89, it considers the same issues in Chapter Five: *Legal Assistance* and Chapter Eight: *Practice Procedure and Case Management in a Family Court of Australia*. ALRC is somewhat contradictory on this issue. At one point of the paper, it wrote:

> Cuts to legal aid are widely assumed to have caused an increase in the number of unrepresented parties. Again, this is not demonstrated by empirical information.

However, ALRC then wrote:

> Just over half of those replied stated the main reason that they do not have a lawyer was either the inability to pay for representation or the unavailability or cessation of legal aid. (Discussion Paper No. 62, para 11.163, fn 369)

Furthermore, ALRC stated in ALRC Report No. 89 that:

> The presence of unrepresented parties is credited with making litigations slower, settlements less likely and increasing costs to the other party and the court or tribunal. There has been little empirical

¹⁰ Matruglio’s empirical research is very good, but its interpretation by ALRC is controversial, as conclusions drawn by ALRC in Discussion Paper No. 62 are inconsistent with Matruglio’s own findings re effects of LIPs.
research to test these propositions. The Commission's empirical research concerning representation demonstrated that in the Family Court and AAT, cases where both parties were represented were more likely to be resolved by consent. (ALRC Report No. 89, p.303)

Despite this, ALRC then wrote:

However, the additional cost contributable to the presence of unrepresented litigants remains unsubstantiated and unquantified. (ALRC Report No. 89, p.304).

I note that in my earlier discussion these same comments were highlighted. In direct contradiction to these statements, ALRC's own research by Matruglio stated:

There is a much higher proportion of attempts at settlement by represented parties prior to any court contact and at the first court appearance. (Matruglio, June 1999, Part 2, p.60)

In Part 1 of the research by the Justice Research Centre and again by Matruglio after examining applicant representation status, they noted that where there is full representation there was a significant difference in outcome in terms of removal time. They concluded:

It appears that cases in which the applicant had partial or no representation were more likely to be listed for hearing whilst those in which the applicant was fully represented were more likely to be finalised before listing for hearing. (Matruglio, June 1999, Part 1, p.31)

This research by ALRC's own researchers is significant. However, ALRC notwithstanding its own substantially funded research by Matruglio decided to largely ignore the significant findings in these research papers.

In response to ALRC's apparent contradictory position in relation to litigants in person, the Family Court wrote:
This is troublesome because it flies in the face of all other published research on the subject and is not based upon any empirical research. There is an uncritical acceptance of government assertions in this area and an attempt to find other causes for the increase in number of unrepresented persons . . . The difficulty created by current legal aid policies are so obvious that they scarcely need empirical evidence to support them. (Submission No. 348, pp.24-25)

The relevance of legal aid is high because litigants in person become a significant issue for a court when the number of applications filed in a particular year exceeds 104,000 (Discussion at Appendix 6 of Submission No. 348). Indeed, the budget announcement in August 1996 was that $100 million would be reduced in Commonwealth funding during the legal aid triennium period of 1997/1998 to 2000/2001. This was an overall reduction of 20 percent (Submission No. 348, p.38). The various difficulties which legal aid restrictions impose upon disadvantaged members is significant and the reader does not need to be shown significant research in the area of domestic violence and minority or handicapped members of the community. The Court wrote:

The experiences of the women in the study provide poignant and powerful reminders of the impacts of the withdrawal or unavailability of aid on them and on their immediate families. They illustrate the vulnerability of those who live in already precarious environments, whose lives have been characterised by violence, and who are trying to care for (and often protect) young children. (Submission No. 348, p.39)

It goes on to write:

The case study shows how gender, ethnicity, lack of English and geographic isolation compound the women's already considerable difficulties and allow what might be short-term disadvantages to develop into far more long-lasting and damaging experiences.
The studies referred to are the Army’s Legal Aid Impact Study at page 39 of Submission No. 348. Furthermore, the Family Court finds it difficult to ameliorate the lack of legal aid. Judges are required by Family Court authorities and in particular, the case of Johnson v. Johnson (1997) FLC 92-764 per Ellis, Baker and Lindenmayer JJ require judges to assist litigants in person while not compromising the fact that the case is adversary and the judiciary cannot over-assist or significantly assist litigants in person.

Indeed, the Family Court reference to the researchers Dewer et al will be referred to later in this paper. That research concluded:

However, they attribute the major reason for the increase (in litigants in person) to tighter legal aid guidelines and capping. (Submission No. 348, p.41)

The Family Court concluded with respect to legal aid issues addressed by ALRC that:

The Family Court considers the treatment of legal aid issues by the Commission to be a most disappointing aspect of the discussion paper. (Submission No. 348, p.42)

The overall position with respect to the Family Court’s strategic vision is that it supports the view of Sir Gerard Brennan. The former Chief Justice of the High Court said at the 15th Annual Conference of the Australian Institute of Judicial Administration:

The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporation or the legal-aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not
an understatement to say that the system of administering justice is in a *crisis* (emphasis added). (Submission No. 348, p.29)

The Family Court is of the view that most of the assertions of His Honour are correct. ALRC, however, ignores the assertions by the former Chief Justice.

The Family Court writes:

This response has already expressed criticism of the Commission’s unquestioning acceptance of the decline in legal aid and the rise in unrepresented litigants. For the Commission to argue as it has in this chapter that there is no crisis represents a failure in its duty to present an independent report on problems in the Federal judicial system. A more courageous report would have been to face these problems and the fact that they have been brought about at least to some extent by deliberate Government policy. (Submission No. 348, p.30)

Finally, ALRC’s media release of 17 August 1999 which pre-dated the Family Court’s response to Discussion Paper No. 62 is relevant. At that event, ALRC reported to the press that ‘Family Court case management system not operating well’. However, in contrast, the same release states that litigation costs in the Family Court are significantly cheaper than those in the Administrative Appeals Tribunal. Furthermore, whilst ALRC criticises the Family Court for having an inflexible approach to case management, it reluctantly applauded the lower number of case events. The Court writes:

These are interesting comments. The Court appears to be being criticised for attempting to settle cases by conciliation, counselling and mediation as both the *Family Law Act 1975* and government policy requires. (Submission No. 348)
Furthermore, 'there is no acknowledgement of the Court's initiatives in integrated client services'.

In conclusion, whilst I have not covered all of the various submissions made by the Family Court in response to Discussion Paper No. 62, the general assertion or thrust of the Family Court's response can be summarised as follows:

There is no evidence for this assertion and this proposal is a gross oversimplification of the issues and of the nature of family disputes. (Submission No. 348, p.50)

Whilst this particular assertion is in relation to a specific paragraph in relation to counselling, it applies equally to the overall view of the Family Court of ALRC's work.

4.7 OCST Interpretation of the Case Study

In the next section, I shall interpret ALRC Report No. 89, Discussion Paper No. 62 and Submission No. 348. This paper concerns the operatively closed systems interpretation of the legal system in postmodern society. It is now useful to discuss a possible interpretation of ALRC Report No. 89, Discussion Paper No. 62 and the Family Court's response in Submission No. 348.

One could approach this task in a number of different ways. One approach would be the discussion of autopoietic systems in general and attempt to find autopoietic patterns of behaviour in ALRC Report No. 89 and Submission No. 348.

11 Again, there is a irreconcilable difference and conflict between ALRC and the Family Court on even basic matters of court processes.
An alternative approach is to apply a gradual layer of analysis in the form of a checklist which is drawn from OCST. This approach is chosen because it offers the greatest numeric probability of ensuring my analysis will attempt to cover the basic issues and features of the complex theory of operatively closed systems. It is 'triangulation' (Denzin & Lincoln, 1998, p.4).

4.7.1 Typology of OCST

The research questions formulated for Chapter Four and the OCST typology are as follows:

(i) Is there evidence of subsystems in the case study?
(ii) Is there evidence of the overproduction of norms in the case study?
(iii) Is there evidence of operational closure (internal reference) of subsystems and cognitive openness (external reference) in the case study?
(iv) Is there evidence of structural coupling and peripheral operations in the case study?
(v) Is there evidence of epistemic traps and self-description in the case study?
(vi) Is there evidence of irritations registered internally in the case study?

I shall now apply the above OCST typology of research questions (or an analytical grid) to the case study, and in turn test Hypothesis One.

4.7.2 Is there evidence of subsystems in the case study?

The concept of a social system has been used explicitly in modern functionalism, but it was also present in 19th century social theory. Any social theory which treats
social relations, groups of society as a set of interrelated functions or parts with some boundaries inevitably is constructing a theory of a social system (Abercrombie, 1988, p.319). Luhmann also argues that the starting point for legal theories in postmodernism is the point of the legal system becoming a subsystem of the social system (Luhmann, 1993b, p.29; Podgorecki, A., *In Legal Systems and Social Systems*, London, 1985). Habermas, despite his difficulties with Luhmann’s broad systems theory, conceded that there are systems in society which evolve from capitalist developments and the necessity for managing large-scale operations in society (Bausch, 1997, pp.321-322).

General observations by systems theory and empirical research suggest that the differentiation of a system requires also an internal differentiation which is developing at the same time. By the phrase ‘internal differentiation’ is meant the form through which the relationship between the subsystems express the order of the whole system, for instance, a hierarchical order of ranks (Luhmann, 1993b, p.282). However, it is important in this particular question to ascertain system ‘boundaries’ with respect to the Family Court and ALRC.

The task of the courts is the execution of the paradox that there is a prohibition of the denial of justice. That is, courts are compulsory decision-makers and are not able to deny cases that are put before it. The courts do not give orders to the legislator. At best, courts can formulate conditions for what courts can understand and accept in practice and therefore it is more appropriate to describe the relationship between the courts and legislation as one of the centre and
periphery as opposed to a model of hierarchy (Luhmann, 1993b, p.304). The prohibition of the denial of justice is the holy shrine of the system and therefore places the court at the very centre of the legal system (Luhmann, 1993b). Legislation, on the other hand, is a contingent act and whilst placed in the law books may or may not invoke at any point in time in terms of communication between elements of the system, but for the purposes of communication the overproduction of norms is settled by the courts as opposed to the perusal of legislation by one party of a dispute. Therefore, all other areas of law belong to the periphery, such as contracts, legislation and the legal profession (Baxter, 1997).

The Family Court is at the centre of the legal system in terms of family law disputes in Australia. It applies the invariant code legal/non-legal in a compulsory and mandated way. What is now necessary to discuss is the place of ALRC in systems theory.

One could argue that ALRC, being comprised of lawyers and engaged in legal research communication, could be in the periphery of the legal system (Luhmann, 1993b, 1992, p.1434). Certainly, it produces reports which are replete with doctrine and excellent legal discussion. Furthermore, it is intended to assist policy-makers in the formulation of law reform in Australia. But on the other hand, there are other features of ALRC which do not lend itself to being characterised as a component of the legal system. That is, for example, it does not interact directly

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12 While the Local Court of NSW and the Federal Magistrates Court of Australia exercise jurisdiction under the Family Law Act (1975), the Family Court of Australia carries the largest caseload of family law disputes.
with court processes in any way. Research is one thing, but participation in proceedings of any description is another. Another example is the fact that its work is solely concerned with the collation, inquiry and reporting of matters which concern the Executive Government and policies which are pursued by the Executive Government. This can be seen with some confidence given that the terms of reference are always prepared by the Attorney-General who is a member of the cabinet of the Federal Government. It is true that he is also a member of parliament. However, his capacity when he executes terms of reference are in his capacity as Attorney-General as opposed to member of parliament. Furthermore, the terms of reference are specific insofar as the report and research must ‘have regard to’ policies which are solely set by the Federal Government. Therefore, although it is by no means certain as to where ALRC resides in terms of systems theory, it can be argued that its communications from time to time originate from within the political subsystem. Furthermore, it is noteworthy that as opposed to the report being directed and accountable to the parliament, the report is directed and accountable to the Attorney-General of the Federal Cabinet. This has implications for the themes and undercurrents which are present in the text.

Whilst it cannot be said that ALRC communications are simply political communications, nevertheless the doubts which have been indicated here have given rise to serious accusations being made by the Family Court as to where specific ALRC communications reside in subsystems theory. This was ably demonstrated by Submission No. 348 whereby it states:
The Commission understates the effect of the government's legal aid policies as the cause of the rapid rise in a number of unrepresented litigants. This is troublesome because it flies in the face of all other published research on the subject and is not based upon any empirical research. There is an uncritical acceptance of government assertions in this area and an attempt to find other causes for the increase in number of unrepresented persons.

(Submission No. 348, p.24)

This type of submission which is repeated elsewhere in the Submission Paper is more profound than would otherwise appear initially. That is because ALRC is ordinarily regarded as a neutral body notwithstanding its accountability to the Attorney-General. The Family Court is stating in a clear and persistent manner that ALRC has lost its 'neutrality' as it were. Its uncritical acceptance of government assertions in important areas is a serious criticism of ALRC and it could be argued that the Family Court at least does not see ALRC communications as originating from within the legal periphery.

For the purposes of my discussion, whilst it is conceded that ALRC could be argued to have certain communications operating within the legal periphery, it is also arguable that ALRC communications operate in the periphery of the political subsystem. That is, it is perceived by the Family Court and arguable upon the terms of reference that a substantial component of the operations and communications of ALRC operate within the periphery of the political subsystem with some overlapping with the periphery of the legal subsystem. This would appear to be a reasonable statement of this complex and uncertain operational environment of ALRC.
4.7.3 Is there evidence of the overproduction of norms in the case study?
The overproduction of norms is a significant catalyst in the development of a postmodern society. Habermas argued that all approaches in the past diverted to natural history, morality of principles and practical reasons (Habermas, 1981). He would also concede that there is an unavoidable diversity of observers and their perspectives in one and the same environment in postmodern society. The rise of the modern state and now the postmodern state, uniformity or universality in moral truth is relegated to history books. This is otherwise stated as the overproduction of norms or the plurality of normative design in postmodern society (Ziegert, 1995, p.495). The overproduction of norms in daily life leads to potential conflict and complexity and requires radical attempts to make meaning from broad and arbitrary overloading of normative communication. Ziegert argues that the pluralist constitution of lifeworlds overall suggest an overproduction of norms in which all norms are equally constitutive for operative closure but not necessarily consistent with each other (Ziegert, 1995, p.505).

The question may then arise: How can a coordination of decisions in the legal system occur where there are a plurality of communications and normative orders? Luhmann argues that Martin Shapiro in Toward a Legal Theory of Stare Decision General Legal Studies (1972 at volume 1, page 125) has demonstrated the importance of redundancy for the coordination of decisions in the legal system which have been made independently of each other without the input of a hierarchical command structure. Therefore, a high degree of redundancy is required
in legal language to enable the proper processing of information. Shapiro argues that ‘a stream of reassurance’ can absorb only a very limited number of new differences (Luhmann, 1993b, p.334).  

Luhmann also argues that one way of reducing anxiety or contingency in an environment where there is an overproduction of norms is whereby a binary system imposes reduced anxiety. This is done by way of the system having an internal binary code which processes norms and meanings as either law versus non-law. It is an internal binary code. Programs of the system deal with the sensitivities of communication which are determined to be either law or non-law. This important function of the system reduces irritability and anxiety.

The notion of justice which is not a function of law but rather a program of the law also adopts the principle of consistency in decision-making. This principle reduces anxiety and contingency and therefore manages risk (Luhmann, 1993b, p.214).

Overall, with evolution and redundancy including the concepts of variation, selection and maintenance, I arrive with a situation in postmodern society where the overproduction of norms leads to a complexity in society. There are too many choices, most people argue, and most people argue that complexity is too difficult to handle and they require relief (Luhmann, 1993b, p.272). Therefore, if OCST is correct and there is evidence of the overproduction of norms in society, there

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Redundancy is the invisible hand of the system. It helps coordinate processes where there is an overproduction of norms.
should be corresponding evidence of participants seeking redundancy and relief from the anxiety which the overproduction of norms produces inevitably.

It is now appropriate to discuss what evidence there is within ALRC Report No. 89 and Submission No. 348 for the above propositions. The evidence for the overproduction of norms in those reports can be identified by some of the following criteria:

(i) Evidence of confusion as to which methodology is appropriate in research
(ii) Lack of consensus on the appropriate vision of a court
(iii) Lack of consensus on definitions in legal discussion or policy discussion
(iv) Evidence of irritations or severe disagreement in public communications.

While ALRC was required by the terms of reference to consult widely with members of the public and institutions, its execution was less than satisfactory according to the Family Court. As has been indicated earlier in this chapter, the Family Court wrote extensive criticisms of the methodology of ALRC whereby it:

... was content to consult with a wide range of often unnamed people whose views are given equal prominence with others who might be expected to have more knowledge, a highlight of this consultation process being the transcript of the remarks of an anonymous participant in a talkback radio program. (Submission No. 348, p.5)

This type of submission was consistently repeated throughout the Submission Paper and indicates a clear lack of consensus on what is appropriate research methodology. This is arguably evidence of an overproduction of norms in this environment.
Furthermore, there is evidence of an overproduction of norms, it is argued, when the Family Court and ALRC recite a statement made by the former Chief Justice Sir Gerard Brennan to the 15th annual conference of the Australian Institute of Judicial Administration. The said statement:

The courts are overburdened. Litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally-aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis. (ALRC Report No. 89, p.69; Submission No. 348, p.29)

Interestingly, however, notwithstanding a clear identification by Sir Gerard Brennan of an overproduction of norms, the Family Court and ALRC disagree as to the effect and implications of this said statement. The Family Court, on the one hand, strongly argues that the experience of the Family Court bears out every one of Sir Gerard Brennan's criticisms. Therefore, there is evidence that the Family Court views the system in crisis.\textsuperscript{14} This is a result of complexities and costs. That is, there is some evidence of an overproduction of norms and demand on the Family Court and the legal subsystem as a result. ALRC, on the other hand, examines the issue of crisis and came to the opposite conclusion. It argued that there were some cost barriers, but they were low barriers. Furthermore, ALRC argued that the difficulties with the explosion in legislation and the consequent demand for clarity by users can be partly overcome by better coordination of

\textsuperscript{14} This 'crisis' is internally constructed, and not constructed in the environment of the legal system (Luhmann, 1992, p.1432).
resources by the courts and government in the market for legal services (ALRC Report No. 89, p.71). ALRC concluded that:

The system talk of "crisis" based on anecdotal evidence, which portrays the exceptional case as the norm, and always sees the problem as emanating from another source, has a tendency to produce cynicism and induce paralysis. (ALRC Report No. 89, p.75)

It is clear, therefore, that Brennan's identification of an overproduction of norms in the legal system is shared by the Family Court to a large extent and not accepted by ALRC to the extent that Brennan identifies and the Family Court accepts. This lack of consensus itself, one could argue, demonstrates an overproduction of norms.

There is also evidence of lack of consensus on the vision of the court and what an appropriate vision should be. The Family Court considers its vision to be 'resolving or determining family disputes' (Submission No. 348, p.19). That is, its strategic vision is the attainment of the objective to resolve disputes using ADR methods first and the significant resources made by the counselling service of the Family Court and family report service is evidence of this priority of the Family Court in terms of resolution by ADR. However, the court correctly identifies ALRC's preoccupation to an almost exclusive extent of litigation in case management as opposed to resolution by ADR. The Family Court says:

What the Commission appears to be saying is that the Court has got its priorities wrong and what the families that it serves really want is to have their disputes determined by a judge. If this is right, it seems that the Commission wants the Court to take a giant leap backwards in time and to adopt philosophies long discredited by courts exercising family jurisdiction throughout the world. (Submission No. 348, p.19)
Elsewhere, throughout this Submission Paper, the Family Court notes that ALRC
is preoccupied with case management and litigation strategies as opposed to the
significant initiatives by the Family Court in ADR. This distresses the Family
Court and one could argue that there is some evidence of a lack of consensus on
what the Family Court’s vision or philosophy should be in postmodern times. One
could therefore argue that there is some evidence of an overproduction of norms.

*Is there evidence of irritation and irritability between the Family Court and
ALRC in the case study?* My earlier discussion in this chapter provided numerous
examples of clear lack of consensus on numerous points between the Family Court
and ALRC. These covered areas such as the methodology of information-
gathering, numerous omissions by ALRC in consulting with the Family Court,
promotion of litigation above ADR, resource issues, workload issues, issues of
statistics, legal aid and unrepresented litigant consequences, media briefings, extent
of crisis in the civil system, and costs. The nature and scope of these criticisms are
best represented by the statement of ALRC:

The Court was stridently critical of the research, conclusions and
reform proposals in DP62, styling them as facile, insensitive, ill
thought out, misguided, poorly researched and impractical, ‘largely
based on the remarks of persons who have no expertise in case
management’ and as failing to have appreciated the Court’s true
workload in the constraints of resources available to it. *(ALRC
Report No. 89, p.528)*

Furthermore, ALRC then quoted the Court as saying:

The Commission as wandering the countryside talking to Uncle
Tom Cobley instead of the people in charge of case management in
the court. *(ALRC Report No. 89, p.528)*
Therefore, ALRC has acknowledged the fact that the Family Court has criticised both personally and professionally the standing and competence of ALRC in relation to its inquiry into the Family Court and its case management and ADR strategies and processes. One could argue that there is significant irritation evidence conceded both by ALRC and evident in almost every single page of Submission No. 348.

It is important to note that Submission No. 348 was not signed off by the Chief Justice in his personal capacity. It is characterised by ALRC in its cover sheet as ‘Organisation: Family Court of Australia’. It is not a personal attack by the Chief Justice in an ex-officio capacity. It is rather a significant attack on the credibility and standing of ALRC by Family Court of Australia as a whole. There were no other submissions which represented the Family Court in its submissions to Discussion Paper No. 62. Therefore, one could argue that there is some real evidence of the overproduction of norms in this case study.

4.7.4 Is there evidence of operational closure or internal reference of subsystems in the case study?

At a basic level, the characteristic property of human practice is ‘communication’ (Ziegert, 1995, p.499). Communication among human individuals, and nothing else, defines and instrumentalises references to the world and to other human beings. Such a use of references constituted by human practice is in stark contrast to references to the world and its static object or ideologies. OCST argues that
communication attributes 'meaning' to events between individuals and nothing else (Ziegert, 1995). This concept of 'normation' is risky and is essential to the desirable notion of the reduction of complexity which I referred to in the previous discussion. This concept of normative practice in an internal sense leads to a fundamental conceptual operation which can be called closure or operative closure (Ziegert, 1995, p.499). This operative or normative closure renders invisible a far more complex world which is difficult to refer to. This normative closure of concepts provides the only available basis for human practice operations and can only be achieved socially, that is, it takes at least one sender and one receiver of communication to establish normative human practice and the attempts to establish truth in a world of plurality\textsuperscript{15} (Ziegert, 1995, p.500).

Consequently, OCST describes the resulting state of modern subsystems with the terms 'autonomy', 'autopoiesis' or 'relative autonomy', which refers to the conception that social subsystems are differentiated to such an extent that they operate independently from one another. They do relate to one another in as much as each system can take up informational cognitive ideas from another subsystem, but only if it is selected by the system's own internal normative criteria (Deflem, 1998, p.779).\textsuperscript{16}

\textsuperscript{15} Contrast the critiques of Beck (1994, p.410) who raises doubt about 'receiver' and 'sender' in communications and multiple interpretations of communications.

\textsuperscript{16} As such, they are cognitively open but operationally or normatively closed.
If then, operative closure or internal reference denotes the concept that a social system is made up of communications which refer recursively to other communications which are similar and identifiable by the system’s own internal binary code, then normative closure or operational closure requires relative autonomy in its communications. Only code-orientated communication belongs to the legal system proper, and only such communication which assumes attributions of law or non-law can be recursively networked in the legal system (Luhmann, 1993b, p.62). By way of example, any suggestion for the change of a specific law becomes, as soon as a reference to the norm which one wants to change in its state, a communication in the legal system. This is even if the suggestion is motivated by a political group, a pressure group or a social movement. Particular examples would be in areas of the law of abortion or an introduction of an article for the protection of the environment into a constitution (Luhmann, 1993b, p.62).

Consequently, the distinction between the system and the environment is precisely the form which makes it possible to designate a system or an environment by distinction in relation to each other (Luhmann, 1993b). Operative closure, therefore, allows the individual legal system or political system to enhance and maintain its own identity by determining by distinction what it is not.

**Is there evidence of operational closure in ALRC Report No. 89 and Submission No. 348? More importantly, is there evidence of the operation of the internal binary code of law versus non-law in a legal system and power versus**
non-power in a political system, accompanied with specific programs of each of those systems?

There is considerable evidence that ALRC was cognitively open to knowledge and ideas provided by numerous different sources in the Australian community. As indicated, Submission No. 348 was only one of 400 submissions. Indeed, ALRC Report No. 89 does cognitively demonstrate a wide and far-ranging reference to members of society outside of its own system. As previously discussed, the consultation process was extraordinary large and involved public hearings as well as written forms of submissions. Furthermore, Submission No. 348 also did indicate that the Family Court consulted with a number of experts such as Professor Ian Scott of Birmingham University with respect to case management systems and studies. Therefore, there is some evidence that both systems were cognitively open to knowledge and ideas. Ironically, ALRC demonstrates greater evidence in relation to cognitive openness than the Family Court.

With respect to operational closure, there again is evidence of operative closure and normative recursive processes. Turning to ALRC Report No. 89, it could be argued that the internal program for the Law Reform Commission was stated in paragraph 1 of its terms of reference. They were stated as

Having regard to the need for a simpler, cheaper and more accessible legal system: the justice statement: and recent and proposed reforms to courts and tribunals. (ALRC Report No. 89, p.57)
This is a government agenda and policy program which was clearly prescribed for ALRC. It could be said that this rather elaborate code could be better described as a program. Certainly it does overall, apart from the justice statement, refer to more efficient and economical processes, both in terms of cost and timeliness. From that point of view, economic internal code sits better in an economic system as opposed to a political system. This does not necessarily mean that an operation which has an economic internal binary code actually emanates from the economic subsystem. The political system often poses economic rationale and borrows the code of the economic subsystem when it attempts to directly steer other subsystems in society. I will address this concept of the reflexive solution as opposed to direct steering in subsequent chapters.

Nevertheless, it would appear that the program of simpler, cheaper and more accessible legal systems largely drive the normative code and operation of ALRC communications in ALRC Report No. 89. There are 138 recommendations made by ALRC Report No. 89. With respect to legal efficiency and costing models, the number of recommendations amounted to over 38. Indeed, three chapters reflected largely upon costs and efficiency, namely, Chapters Four, Five and Eight.17

ALRC’s own findings were to the effect that cases of unrepresented parties statistically led to proceedings which are significantly longer and more complex

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17 The other chapters were also concerned with efficiency and cost restraints in a more general sense.
than proceedings whereby parties are represented. The research by the Justice Research Centre demonstrated this clearly (Figure 10).

**Figure 10: Cases listed for hearing by an applicant’s representation**

<table>
<thead>
<tr>
<th>Applicant Representation</th>
<th>Removal Time</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Before Listed for Hearing</td>
<td>After Listed for Hearing</td>
</tr>
<tr>
<td>No representation</td>
<td>48 (6%)</td>
<td>15 (8%)</td>
</tr>
<tr>
<td>Partial representation</td>
<td>66 (8%)</td>
<td>26 (14%)</td>
</tr>
<tr>
<td>Full representation</td>
<td>673 (86%)</td>
<td>148 (78%)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>787</td>
<td>189</td>
</tr>
</tbody>
</table>

Applicant representation status and whether or not the case was listed for hearing were not statistical independent.\(^{18}\) It appears that cases in which the applicant had partial or no representation were more likely to be listed for hearing, whilst those in which the applicant was fully represented were more likely to be finalised before listed for hearing. (Justice Research Centre, *Family Court Research for ALRC June 1999*, p.31)

This research corroborated findings made by Matruglio and McAllister in *Empirical Information About the Family Court of Australia*, February 1999, whom found where applicants were unrepresented, 50.8% of cases were resolved whereas where applicants were represented, 82.9% of cases were resolved (Section 10.5.1).

\(^{18}\) \(X^2 = 6.401, \text{df} = 2, p = 0.041, n = 976.\)
Furthermore, Law Council of Australia made a strong submission to the effect that increasing numbers of unrepresented litigants or litigants in person were substantial additional factors leading to delay in proceedings. Notwithstanding ALRC’s own research and the submissions of others, including the Family Court, which is the prime observer of litigants in person in action, ALRC still concluded that ‘additional costs contributable to the presence of unrepresented litigants remains unsubstantiated and unquantified’. This is not withstanding ALRC stating:

Governments bear the cost of legal aid, and a cost which flows from unrepresented litigants who may be more time-consuming for opponents and the courts. The High Court, Federal Court and Family Court have stated that the responsibility to ensure that unrepresented litigants present their case adequately creates difficulties for the courts. (ALRC Report No. 89, p.303)

ALRC then goes on to state:

Whatever the ultimate funding formula, the task of providing adequate services with fewer resources seems reality for the foreseeable future ... The Commission’s recommendations are aimed at improving the efficacy and distribution of legal aid. (ALRC Report No. 89, p.304)

There is evidence that ALRC has applied the model of simpler and cheaper solutions as opposed to solutions which are sought by the courts themselves. The courts and the Family Court in particular have sought increases in legal aid funding to ensure that litigants in person do not increase but in fact decrease. The Family Court indicated by way of appendix to their submission that in the 1997-1998 year 104,864 applications were filed by applicants in the Family Court in Australia. At the same time, the Federal Court had only 3,496 applications. It is clear that if only
30 per cent of applicants are unrepresented, the number of applicants unrepresented in the Family Court is approximately 31,000. This provides substantial and chronic difficulties for the Family Court given that the Family Court must assist the litigants in person as required by the authority of *Johnson v. Johnson* referred to earlier. Notwithstanding the clear knowledge transmitted to ALRC, ALRC constantly refers back to the coding/program of simpler and cheaper services. Indeed, there is evidence that ALRC attempts to provide services with little cost to government with respect to the following recommendations:

(i) Recommendation 37: Legal professional associations should urge members to undertake pro bono work each year in turn similar to the Bar Association model rules of professional conduct 6.1.

(ii) Recommendation 38: To enhance the appreciation of ethical standards, law students should be encouraged and be provided opportunities to undertake pro bono work as part of their academic practical legal training requirements.

(iii) Recommendation 43: Priority clients should be assigned to in-house legal aid lawyers wherever possible as opposed to professional private practitioners experienced in family law work.

(iv) Recommendation 52: The Attorney-General is encouraged to establish an on-line information service to assist in the "unbundling" of legal assistance which involves the segmentation and fracturing of professional and complete advice. This recommendation would shatter the traditional concept of an entire retainer or agreement demanded by common law authorities with respect to the provision of legal services.

Also, the great difficulty with respect to unbundled services is the problem whereby a lack of coordination of services result in clients seeking assistance from public legal service agencies and often experiencing a legal advice roundabout
where they are referred from one community legal centre or legal aid office to another without any substantial assistance ever been provided.

Finally, Recommendation 57 is to the effect that the Legal Aid Commission should use paralegals and/or law students in intern programs to assist applicants to complete legal aid applications and provide unbundled services.\(^\text{19}\) Furthermore, at Recommendation 59, the Family Court was encouraged to set up a court network scheme in all registries whereby a duty lawyer could provide assistance by way of unbundled services.

The above demonstrates and provides some evidence of ALRC’s commitment to simpler and cheaper legal services. Notwithstanding the Family Court’s central dilemma with respect to litigants in person, ALRC makes no commitment to an increase in legal aid funding. Alternatively, it provides for a piecemeal solution of the provision of unbundled services by way of recommendation only. Given that ALRC concedes that the Law Society of New South Wales provides pro bono work of 63,000 hours or $74 million in value for the 1997-1998 year, it is notable that ALRC seeks greater subsidisation by the Law Society to fill the clear gaps in legal aid funding.

With respect to the Family Court, the Family Court in its Submission No. 348 does provide some evidence that it is operatively closed. Its own internal binary code is law versus non-law and its program (as such as can be extrapolated)

\(^{19}\) This is strongly resisted by Legal Aid Commissions throughout Australia.
is concerned with ‘resolving or determining family disputes’. In particular, its
greatest priority is with respect to resolving disputes with ADR and then the
determination of disputes by judicial determination. Submission No. 348 reiterates
the Court’s extreme concern that the Court is misunderstood by ALRC. The
Court’s own code and program is not accepted or understood by ALRC according
to the Family Court. This is reiterated throughout the Submission Paper. For
example, at page 52, the Family Court writes, ‘The Commission clearly has a poor
understanding of the nature of children’s issues in family law cases.’ Then at page
54, it writes:

Similarly, the Commission has not understood case management
issues and has tried to import inappropriate solutions from other
jurisdictions. It has apparently not sought expert advice nor has it
consulted the court adequately.

There is evidence that the Family Court is concerned with the program of
minimising litigants in person and achieving efficiencies through ADR as opposed
to litigation case management in the traditional sense. Statements such as:

It is surprising in the light of this finding that the paper does not
contain any proposal for an increase in legal aid or even that such a
matter be the subject of a review . . . as well as the difficulty of
those who are represented in having to deal with them. Indeed, the
Commission referred to these difficulties in the paper. (Submission
No. 348, p.25)

provide evidence that the Family Court views legal aid funding increases as
necessary but not sufficient to redress the increase in litigants in person which
produce consequently extraordinary burdens upon the Family Court and its ability
to discharge its primary duty. Therefore, the Family Court has viewed the
communications of ALRC as ideas which promote simpler and cheaper access to
the Family Court as opposed to a proper efficient discharge of the Court’s function
pursuant to the requirement of ‘resolving or determining family disputes’. This is
the code/program of the Court and it informs its conditional program.

Accordingly, there is some evidence that the Family Court operates in a
normative closed environment whereby it preserves and most aggressively protects
its normative codes and programs. It has observed and distinguished its boundary
and has made this eminently clear in a most stinging attack in a public forum.

Consequently, there is evidence that Family Court communications and
ALRC communications operate with operative closure (internal reference) and
cognitive openness. Whilst my analysis is not exhaustive, there is evidence in the
case study of Family Court communications operating recursively, and similar
evidence of ALRC communications operating recursively

4.7.5  Is there evidence of structural coupling (or temporal coupling) and
peripheral operations in the case study?

Consequent to the notion of operative closure or internal reference of autonomous
systems is the idea generally agreed by systems theorists that a distinction must be
made between the legal system and the political system or other systems in society.
This concept of distinction is explicit and implicit if one needs to discuss and
accept the notion of operative closure and the notion that a system determines its
own meaning by distinguishing its own recursive communications from non-
system recursive communications that it can perceive. This is in line with the program of the reduction of complexity in an environment of the overproduction of norms.

However, a too rigid adherence to autonomous operative closure can lead to a weakness in the resulting theory. That is, if there is rigid autonomous operative closure or autistic closure, *how does this account for influences of one subsystem on another and the notion of overlapping programs of different subsystems in society, such as legal and political programs overlapping in relation to the environment? How, therefore, are relations established between the system and its environment?*\(^\text{20}\) If the system cannot operate in its environment and hence cannot communicate with the environment by using the system's own operations, *how are relations established with the environment?* The response to this problem lies in the concept of 'structural coupling' (or 'temporary coupling' in some cases). This is opposed to operational coupling which are confined to the coupling of operations with operations. Structural coupling is in contrast, for example, the coupling of politics and legal subsystems in the production of a written constitution, for example. An example of the coupling of the economic system and the legal system is the freedom of contract and the money economy (Luhmann, 1993b, p.416; 443).

Developing a notional structural coupling, I then note that if a system presupposes certain features of its environment on an ongoing basis and relies on

\(^{20}\) *Mutual* relations and mutual influences are at stake here, resulting in 'co-evolution'.
this feature structurally, then this is a form of structural coupling. An example would be that the legal system could rely on the structural notion that money is accepted or that people can find out what time it is (Luhmann, 1993b, p.417). Accordingly, the form of a structural coupling (or temporary coupling in temporary cases) reduces and facilitates influences of the environment on the system. The process or mechanics of a structural coupling and the relationship within the structure can be understood as the mechanics of the centre, periphery and the environment. The distinction between the centre and the periphery of a system is opposed to the hierarchy within a system such as the legal system. The centre of the legal system is the court. The periphery are all the other non-compulsive programs within the legal system, such as legislation, contract enforcement and legal profession.

The periphery also acts as an immune system. The centre of the legal system needs protection because it operates under the premise of having to decide by compulsion all conflicts brought to it. The periphery, however, demonstrates its autonomy by not having to decide as it is not required to decide by compulsion issues brought forward. For example, lawyers who are confronted with a case can decide not to take the matter on for the client if it is unsuitable or not remunerative. Furthermore, the courts operate under formalities of evidence whereas legal practitioners and the periphery are not so constrained. Therefore, the periphery is an appropriate and efficient zone of contact with other functional systems of society be it economy, family life or politics. In frequent direct connection with
contract law, various new forms of privately produced law prosper as a result of contact with the economy and politics. Provisional collected agreements of interest groups and other big organisations and conditions of trade also prosper in this periphery zone of contacts (Luhmann, 1993b, p.304-305). This idea of peripheral sensitivity and parallel processing and networking of the periphery is how the relationships between the system and its environment are constituted. I can therefore say that structural coupling occurs due to the sensitivity and parallel processing of the zone of contact in the periphery with this environment through programming operations in the relevant semantic space. Without this relationship, systems theory could not cope with the reality of incremental adjustments in the programs and codes of different systems (Baxter, 1997).

Correspondingly, the political periphery must have a freer position than the centre.\(^{21}\) It cannot be that each voiced opinion or each attempt at political pressure and each political strategic move is immediately turned into a collectively binding decision in the centre of political communications, for example, or the centre of government (Luhmann, 1993b). The centre needs protection or immunity from the environment. This is performed by the periphery again which is sensitive and is a zone of contact between the system and its environment. It is also a most active and transforming part of the system (Baxter, 1997, p.2035). Furthermore, the distinction between the centre and the periphery is crucial for maintaining an order

\(^{21}\) Otherwise expressed as code is ‘invariant’, and programs are ‘variant’.
of the kind mentioned above. Its internal boundary is marked by office holdership and in the political system is reproduced by political power (Luhmann, 1993b, p.318).

Bearing in mind the above, is there evidence of structural coupling, temporary coupling or peripheral operations in ALRC Report No. 89 and Submission No. 348?

My discussion in relation to the position of ALRC communications was one whereby I conceded that it was not clear as to whether or not ALRC occupied the periphery in the legal system or the periphery in the political system. I did assume in my methodology that at least its communications in this case study were non-legal communications in origin. Certainly, ALRC does not occupy a central court position in either subsystem. Once this is accepted I can then possibly argue that if ALRC communications and its operation occupy the periphery in both subsystems in the concept of a VENN diagram which overlaps, then I have a mutually self-executing demonstrable position of a zone of contact between the periphery of both subsystems occupied by the one law reform commission communication. The advantage of this temporary coupling is that it provides some evidence that the periphery of the legal system has a relationship with the periphery of the political subsystem subject to the requirements of internal reference and operative closure. OCST describes the relationship between the political and the legal systems as a ‘parasitical relationship’ (Luhmann, 1993b, p.402). It argues that the political system benefits from the difference between law and non-law being

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administered elsewhere, namely, in the legal system. Conversely, the legal system benefits from having peace, a clear balance of power and with it the enforceability of decisions all being secured elsewhere, namely, in the executive enforcement components of the political system (Luhmann, 1993b, p.402). Few commentators or readers would disagree with the above observation by Luhmann. In that regard, there is some evidence that ALRC communications demonstrate an operation in the peripheries of the legal and/or political subsystems, whether it be by its operations or communications specifically in this case study.

There is further evidence of the relationship between the periphery and its environment by examining the nature of cognitive openness and widespread consultation by ALRC and its environment. ALRC received some 400 written submissions as well as public hearings around Australia. This broad and comprehensive consultation with ALRC’s environment demonstrates an interaction between the periphery of the political system and its environment. Naturally, operational closure dictates that ALRC selects and interprets those cognitive submissions in a form which is recursive and meaningful to its own autonomous operations. Nevertheless, incremental change is possible and there are productive processes taking place in the periphery prior to their submissions to the centre. In the periphery, interest and norms of all kinds are represented and argued by submission holders. Notwithstanding this, a distinction between power and non-power or legal and non-legal interests are still maintained in the core (Baxter,
1997). This is why peripheries are particularly suited as the zone of contact with other functional systems in society (Luhmann, 1992).

Other evidence of a relationship between the periphery of the political system and the legal system and their respective environments is found at page 103 of ALRC Report No. 89. It is headed ‘A collaborative approach to managing justice in a Federal system’. ALRC quoted a study by the *Ontario Civil Justice Review*, noting that problems with a civil justice system in that province were exacerbated by poor communication and limited coordination among the various stakeholders, including government, the judiciary and the bar. These in turn could be characterised as the political system, the legal centre and the legal periphery respectively. They were also described as the ‘solitudes’. ALRC concluded:

> Effective communication is essential to facilitate and manage individual and systemic change. This theme has featured in several of the recent reports and reviews into the practices and processes of common law, common civil justice and administrative review systems. (ALRC Report No. 89, p.104)

ALRC also notes that it is critical that communication between the courts, ALRC, public and environment succeed to ensure law reform. This reflects Luhmann’s concept that productive law reform can occur within a zone of the periphery. Accordingly, there is some evidence that ALRC accepts that zones of contacts and communications and the periphery of the legal system and its environment are crucial to an evolving law reform process.

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22 Interestingly, this part of Report No. 89 attempts briefly a theoretical discourse on ‘communications’
The Family Court also sought a greater relationship insofar as it sought repeatedly in Submission No. 348 greater consultation between ALRC and itself notwithstanding their differing codes and programs. There is no need to repeat here the often-quoted assertions by the Family Court that ALRC failed to consult with any of its important stakeholders with respect to case management and ADR.

Further evidence of peripheral operations and cognitive openness is found in judicial and staff education and training. The Family Court required its judges with respect to staff education to undertake particular conferences in overseas jurisdictions.\textsuperscript{23} Furthermore, ALRC conceded that the Family Court conducts its own excellent social science research. ALRC conceded that social science research is an obvious source of information of assistance in making findings by the judiciary. The Family Court access social science research in a number of ways including family reports prepared by social science or social workers. Social science may also be contained in information obtained through the appointment of court experts as part of the expert panel. Furthermore, section 66 of the \textit{Family Law Act} specifically permits relevant findings of published research in relation to the maintenance of children to be taken into account in considering financial support matters. Therefore, the Family Court accesses its relationship between itself and its environment in this specific example of social science research. That is, there is some evidence acknowledged by ALRC that the Family Court has

\textsuperscript{23} This is to encourage some environmental cross-fertilisation with respect to cognitive and normative operations.
access to this environment through published research. However, this does not mean that all such published research is forced upon the Family Court. The Family Court can determine whether or not such findings are consistent with its own internal codes and programs and the findings are reinterpreted and veiled or cloaked with the normative imperative of law versus non-law to ensure the resultant valid law is achieved (ALRC Report No. 89, p.594).

There is also some evidence of the breakdown of peripheral operations in the zone of contact in Submission No. 348. The repeated assertion by the Family Court that the Commonwealth makes assertions which are contrary to published findings and the Family Court’s best practice operates as a strain and irritation in structural coupling relationships. However, these assertions and criticisms themselves do demonstrate that no matter how tenuous, peripheral communication, no matter how weak, are required given the ‘parasitic’ relationship that is demonstrated in these documents. If law reform requires improved communication between the ‘solitude’ as described by the Ontario Civil Justice Review, then this fact provides some evidence that temporary couplings and peripheral operations do exist but it is a dynamic and evolving relationship. This ‘parasitic’ relationship is, notwithstanding the irritations registered, an important and constructive relationship when communications are improved. Indeed, the Family Court stated:

The Commission by avoiding its primary task has missed what would have been a significant opportunity to examine the adversarial nature of the system in a family law concept. (Submission No. 348, p.2)
To the extent that the case study communications can be interpreted as programs in the periphery of legal and political systems, this operation constitutes an operation in the periphery and a coupling.

However, it must be conceded that OCST would not interpret the case study communications as a typical structural coupling. This is because the case study documents are not legislation, contract, rules or some other form of permanent positive law. The case study communications in contrast are temporary communications or peripheral communications concerning research proposals for court reorganisation. Accordingly, OCST would perhaps construct such communication as evidencing a ‘temporary’ coupling. In this sense, the case study evidence is more fruitful in discussing peripheral operations, cognitive openness and the limitations of structural couplings. Certainly, ALRC Report No. 89 could be simultaneously ‘constructed’ in the legal periphery and the ‘political’ periphery, and so could Submission No. 348. In this sense, they are temporary couplings and peripheral operations.²⁴

4.7.6 **Is there evidence of epistemic traps and self-description in the case study?**

In the previous section, I analysed peripheral operations and looked at the evidence for such operations in ALRC Report No. 89 and Submission No. 348. OCST sees

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²⁴ The significance of temporary couplings is far less than ‘structural couplings’, which are permanent.
the need for the law, as an autopoietic discourse, to subject its proceedings and reality constructions to the higher authority of first-order autopoietic systems the epistemic trap (King & Piper, 1990, p.27). If law is forced to produce a legal reality and cannot at the same time immunise itself against realities produced by other discourses in society or its environment, then this is the paradoxical situation known as the epistemic trap. It is an oscillation between autonomy and heteronomy (Teubner, 1989, p.5).

A consequence of this is that the legal system and its discourse has considerable difficulty in processing the discourse and reality construction of other discourses and subsystems (King & Piper, 1990, p.28). Furthermore, the difficulty is that the legal system has no option but to consider the reality construction of first-order discourses. First-order discourses include science and economics. The reader may recall that Luhmann defines the core of the legal system as one which is required to consider mandatory all disputes put to it.

There is a prohibition of the denial of natural justice as Luhmann explains. Accordingly, if a discourse is separate in terms of epistemology and also separate in terms of operative closure, then how does one subsystem deal with its interpretation and interactions with another subsystem? In a crude fashion, this is the paradox of the epistemic trap. King and Piper use the example whereby within the context of the legal process and legal system, legal discourse claims to be entitled to ‘enslave’ other cognitive operations in other discourses. One example is the psychiatric expert giving evidence on the mental state of an offender at the time

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of the crime. This evidence is reconstructed by the law to answer the question: *Was she responsible at the time?* Yet any notion of responsibility is quite foreign to the psychiatric diagnosis and treatment of mental illness (King & Piper, 1990, p.27).

*Is there any evidence of this epistemic trap in ALRC Report No. 89 or Submission No. 348?*

It would be best to look for evidence of the enslavement of the legal discourse over other discourses. Alternatively, enslavement of an economic discourse over a legal discourse is also evidence of an epistemic trap. In ALRC Report No. 89, the terms of reference appeared to be relatively straightforward and simplified.

Terms of reference required that the Attorney-General have regard to:

... the need for a simpler, cheaper and more accessible legal system; the justice statement; and recent and proposed reforms to courts and tribunals. (ALRC Report No. 89, p.3)

Indeed this vision of a simple and deductive analysis of simpler access to justice is regrettably more complex when empirical analysis is attempted. ALRC agreed that there were competing visions of the role of the Family Court and:

... issues associated with these competing visions affect the structure of the Court, public and professional expectations of the court and the way the court manages its business. (ALRC Report No. 89, p.535)

However, regrettably, at a time when ALRC could have examined the vision which would explain differences in discourse, ALRC decided not to pursue the
examination or analysis of factors underlying differences in discourse and reality
construction. ALRC then concluded:

Such matters are beyond the Commission’s terms of reference. The
issues deserve fuller analysis as they emerge as part of the
continuing public debate around the Family Court. (ALRC Report
No. 89, p.535)

In contrast, ALRC focused upon case managements and empirical data collection
by Matruglio. Although examinations of case management, case duration and case
events for settlement are important in terms of examining whether or not legal aid
is essential for reducing delays, such empirical analysis does not assist in
examining the nature of the interaction between the differing discourses. It appears
at page 535 that ALRC puts the difference as a matter which is beyond its terms of
reference. In doing so, one could argue that ALRC has, by implication, determined
that its own vision of economic analysis and case duration is superior to the
discourse of the Family Court which concerns priorities and strategic visions.

Furthermore, the Court in Submission No. 348 does at least concede that an
examination of the rise of litigants in person and resource allocation, as well as the
overriding importance of ADR is a discourse which does not appear to be accepted
as valid by ALRC.

The Family Court writes:

The responses have already expressed criticism of the
Commission’s unquestioning acceptance of the decline in legal aid
and the rise in unrepresented litigants . . . A more courageous
approach would have been to face these problems and the fact that
they have been brought about at least to some extent by the Liberal
government policy. (Submission No. 348, p.30)
Furthermore, there is repeated stress throughout the paper by the Family Court that there was a substantial lack of consultation by those responsible for the management of the Family Court by ALRC. These two factors appear to indicate that there is some evidence that the discourse of ALRC which is a discourse in the periphery of the political system, has attempted to subordinate the discourse of the legal system.\textsuperscript{25} That is, the discourse of ‘simpler, cheaper and more accessible legal system’ has strived to determine the route of the debate in ALRC Report No. 89 in contrast to incorporating the discourse of the Family Court. The discourse of the Family Court is to recognise that litigants in person are a phenomena of the reduction in legal aid and that a focus upon case management minimises the necessary and important focus upon ADR as crucial in the strategic vision of the Family Court. Further evidence of this ‘enslavement’ of the legal system’s discourse by ALRC’s own discourse can be found in this quote:

\begin{quote}
The Commission shows no semblance of treating the Court’s attempts to resolve disputes without resort to litigation seriously, or even as relevant to its work. (Submission No. 348, p.17)
\end{quote}

This particular passage can be interpreted in a number of ways, either:

(i) The Court could be regarded as having made a baseless allegation designed to personally attack members of ALRC.

(ii) The Court perceives its own discourse as enslaved by the discourse of ALRC as evidence in ALRC Report No. 89.

(iii) The Court feels disenfranchised due to the lack of consultation throughout ALRC Report No. 89 and Discussion Paper No. 62 process.

\textsuperscript{25} Hence, steering or heteronomy is possibly witnessed as a dynamic.
There is some other explanation for this passage.

Whilst the analysis is not determinative, I feel that interpretations (ii) and (iii) above have some merit.

4.7.7 Is there evidence of irritations registered internally in the case study?

Where there is an overlapping of the periphery in terms of semantic space or zone of contact, there may be the triggering of irritations, surprises and disturbances (Luhmann, 1993b, p.418). The terms ‘structural coupling’ and ‘irritation’ are mutually inclusive (Luhmann, 1993b, p.418).

Irritation is a perception of the system, but does not have a similar perception in the environment (Luhmann, 1992). The environment is not irritated, and only a second-order observer can formulate the irritation of the system by the environment (Luhmann, 1993b; 1992, p.1432). Pressure from the environment and the registering of the irritation, such as a dispute, is registered in the internal structure of the system selectively. At the same time, the environment would not perceive the irritation as an irritation, but rather perceive it as either as intended or unintended demand on the periphery and hopefully the core of the system which is targeted.

OCST strongly interprets the notion of cognitive openness and normative closure as necessary for the communication about the environment by the system. That is, whilst the system does not communicate with its environment, it does communicate about its environment (Luhmann, 1992). That is, the periphery of the
system receives pressures, irritations and disturbances. They may be in the form of demands and so forth.\textsuperscript{26} The discourse is then selectively employed and made redundant. It is furthermore transformed into a useful discourse such as the legal discourse in the legal system periphery. This transformation may take some time and reflects the normative closure of the operations of the legal system (Luhmann, 1993b). However, note that whilst the periphery is sensitive to the cognitive appearance of disturbances and irritations, they by no means are directly transferred to the centre of the legal system. A process of normative reiteration and semantic meaning development occurs before the dispute may finally reach the centre or core of the legal system to be operatively dealt with (Baxter, 1997).

\textit{Is there evidence of irritation and pressure in the structural/temporary coupling of the legal system and the political system as demonstrated by ALRC Report No. 89 and Submission No. 348?} For the purposes of my discussion and taking into account OCST’s concept of irritation as only observable within the system, I will initially focus upon Submission No. 348. This is because irritation is registered initially only in the receiving subsystem from a background at noise (Luhmann, 1992). It is not recorded initially in the environment because the environment does not interpret its own request or demand upon the legal system as an irritation or a disturbance.\textsuperscript{27} Alternatively, using the language of King and Piper,

\textsuperscript{26} They are received by the periphery in the cloak of noise initially.

\textsuperscript{27} It justifies its own demand or dispute as a perfectly normal and justifiable operation instead.
the epistemic trap produces irritations in the form of the necessity for the legal system to confront and deal with other discourses. For example, the legal system may be caught in an irreconcilable conflict between the maintenance of its own discourse and autonomy on the one hand, and its dependence upon the interpretation of a number of competing epistemies.

*Is there evidence that the legal system has to deal with discourses of the political system resulting in irritations and disturbances registered internally?*

In its submission, the Family Court writes:

A major weakness of the Discussion Paper’s treatment of the Federal Court and Family Court is its lack of even-handedness and balance when considering important issues associated with case management . . . The Commission’s approach suggests that it has adopted a methodology which lacks objectivity and is driven more by ideological and practical considerations. (Submission No. 348, p.1)

In this passage, there is some evidence that the Family Court considers the methodology of discourse in the Discussion Paper as one clearly disturbing to the Court. The Family Court appears to take great exception at what it perceives to be a discriminating and unbiased methodology employed by ALRC in its discourse.

Later in its submission, the Family Court writes:

The Commission has failed to focus on the adversarial system but has directed its attention as is made explicit in the title of the Discussion Paper towards a review of the Federal civil justice system, and in particular to issues of case management. Its rationale and motivation for the shift are unclear, as is its ability to perform the task it set itself. (Submission No. 348, p.2)
In this passage, the Family Court is concerned with the shift by ALRC in addressing the terms of reference, which was to focus upon the adversarial versus non-adversarial methodologies. The Family Court points out correctly that ALRC focuses upon almost exclusively adversarial procedures in the Federal civil justice system and dismisses non-adversarial proceedings very quickly early in ALRC Report No. 89. It appears here that there is some evidence that the Family Court regards this shift as a significant disturbance and irritation.

The Family Court returns to the notion of adversarial versus non-adversarial procedures and ADR later in the paper, and I have already discussed earlier in this chapter various points at which the Family Court was most concerned by the failure of ALRC to recognise the significant ADR initiatives of the Family Court. The Family Court repeatedly refers and revisits the notion of ADR and successful settlement procedures prior to trial. There is, therefore, some evidence that the Family Court registers ALRC's failure to address non-adversarial initiatives as a significant disturbance and irritation.

At page 25 of Submission No. 348, the Family Court writes:

The difficulties created by current legal aid policies are so obvious that they scarcely need empirical evidence to support them. It would only necessary to spend a day at any registry of a Family Court of Australia to be provided with graphic and harrowing evidence of the effect of these policies.

Submission No. 348 is in response to ALRC’s position regarding legal aid and unrepresented litigants. ALRC, in ALRC Report No. 89 and Discussion Paper No. 62, was of the view that legal aid cuts are only allegedly resulting in an increase in
the number of unrepresented litigants. ALRC is however of the view that this assertion is not evidenced by way of empirical survey.

The Family Court, however, as indicated in the passage above, is of an entirely different view given that the Family Court operates within the core of the legal system and on a daily basis confronts the reality of unrepresented litigants. I have already referred to the data in relation to unrepresented litigants in Family Court proceedings. They are extremely high and are reported in ALRC Report No. 89 itself. Furthermore, Matruglio’s analysis indicate that one of the reasons that litigants in person are in fact defined as such is that these persons have had legal aid rejected after an application. Accordingly, the discourse emanating from ALRC in terms of litigants in person and the discourse of the Family Court in relation to litigants in person represent quite different internal representations. There is evidence, therefore, that the Family Court registers the views and discourses of ALRC in relation to cuts in legal aid and litigants in person as a significant and ongoing disturbance and irritation. The Family Court concluded in their submission:

These chapters contain little or no analysis or critical comment on the impacts of legal aid availability or otherwise on the matter and timing of Family Court proceedings, despite the presence of an increasing body of knowledge which indicates a number of (presumed/unintended) ... consequences for those in the adversarial system. (Submission No. 348, p.39)

The Family Court then produced at page 39 onwards other studies which demonstrate the impacts of legal aid cuts on the Family Court system and the inner
core of the legal system. Although ALRC would not regard its position in relation to litigants in person and research as a disturbance or irritation, there is substantial evidence in the submission that the Family Court regards the position and discourse of ALRC as highly irritating. Conversely, it should be mentioned that at page 103 of ALRC Report No. 89 that ALRC noted that its goals in relation to the terms of reference were to provide quality outcomes which are efficient and cost-effective. The terms ‘efficient and cost-effective’ are terms which ordinarily relate to cost minimisation and rationalisation of resources. These terms are ever-present in the dialogue of ALRC and the Family Court, in contrast, argues for greater resources and greater legal aid. It is at this point at which the discourse of ALRC and the discourse of the Family Court becomes irreconcilable. The conflict which is generated leads to an apparent frustration in the language of the Family Court as demonstrated in various passages of Submission No. 348. Whilst ALRC regards its pursuit of ‘efficient and cost-effective’ as both normal and justifiable as a result of its terms of reference, the Family Court cannot reconcile ‘efficient and cost-effective’ with its operative demands for increase in legal aid resources and increase in Family Court resources.

Conversely, ALRC itself appears to have registered certain remarks and dialogue of the Family Court in submissions as both disturbing and irritating. ALRC noted:

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28 As per the terms of reference.
The Court's submission and the Chief Justice's public comments on DP No. 62 were highly and personally critical, implied that the Commission was acting in bad faith. (ALRC Report No. 89, p.108)

There is evidence here that ALRC found the Family Court submission disturbing and distressing.

Furthermore, ALRC wrote:

The Court was stridently critical of research, conclusions and reform proposals in DP No. 62, styling them as facile, insensitive, ill thought out, misguided, poorly researched and impractical, largely based... on the remarks of persons who have no expertise in case management. (ALRC Report No. 89, p.528)

It would be difficult to find a passage which better reflects the position of the Family Court with respect to ALRC's agenda. Furthermore, it is important to note that ALRC itself quoted this passage of the Family Court's submission near the beginning of Chapter Eight of ALRC Report No. 89, which deals with the Family Court and its case management. It is arguable, therefore, that there is some evidence that ALRC finds the underlying rationale of the Family Court's submission as most disturbing and irritating. ALRC, at pages 528 and onwards, attempts to dispel the substance of the Family Court's disturbance. It attempts to do so by arguing that the Family Court is overly staffed with bureaucrats as opposed to persons dealing with litigants such as judges. It therefore puts a case forward at page 530 that its bureaucracy should be slashed and the resources then made available should be turned towards other aspects of the Family Court's program.

However, this is not spelt in any great detail by ALRC.
Interestingly, ALRC notes that the extent of any shortfall in the Family Court's resources is *unclear*, and importantly, ALRC concedes that it is in no position to comment or make recommendations with respect to resources. This position is most incongruous with its earlier position that it is determined to achieve 'quality outcomes which are efficient and cost-effective' (ALRC Report No. 89, p.103). ALRC does not make clear why it considers the question of resources and the Family Court an issue which is outside the scope of 'efficient and cost-effective' in terms of reference. The terms of reference were quite large and conceivably resources or the lack thereof with respect to the Family Court could have easily been dealt with by ALRC if it had the will to do so.

Ultimately, the difference in the nature of the discourse of the Family Court and ALRC reflects the inevitable separate epistemies and discourse of the legal system and the political system (Teubner, 1989).\(^\text{29}\)

The following passage by ALRC demonstrates the clear difference in the said discourses:

> There may still be significant disagreement between the Court and the Commission concerning our identification of case management 'problems' in the Court, the scope and cause of such problems, and the Court's approach to reform and consultation with the profession. (ALRC Report No. 89, p.531)

In this particular scenario, ALRC concedes that the demands of the discourse of the Court in its submission is both disturbing and irritating.

\(^{29}\) See critique of Beck (1994, p.409) on the 'system or subject' for an interesting analysis.
In the case study, there is some evidence of irritation registered internally by both ALRC and the Family Court in ALRC Report No. 89 and Submission No. 348.

Far from being unsatisfactory, the evidence of irritation seems to demonstrate that OCST is correct in arguing that when there is structural coupling of separate systems (or even temporary coupling or peripheral operations), there will inevitably be disturbances and irritations in the area of its periphery whereby the contact zone allows cognitive observations between the peripheries of the relevant subsystems. In this particular case, the core of the legal system has been able to respond to the irritations produced and transmitted to the core by the periphery. In this case, one could argue ALRC which produces discourse in both the legal periphery and the political system periphery has transmitted the irritation and disturbance to the political core and then re-transmits a response to the political periphery and its environment.

4.8 Conclusion and Findings

In this Chapter, I have looked for patterns in the Australian case study data in response to Hypothesis One, namely that certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST.

I was able to apply the typology of OCST research questions to the case study. There were six research questions in the OCST typology.
I found positive evidence for each research question posed in ALRC Report No. 89 and Submission No. 348. I was able to demonstrate that there were some evidence for each of the research questions posed in the affirmative in ALRC Report No. 89 and Submission No. 348. I discussed how the evidence could be construed and how this evidence supports, at least in part, the OCST interpretation of the legal system in society. That is, patterns in the case study answered each of the research questions in the affirmative.

Accordingly, as a result of finding that certain patterns in the Australian case study matched in the affirmative predictor elements in the six research questions of the typology of OCST, Hypothesis One appears to be supported and confirmed.
Chapter Five
A Systems Theory Interpretation of the Reduction in Legal Aid Funding in Australia and Its Response

5.1 Introduction

In Chapter Four, I applied the six research questions in the typology of OCST to the case study of ALRC Report No. 89 and Submission No. 348 in order to test Hypothesis One.

I was able to find some evidence answering in the affirmative each research question in the OCST typology. This in turn supported Hypothesis One of the research problem. The standard of evidence is not conclusive in the qualitative study, however, it is corroborative and significant.

The purpose of Chapter Five is to study a number of additional case studies. Hypothesis One will again be tested by looking for patterns in the selected case studies.

The OCST typology research questions for this chapter are:

(i) Is there evidence of operational closure and internal reference in the case study?

(ii) Is there evidence of structural coupling and peripheral operations in the case study?

(iii) Is there evidence of an epistemic trap in the case study?

(iv) Is there evidence of irritation registered internally in the case study?
In Chapter Four, I outlined six research questions in the typology of OCST. The first two questions of that typology will not be pursued in this chapter. The questions of whether there is evidence of subsystems and overproduction of norms will not be pursued in this chapter. This is due to my decision that the utility in pursuing those questions is outweighed by the difficulties that will be encountered in pursuing those two research questions. Accordingly, I have made an assumption that there is some evidence supporting the first two research questions. This reasonable assumption is based on the fact that the case studies in this chapter are sourced from the ‘legal aid industry’. The industry is directly linked to the operations outlined in Chapter Four and the Family Court of Australia. Some of the findings in Chapter Four would hold for the following case studies.

5.2 Methodology

The various studies which I shall examine are sourced from the ‘legal aid industry’. The methodology employed will be more collective and less intensive that the methodology employed in Chapter Four. Given the limited space available in this thesis for such analysis, my findings will be qualitative and tentative.

The four case studies tackle a theme which was present in ALRC Report No. 89.¹ The case studies are:

(i) *Hitting the Ceiling: Springvale Legal Service Report into the Impact of Funding Limits in Legally Aided Family Law Matters which came into*

¹ And Discussion Paper No. 62.
effect on 1 July 1997, a project under the Federation of Community Legal Centres (1998)

(ii) Litigants in Person in the Family Court of Australia by Dewar, Smith and Banks, a report to the Family Court of Australia, Research Report No. 20 (2000)

(iii) Dewar, Giddings and Parker, Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland (Griffith Legal Aid Report) Faculty of Law, Griffith University Queensland (1998)


The purpose of Chapter Five is to test Hypothesis One, ‘That certain patterns in the Australian case study will match certain predictor elements in the typology of OCST’. The nature and scope of Chapter Five will not be as ambitious as those in Chapter Four. In this Chapter, a briefer and more selective study will be undertaken with respect to each of the case studies. This methodology is chosen to ensure some comment and reference is made in a meaningful way to each of these case studies. Each of the case studies contain important research data that is valid and relevant to legal aid reduction in Australia from 1997 to 2000. They also overlap in aim to a large degree, making the combined case study valid and useful, although the analysis and findings must be selective and tentative. They also tackle themes in ALRC Report No. 89.

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PART A: BACKGROUND TO CASE STUDIES

5.3 Springvale Legal Service Report into the Impact of Funding Limits in Legally-Aided Family Law Matters

In July 1996, the Commonwealth Government gave notice to state and territories legal aid commissions that future funding would be severely curtailed. In effect, the budgetary cuts would amount to an excess of $120 million over the three successive years. These cuts were not informed by any research into the extent of legal need nor the impacts on the client or the legal system (Springvale Legal Service Report, 1998, p.2). The cuts were exclusively dealing with funding limitations with respect to Commonwealth matters which are primarily family law and other federal law funding matters. At the time of the Springvale Legal Service study, there was a dearth of research into levels of legal aid assistance in the community.

At the time, the Senate, Legal and Constitutional Reference Committee final report was not yet available. Furthermore, ALRC Report No. 89 was not expected to be released until mid-2000.

The Springvale Legal Service Report’s objectives were described as gathering information regarding the impact of ceilings in grants of aid for family law matters on clients, legal service delivery and the courts by seeking responses to questions by participants about how cases are managed within the limits imposed by Victorian Legal Aid. The Service did not seek to assess the hidden impact of the
most recent round of cuts, that is, clients who may be eligible for legal assistance but are discouraged from applying for aid.

The methodology of the survey involved a family law practitioner questionnaire prepared involving 18 questions. Some of the questions involved the classic ‘please tick’ options and some of the questions allowed a more lengthy response. A total of 133 of the 152 practitioners listed as family law specialists accredited in the Law Institute of Victoria scheme were invited to respond to the questionnaire.²

The value of the Springvale Legal Service study is that it is one of the first reports that sighted legal aid data from a reasonable sample after the July 1997 reductions in legal aid by the Commonwealth. Furthermore, its usefulness is heightened by the fact that it seeks responses from practitioners who are specialist accredited. These practitioners are required under the specialist scheme to: (i) have at least a 25 percent family law case load mix per annum; and (ii) are required to undergo comprehensive continuing legal education in family law.

Therefore, it can be implied that these practitioners are at the coalface of family law and legal aid interaction.

² A 47.3 percent response rate was achieved which was excellent in the circumstances.
5.4 Litigants in Person in Family Court Research Report No. 20 (2000)

The Family Court commissions reputable researchers to undertake reports for the Family Court from time to time. Family Court Research Report No. 20 titled *Litigants in Person in the Family Court of Australia* is one such report. It was commissioned and submitted in 2000. It was conducted by a team comprised of members of the Family Law Research Unit by the Faculty of Law at Griffith University and the Family Court of Australia. The researchers were Professor John Dewar of Griffith University, Barry Smith of the Family Court of Australia and Cate Banks of Griffith University.

One of the reasons for commissioning the research was that the Family Court had found that 35 percent of Family Court matters involved at least one party who was unrepresented (Family Court Research Report No. 20, p.3).

For the purposes of the research, a litigant in person was defined as a litigant who is seeking orders that require a formal procedure before a judicial officer as opposed to those who do not appear in court after filing. Furthermore, they appear without legal representation. These litigants in person may have had some assistance, but their actual appearance in court is without a representative. The report may have also been commissioned by the Family Court given the then-simultaneous release of ALRC Report No. 89. I have already discussed in the previous chapter the extensive mutual irritation of ALRC and the Family Court. The Family Court certainly made it clear in its submissions and its subsequent
media releases that it felt it was not being heard by ALRC. Consequently, there
may be some evidence that Family Court Research Report No. 20 was the Family
Court's own effort to produce in the public domain a report which counteracts
some of the perceived negative effects of ALRC Report No. 89.

Even in 2000 there was still comparatively little research into litigants in
person in Australia. The research which had been conducted at that time had
provided some preliminary conclusions. They were:

(i) Restrictions on legal aid combined with prevailing economic difficulties are
the most commonly sighted factors contributing to the increase in the
number of litigants in person (Family Court Research Report No. 20, p.11,
fn 36).

(ii) There is a perception expressed throughout the literature that the number of
litigants in person is increasing in the court system.

(iii) It appears that in the majority of cases litigants in person are forced to
represent themselves because they cannot afford the high cost of legal
representation and do not quality for legal aid or have exhausted legal aid
(Family Court Research Report No. 20, p.12, fn 44).

(iv) Another reason for the increase in litigants in person is that some litigants
in person are unable to obtain legal representation.

Furthermore, there was research available from a committee of the British section
of the International Commission of Jurists which was replicated on page 13 of
Family Court Research Report No. 20. Some of the disadvantages of self-
representation were found to be: (i) complexity of substantive law; (ii) complexity
of pre-trial practice; (iii) ignorance of trial procedure and tactic; (iv) hostility from
the court; (v) vulnerability to unfair or oppressive tactics by opposing counsel; and
(vi) risk of financial ruin if the case is lost. The International Commission of Jurists
report known as *Justice* was reported to have outlined some advantages but concluded these advantages were in fact illusory.\(^3\)

Given the very high number of litigants in person in big cities in the Family Court of Australia, the Family Court is keen to address the perceived needs of the litigants in person whilst still allowing an equitable playing field for all parties. Furthermore, whilst the Family Court does indeed perceive litigants in person to be an undesirable outcome of legal aid funding cuts, it does appear to accept that they are here to stay.

To accommodate the rising phenomena of litigants in person in the Family Court, the Family Court as at 2000 already had addressed the needs and demands of litigants in person by providing simplification procedures in legislation and rules, mandatory information sessions at the commencement of proceedings, the publication of self-help kits and the publication of the *Family Court Book*. However, in a bid to discover more about the cause and effects of litigants in person, Family Court Research Report No. 20 pursued six research questions. They were:

(i) Why do litigants appear unrepresented in the Family Court?
(ii) What are the demographic and other characteristics of litigants in person?
(iii) What needs or assistance do litigants in person have?

\(^3\) Justice Kirby of the Australian High Court is a member of the ICJ.
(iv) What are the effects of a party being unrepresented on the judge, on the court system, on the other party, on the lawyers and on the litigants themselves?

(v) Do cases involving litigants in person use more resources of the Family Court as opposed to those matters in which both parties are represented?

(vi) If so, how might the Family Court be able to assist litigants in person more effectively and how can the Court cope with the problems of litigants in person present to the Court?

In terms of methodology, the researchers spent a week in each of the five different Family Court registries in Australia. They used a mix of quantitative and qualitative approaches involving primarily questions and semi-structured interviews. Questionnaires were completed by judges and judicial registrars of each of the registries. Furthermore, observations of hearings were allowed by judges in particular proceedings but they were by way of non-participant observation.

Interviews with litigants in person were also held with 49 litigants in person. These involved 15-20 minute of interview time. Furthermore, interviews were held with legal practitioners after hearings involving a significant number of cases.4

Furthermore, informal discussions took place with barristers, solicitors and duty solicitors within the court network scheme. Overall, it was a comprehensive study involving the Family Court, litigants in person and the private profession. It is a valuable source of data given that there was full and complete cooperation by the Family Court, the centre of the legal family law system in Australia.

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4 Three duty solicitors were also interviewed as a group in one registry.
5.5 Griffith Legal Aid Report

The Griffith Legal Aid Report is also known as *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland*. John Dewar, Jeff Giddings and Stephen Parker of Griffith University, and Monash University respectively undertook valuable research in 1998 primarily at the behest and funding initiative of the Queensland Law Society and the Family Law Practitioners Association of Queensland.

Whilst the professional bodies did fund the research, the authors insisted that the research was to be independent. Indeed, some of the conclusions would not have been considered favourable by the legal profession in Queensland.

The impetus for the research is due to the ‘change’ and impact of these changes on legal aid rather than simple financial cuts. Some of these changes include altered funding arrangements between the Commonwealth and the states, Commonwealth priority and guidelines, introduction of capital grants and assistance and alteration of merit tests (Dewar, 1999, p.34). Dewar concluded with his colleagues that the legal aid system now delivers a service that is beginning to look qualitatively different from its private sector counterpart in ways which needed to be researched. As indicated in my previous discussion, the 1997 changes to legal aid funding and its prioritisation with respect to Commonwealth matters was far-reaching and substantive in nature and impact. Family law matters were now a priority for Commonwealth funding and the legal profession and state governments had to make up the gap for a large shortfall in state-funded matters.
such as care and protection, adult and children's crime and other important state programs.

In response to the wholesale change by the Commonwealth, Legal Aid Queensland introduced their preferred supplier scheme of firms prepared to act on behalf of assisted persons. Furthermore, Legal Aid Queensland introduced an initial ADR mechanism before substantive grants were provided for substantive proceedings. This change was welcomed by the profession and by all participants.

The research questions which Dewar and his colleagues sought to explore were specific and were:

(i) What changes, if any, has there been in the availability of experienced family law practitioners to undertake legal aid work as a result of changes to legal aid in Queensland in the last five years?

(ii) Have changes to legal aid in Queensland in the last five years disadvantaged legally aided family and criminal law clients or otherwise affected them?

(iii) Have changes in legal aid increased the likelihood that litigants will undertake some or all of the matters in person and are litigants in person disadvantaged compared to represented persons?

(iv) Is the legal aid system indirectly subsidised by, and if so to what extent, full fee paying clients or the profession that undertakes legal work?

The above questions were largely fuelled by anecdotal evidence that experienced legal practitioners were dropping out of legal aid work for reasons that lay in changes to the legal aid system. Furthermore, anecdotal evidence provided that there is a perception that legal aid work is increasingly in the hands of junior or less experienced practitioners.
In terms of methodology of the Griffith Legal Aid Report, in the period from March to June 1998 the authors interviewed seven criminal law practitioners including counsel, seven family law practitioners, two judges of the District Court and Family Court, five staff from Legal Aid Queensland and six practitioners in community legal centres. Furthermore, they spoke by telephone or correspondence with a second Family Court judge, a magistrate and a further legal centre lawyer. Finally, they spoke with five law firms that had made a deliberate decision to withdraw from legal aid work. These interviews focused on the reasons for withdrawing from legal aid work. Therefore, 27 formal interviews were conducted whilst structured dialogue on particular issues took place on a further eight occasions.

Their findings will be discussed in my analysis later and subsequently in this chapter. It is worth noting that the research is primarily qualitative as opposed to quantitative because they were looking for themes and trends rather than for numbers to analyse and compute. The authors' reasons for this were:

(i) The research was the first of its kind in Australia.

(ii) They intended this to be a preliminary study as opposed to a large conclusive study.

(iii) Funding was somewhat limited and did not allow a further more comprehensive study.
By way of contrast, the study by ALRC and in particular Matruglio and his colleagues was funded by ALRC and was able to access the Family Court’s data during that period of time during a particular part of the Court calendar year.5

Furthermore, the analysis by Dewar, Smith and Banks in Family Court Research Report No. 20 in relation to litigants in person, which was discussed in the previous section, was better funded, again primarily because significant funding was available from the Family Court and its research program. Dewar’s work in relation to Family Court Research Report No. 20 and the Griffith Legal Aid Report do complement each other and there are common themes.

5.6 Senate Inquiry into the Australian Legal Aid System 1997

The Australian Senate Legal and Constitutional References Committee of the Australian Parliament was referred various terms of reference by the Senate on 17 September 1996. The terms of reference numbered 9, number 1 of which read:

... the capacity of the Australian legal aid system to meet community demand for legal advice and information and representation and other advocacy services.

The Senate reference was prompted by the Treasurer’s press release on 17 April 1996 whereby the government explained the need to introduce a radical deficit reduction strategy. On 26 June 1996, the Attorney-General wrote to his state and territory counterparts advising:

5 The study is extremely useful insofar as the themes and qualitative analysis complements the heavy empirical work of Matruglio (1999).
The Commonwealth would exercise its rights under the existing legal aid agreements to give notice that they would terminate on 30 June 1997. (Senate Legal Aid Inquiry First Report, 1997, p.1)

On 20 August 1996, the Commonwealth budget was announced for 1996-1997. It outlined that Commonwealth legal aid would be reduced by $33.16 million from 1997 to 1998. The terms of reference from the Senate were drafted and provided to the Legal and Constitutional References Committee soon thereafter. The reporting date was required to be the last sitting day of April 1997.

The effects of the proposed agreements in the legal aid industry were vast, rapid and widespread. The nature of the impact will be outlined subsequently in this chapter.

On 10 October 1996 from the Attorney-General’s Department, the Commonwealth released a discussion paper attempting to justify the massive reduction in legal aid funding in the legal aid industry. On 27 November 1996, the Law Institute of Australia sponsored a national summit of legal aid funding in Canberra. A topic of particular discussion was that the Commonwealth had based its calculations on out-of-date or incorrect figures which reached back to 1994 and 1995 (Senate Legal Aid Inquiry First Report, 1997, p.3).

In March 1997, new funding agreements were reached between Queensland, Australian Capital Territory, South Australia, Northern Territory and Victoria.
Chapter 5: A Systems Theory Interpretation of the Reduction in Legal Aid Funding

It is in the context of these wide-ranging and far-reaching events that the first report was delivered in March 1997, reporting briefly upon the nine terms of reference, which can be summarised as:

(i) The capacity of the legal aid system to meet community demand, legal advice and representation.

(ii) The respective responsibilities of the Commonwealth, state governments, legal profession and the provision of legal aid through legal aid commissions and other agencies ‘the legal aid industry’.

(iii) The implications for Commonwealth responsibility for legal assistance arising from its international obligations and treaties.

(iv) The nature and level of legislative and administrative impediments to effective legal assistance delivery.

(v) The levels of disparity between the Commonwealth Government, payment of legal aid lawyers and non-legal aid services.

(vi) The relationship between the legal profession and the government in delivering assistance in the legal aid industry.

(vii) The equity implications arising from current tax deductibility regime for legal expenses by the corporate sector.

(viii) Implications, if any, for the Dietrich system in the legal aid industry.

(ix) The capacity of the legal aid system to provide for separate representation of children in the future.

In the first report, the Committee outlined the Commonwealth position and the focus of the Committee’s proposed inquiry. It noted that it had received a significant number of submissions in only the six months since terms of reference were received. It also noticed that there was an election promise by the Coalition Government to maintain existing levels of legal aid funding. The Committee noted
that the Commonwealth decision to fund only matters that arise under Commonwealth law was a subject of concern to almost all witnesses who gave evidence to the Committee’s inquiry leading up to the production of the first report. The remainder of the first report concerned the discussion of the Commonwealth/estate law distinction and the implications of that for funding in a practical and administrative sense. Furthermore, the first report investigated the risk of damage to Australia’s legal aid system in the long term. The Committee noted in the first report’s conclusion that there was ‘widespread concern over the Commonwealth proposal to reduce expenditure for legal aid in the 1996-1997 budget’. Furthermore, it noted there were significant errors on how the Commonwealth policy would be implemented and its impact thereafter. Because the legal aid industry was in a high state of flux in March 1997 and the agreements were yet to commence (from 1 July 1997), the Committee decided to hand down a preliminary report. It noted that it had not had adequate opportunity to analyse all of the submissions and information, and furthermore, further submissions were needed after the commencement of the new agreement in July 1997. This paved the way for the second report which was published in June 1997. It should be noted that the first report took into account but did not analyse approximately 170 submissions from pre-eminent and high profile entities and individuals throughout the Commonwealth. Furthermore, public hearings were held before the Committee
in Darwin in January 1997, Canberra, Brisbane, Melbourne, Hobart and Adelaide in March 1997.\(^6\)

Appendix 3 of the first report was a copy of the Government’s response to the first report’s conclusions. At page 3, paragraph 11, the response notes:

The Commonwealth estimates that approximately $33 million of its current annual funding to legal aid commissions of $132 million is expended by commissions on matters arising under state and territory law.

This coincides with the proposed reduction by the Commonwealth Attorney-General of $33.17 million outlined earlier in my discussion for the 1997-1998 funding year. Examination of this response and the later responses will be most worthwhile subsequently in this chapter.

The second report was produced in 1997 and provided a brief analysis and statistical data of the submissions and commission profiles. Furthermore, greater detail was provided in terms of the Committee’s findings in relation to the *Dietrich* decision which was a High Court decision requiring criminal defendants the right of legal representation. If legal representation was not available, the High Court dictated that the defendant could seek an adjournment. Furthermore, the second report gave further guidance in terms of its findings in relation to the separate representation of children and its impact upon legal aid funding. The decision of *ReK* was a decision of the Full Court of the Family Court which directed that if certain criteria were met the Family Court should exercise its discretion in

\(^6\) Each submission is reported in brief at Appendix 1 of Report No. 3.
appointing a separate representative for the child. Prior to this decision, there was uncertainty as to whether or not the Family Court should exercise its discretion in appointing separate representatives. This decision made it easier for the Family Court to limit the number of appointments made in each state by the Family Court.

The most interesting and comprehensive report of the Senate Inquiry into the Australian Legal Aid System was the third report published in June 1998. This report totalled 192 pages. Furthermore, an additional 100 pages was devoted to the itemisation of legal aid agreements and responses by Government senators in an appendix segment. Indeed, Appendix 9 was the Government senators response to the third report and was of itself a mini report totalling 102 pages. It refers to each recommendation published by the Senate Committee and provide the Government’s interpretation of the appropriateness or otherwise of each of the recommendations which totalled 22 recommendations found in 10 chapters.

Chapters that attempted to address the nine senate terms of reference which were numerated earlier in this discussion were titled:

- Chapter 1: Events since the second report and update
- Chapter 2: Inadequate data on the state of the legal aid system
- Chapter 3: Funding issues
- Chapter 4: Priorities and guidelines, general issues
- Chapter 5: Legal aid in family law matters
- Chapter 6: Legal aid in criminal law matters
- Chapter 7: Legal aid in civil law matters
- Chapter 8: The change in legal aid community
- Chapter 9: The effect on the wider community
- Chapter 10: Tax deductibility of legal expenses
Chapter 5: A Systems Theory Interpretation of the Reduction in Legal Aid Funding

Each of these chapters had a modest analysis, including a citation of submissions and their authors. Furthermore, each section or sub-section in each chapter had conclusions and subsequent recommendations totalling 22. The third report constitutes a most valuable contribution to the response of the legal aid industry to Commonwealth policies. This is largely due to the fact that the submissions totalled approximately 180 not including public hearings and witnesses since the second report. Every conceivable stakeholder in the Australian legal system and the various participants in the legal aid industry made written or oral submissions. Accordingly, it is the most valuable indicator of the attitude and interpretation by numerous stakeholders. Appendix 1 lists individuals and organisations that provided written submissions for the committee. Generally speaking, the Committee was, based upon numerous submissions received from stakeholders and legal aid industries, critical of the decline in legal aid funding of such a dramatic nature in the 1996 announcement by the Attorney-General. These cuts continued into the 2000 funding year.

These criticisms were found on a number of different levels but essentially the Committee was concerned for the continued viability of the legal aid industry facing increased demands upon it. Not only is the funding issue overwhelming in terms of its impact upon litigants in person and the courts, but the fragmentation of the legal aid system was also noted by the Committee. That is, ALRC noted in its March 1998 submission that the legal aid industry or system lacks coordination at the national level. The fragmentation of legal aid commissions on a state to state
basis provides for inefficiencies and duplication of resources. Furthermore, the Committee examined legal aid in family law matters and noted the serious impact of the Commonwealth’s proposal upon domestic violence issues in the state arena. The Committee correctly notes that the domestic violence issue was elevated to a national priority by the Prime Minister in 1997. However, the clear impact of a reduction in legal aid funding would be to reduce the availability of funding to victims of domestic violence when seeking domestic violence orders in a state’s jurisdiction. This is because state governments have to allocate funding priorities to criminal matters and children matters before funding is received by domestic violence victims in a state’s jurisdiction. Finally, the Committee noted in general the changing legal aid community or industry and the effect on the wider community.

The third report on its own accord represents a useful vehicle in demonstrating impacts of legal aid funding cuts upon the legal aid industry and the irritations it produces as represented by the evidence in submissions made to the Committee.
PART B: ANALYSIS AND INTERPRETATION OF CASE STUDIES

5.7 Methodology and the OCST Typology

It was foreshadowed at the beginning of this chapter that there would be value in analysing other aspects of the legal aid industry (that is, all stakeholders in the provision of legal aid services to those who cannot afford private legal services) an attempt to further test Hypothesis One. I shall employ the same OCST typology of the previous chapter. I will apply in a selective manner the four research questions outlined above, namely:

(i) Whether there is evidence of operative closure and internal reference in the case study.

(ii) Whether there is evidence of structural coupling and peripheral operations in the case study.

(iii) Whether there is evidence of some type of epistemic trap in the case study.

(iv) Whether there is evidence of irritation and mutual irritation in the case study.

It should be clear that the four reports referred to have one common underlying theme of legal aid decline. That is, they are reports and submissions producing communications which originate from different stakeholders in the ‘legal aid industry’. The various reports and submissions themselves describe the creature under investigation as the ‘legal aid system’ or ‘legal aid community’. This theme has some parallels with ALRC Report No. 89. I shall use the term ‘legal aid

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7 See Chapter Four typology for contrast.
industry' as it denotes correctly a segment of the community which provides service in a industrious and methodical fashion. Furthermore, the reports and submissions will be usefully analysed subsequently in this chapter as texts and communications originating from various segments of the legal aid industry, which in turn, evidence a form of 'structural coupling' understood by Ziegert. Whether or not such a 'legal aid industry' is a 'structural coupling' or 'temporary coupling' as understood by OCST will be examined later in this Chapter. The communications which are produced by these stakeholders will determine the nature of the coupling, if any.

5.8 Operatively Closed Systems Interpretation Applied to the Springvale Legal Service Report

The writer is strongly of the view that OCST adopts a fundamentally reflexive posture. That is, while Selznick describes the various stages of legal evolution as primitive, autonomous rationality and purposive rationality, OCST is post-Selznick and effectively adopts a reflexive and self-referring paradigm (Teubner, 1989).

For the purposes of a reflexive interpretation of the legal system in society, the Springvale Legal Service Report has some merit as a case study.

Applying the research question, I need to first look at whether there are subsystems present. One can argue with some confidence there is a legal system present in the form of the Springvale Legal Service which forms part of the periphery of the legal system (Luhmann, 1993b, p.307). Furthermore, the presence
of the political system is evident in the form of the Commonwealth Government cutting legal aid by a substantial margin. Accordingly, the periphery of the legal system and centre of the political system appear to be present.\(^8\)

\textit{Is there evidence of operative closure?} There is some evidence of operative closure within the methodology of the survey of the Springvale Legal Service. The questionnaire which is annexed to the Springvale Legal Service Report was forwarded to 160 practitioners listed as family law specialists under the Law Institute of Victoria Specialisation Scheme. Other participants or stakeholders in the legal aid industry were not contacted. For example, the Commonwealth Government or its officers were not contacted, nor were stakeholders in the courts which form the centre of the legal system. It could be argued that there is some evidence within the methodology of the report that Springvale Legal Service which operates in the periphery of the legal system has consulted another component of the legal system, namely, the legal profession. It is understandable given that the Springvale Legal Service and other legal centres rely heavily upon the contribution of the legal profession to ensure its continued viability. Furthermore, legal aid private practitioners in Victoria appear to constitute the great majority of the source of legal services for family law matters.\(^9\)

\(^8\) And it appears one is in each other’s ‘environment’.

\(^9\) Indeed, approximately 90 percent of family law matters in Victoria are traditionally handled by private practitioners in Victoria (Springvale Legal Service Report, 1997, p.3).
Is there evidence of structural coupling? Whilst OCST argues that the classic and most impressive form of structural coupling between the legal system and the political system is the written constitution and legislation, there are other forms of structural coupling which are evidenced within the case study.

I have spent considerable time in Chapter Two outlining the nature and definition of structural coupling. However, structural coupling can occur at a level below that which is often presumed. Ziegert writes in a valuable contribution of the supportive function of law in an area of relatively low normality and high instrumentality of the use of legal references as exercised by, for example, in social security law, welfare and equal opportunity law. He argues that the supportive function of law in these areas can be reinforced by a structural coupling with the welfare state. He links this argument with his findings that there is evidence that the legal correctness of the decision is not enough for legal references in order to be scripted as 'just' (Ziegert, 1995, p.507). He argues that legal practice is only selected for scripts in everyday life coping if it is coupled with further supportive communication which is provided by non-legal communication. Consequently, structural coupling of supportive law such as welfare law with the welfare state, for instance, is possible. The 'legal aid industry' would be an example of such a structural coupling. Therefore, it seems plausible and arguable that the legal aid industry, which involves stakeholders from the periphery of the legal system and
the core of the political subsystem constitutes structural coupling. The 'legal aid industry' appears to be more permanent than a temporary coupling.

*With respect to the Springvale Legal Service Report, is there evidence of an epistemic trap?* The notion of the epistemic trap is whereby there is some form of evidence of enslavement of the legal discourse to other first-order discourses, such as political or economic discourse (and a process of oscillation between autonomy and heteronomy) (Teubner, 1989). That is, the special problem which law faces is that it is obliged by the role it plays in modern society\(^{10}\), of stabilising and imposing order, to confront and deal with other discourses at the same time whilst attempting to maintain stability (King & Piper, 1990, p.26). The Springvale Legal Service displays some evidence of discourse confusion when it states:

> The spurious nature of the justification offered for the cuts is evidenced by the fact that the area which has sustained the heaviest cuts is one of the areas said to be a priority for Commonwealth funding, family law being the largest Commonwealth matter category. (Springvale Legal Service Report, 1997, p.2)

In this passage, there is some evidence of:

(i) Legal discourse conceding that the political discourse is superior and powerfully imposing; and

(ii) Recognition by the legal discourse of the inability of this discourse to comprehend the rationale for the political discourse in its decision-making and steering.

There are other passages in the Springvale Legal Service Report which are similar to the one sighted above. Indeed, the dismay which is displayed by the Springvale

\(^{10}\) As opposed to pre-modern society, where risk discourse was absent (Luhmann, 1993b).
Legal Service, which is a stakeholder in the periphery of the legal system, is evident in the following passage:

What we are witnessing is the dismantling of a system which has been largely successful over the past 20 years in ensuring that *all* Australians, regardless of financial status, have the opportunity to participate in the legal system when necessary. (Springvale Legal Service Report, 1997, p.20)

The dismay and irritation which is felt by the legal system in its periphery, known as the Springvale Legal Service, and also the private profession in Victoria, is an irritation of dismay which is not felt in this environment, namely, the political system. Structural coupling does ensure mutual irritation as well as a structural dependence. It does not ensure or promise the transfer of cognitive or normative positions or expectations.

Significantly, the Springvale Legal Service Report case study does provide some selective evidence of a reflexive system attempting to deal with its environment whilst pursuing a reflexive posture.

5.9 **Operatively Closed Systems Theory Applied to Family Court Research Report No. 20**

In terms of OCST, it is trite to say that the Family Court is the centre of the legal system insofar as it is one of the courts of the legal system. Furthermore, I have already dealt with the claim that the political system in my discussions is constituted by the Commonwealth Government in part and its funding cuts communications in particular.
I reiterate the assumption that the legal system is forced to deal with an overproduction of norms in postmodern society. This claim has been made throughout this paper and does not need to be repeated.

*Is there evidence of operative closure within the communications of Family Court Research Report No. 20?* Family Court Research Report No. 20, which was an extensive report, drew its methodology and data-gathering from a number of basic sources. They were:

(i) Questions completed by judges, judicial registrars and registrars

(ii) Observations of hearings of the Family Court

(iii) Interviews with litigants in person

(iv) Interviews with judges, judicial registrars and registrars

(v) Brainstorm sessions with registry staff and other practitioners

What is absent from the above data-gathering methodology are stakeholders in the political system such as:

(i) Members of the Attorney-General’s department

(ii) Members of the Government staff centred around the Prime Minister’s office

(iii) Members of ALRC

It is therefore arguable that given the communications constructed and data-gathering are from particular stakeholders within the periphery of the legal system, differentiation enforced. That is, by differentiating members of the legal periphery from members of the political periphery or centre, the legal system in this
particular work is conducting a self-operating and self-executing textual analysis. That is, by conducting research and publishing works in the public domain which are arguably meaningful only to members of the legal periphery, I can perhaps see some evidence of operative closure in terms of legal discourse as oppose to non-legal discourse, and legal operations as opposed to non-legal operations.\textsuperscript{11}

\textit{Is there evidence of structural coupling?} I suggest that the argument that I provided earlier in this discussion whereby the position of structural coupling was clarified by reference to Ziegert's work in particular is applicable here. There is no need to reiterate and repeat the discussion in relation to structural coupling as it is applicable for each and every one of the case studies that had been discussed in this chapter. Structural coupling amongst other things enhances the ability of a particular function of the legal system to deliver appropriate outcomes in environments of overproduction of norms. This is also applicable in the current case. The Family Court is the centre of the legal system but as a stakeholder in the legal aid industry (and a creator of peripheral operations as per the case study report), it is structurally coupled with the Commonwealth in its capacity in the political subsystem.

\textit{Is there evidence of an epistemic trap?} The epistemic trap is constituted by the requirement or need for the law as autopoietic autonomous discourse to subject its procedures and reality constructions to the higher authority and discourse of

\begin{footnote}
\textsuperscript{11} This necessarily reduces complexity and furthermore enhances the ability of the legal system to differentiate and otherwise selectively eradicate irritations from the environment.
\end{footnote}
first-order autopoietic systems such as economic or political systems. There is an
element of enslavement and the imposition of discourse in the notion of the
epistemic trap.

Legal discourse is caught in a simultaneous dependence on an
independence of other social discourses, thereby resulting in the permanent
oscillation between positions of autonomy and heteronomy (Teubner, 1989, p.2).
This latter aspect of heteronomy is the enslavement of the discourse which I have
referred to in the previous discussion.

This aspect of oscillation between autonomy and heteronomy can be seen to
some extent in Family Court Research Report No. 20. At Appendix A to Family
Court Research Report No. 20, judicial guidance for litigants in person is
comprehensively outlined. The framework for judicial guidance of litigants in
person was set out by the Full Court of the Family Court in the decision of Johnson
v. Johnson (1997) FLC 92-764 per Ellis, Baker and Lindenmayer JJ. In that case,
the husband was unrepresented at the trial and there was a child representative as
well as solicitor and counsel for the mother. The trial judge did not inform the
husband of the consequences of allowing evidence by a psychiatrist without notice.
The Full Court outlined a framework for the Court’s dealings with litigants in
person and outlined eight obligations for trial judges in doing so. The decision in
effect provides a framework in which the Family Court is to inform the litigants in
person of his or her basic rights and obligations with respect to litigation but does
not go far enough as to constitute legal advice. This reflects the operative closure
and subsequent epistemic trap of the legal system. It reflects on possible oscillation between autonomy (do not provide legal advice) and heteronomy (the need to assist the special litigant in person).

In an earlier case of *Sadjak v Sadjak* (1992) 16 Fam LR 280 per Nicholson CJ, Nygh and Purdy JJ, the Family Court looked again at the fine line the court must tread with respect to not giving legal advice but informing the litigants in person of their basic natural rights and obligations.

The Family Court said:

In this regard there is very little that a Court can do. Its role is to decide cases between litigants and it cannot perform that role and retain the confidence of litigants if it is proffering advice to one side or another.

There is, therefore, some evidence that the Family Court, on the one hand, wishes to exercise autonomy in its operative closure as legal discourse, but on the other hand, needs to submit its operations to litigants in person who have no legal discourse training nor are represented by a counsel who can engage in legal discourse. The Court, therefore, transforms itself through the principles outlined above into a role which it is not traditionally operatively accustomed to. This therefore provides selective evidence of the oscillation between autonomy and heteronomy, and therefore provides some evidence of an epistemic trap. It does not provide the Family Court with any great joy given the remarks by the Court, but the Court has outlined a framework to deal with this particular difficulty.
Is there some evidence of irritation or perturbation? It is now probably appropriate to use a slightly different definition of irritation. Critics of OCST such as Beck write that the concept of irritation or perturbation needs to be properly addressed. OCST has responded by writing that the system in its normal dealings with its structural coupling does not observe structural coupling per se but does have to contend with perturbations and surprises from its environment (Luhmann, 1992, p.1432). Perturbations are purely internal constructions because they appear only as deviations from expectations from within the structure of the legal system. The environment does not contain perturbations as such (Luhmann, 1992, p.1432). This is because the idea of closure and structural coupling exclude the idea of information entering the system from the environment through the boundary. However, without structural coupling there would be no perturbation and the system would lack any chance to learn and transform structures (Luhmann, 1992, p.1433). Therefore, perturbation is a necessary precondition for building up regularities to construct order from noise or redundancy from variety. In this way, structural couplings provide a continuing influx of disorder against which system maintains or changes the structure and is a most necessary mechanism for the survival of the system in its environment (Luhmann, 1992, p.1433).

Chapter Seven of the Family Court Research Report No. 20 is headed: What are the effects of a party being unrepresented? Interestingly, the responses were characterised and reported from the point of view of the legal system
internally. At page 37, it was reported at footnote 108, reporting from the point of view of a judge:

It was very stressful. You have to be so careful about what you are doing, and you just see the day seeping away from you; it would not be as bad if she was represented.

At footnote 109, the report provides a judge also indicating ‘it was stressful. I got much more information than I should have because of the unrestrained exchanges from the parties’. Therefore, it appears that the legal centre is constructing the litigant in person as an irritant from its environment, specifically in these cases.

At page 37, the report noted judges and judicial registrars indicated the effects on the Family Court of litigants in person. There was often an increase in the time taken for a hearing they submitted, and that there are frequently more mentions, return dates and administrative tasks.

The report was able to conclude at page 42 that in summary the comments of judicial officers suggested a high degree of frustration arising from litigants in person as irritants from the environment. The chief sources were:

(i) A litigant in person’s inability to state clearly the issues and disputes or produce evidence that was relevant.

(ii) A litigant in person’s lack of knowledge of procedural and documentary requirements which often means that matters have to be dismissed or adjourned.

(iii) The difficulty of ‘walking the line’ between assisting the litigant in person without offering legal advice and prejudicing a represented party (Johnson’s case).
It is important to note that the litigants in person themselves are often ignorant of the frustrations and sources of frustrations outlined above. Litigants in person are ignorant of their lack of knowledge of procedural and documentary requirements and are ignorant of the requirements of evidence. This is consistent with the environment lacking knowledge of irritations that it may cause in systems. However, whilst the environment itself does not constitute a perturbation, the judges or the legal system do interpret and construct internally selected irritations and perturbations from the noise of the environment. Accordingly, there is some evidence within Family Court Research Report No. 20 of perturbations internally constructed within the legal system as a result of litigants in person engaging in litigation.

*Is there evidence of the legal system changing its structure after a continuous influx of perturbation or disorder?* Interestingly, Family Court Research Report No. 20 at pages 61 and 62 under the subheading, *Implications,* describes what the Family Court must engage in if the phenomena of litigants in person does not abate. That is, *what are the consequences for the legal system if perturbation of litigants in person is not removed?* Initially, the report concludes that more funding for legal representation at the legal aid stage will help remove the growing phenomena of litigants in person. It also calls for a greater investment in legal aid funding which may result in cost-savings for the Court and therefore,

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12 Indeed, it is reported that LIPs enjoy the novelty of court participation unrepresented.
the taxpayer. However, at page 62, the report concludes that if such phenomena is not dealt with, as indicated, then the Court and government agencies will need to reconceptualise litigants in person and their needs. For example, whilst at present the system sees litigants as either represented or unrepresented, a redefinition of litigants in person could perhaps see the adoption of the benchmark 'meaningful opportunity to be heard'.

The precise requirement set by this benchmark would vary according to the circumstances of each case and according to the needs and capacity of each litigant (Family Court Research Report No. 20, 2000, p.62). At page 63 of the report, a number of recommendations are made whereby increasing information to litigants in person may help the system to achieve the benchmark of the 'meaningful opportunity to be heard' standard. Such information and assistance includes:

(i) Information related to Family Court procedure and etiquette.
(ii) Information regarding support services available to litigants in person.
(iii) Offering mandatory primary dispute resolution.
(iv) Assistance in preparation of Court documents and forms.
(v) Help in the preparation of oral arguments to the Court.
(vi) Advice in relation to the rules of evidence.\(^{13}\)

It is noted that the assistance and information above is in part already provided to litigants in person, but the recommendations above suggest a significant shift in

\(^{13}\) Australian Family Court Registry advised the public that this advice is not policy.
information and non-specific legal advice to litigants in person. Therefore, Family Court Research Report No. 20 insofar as it represents communications of the Family Court or legal periphery in the selected case provides some evidence in which the legal system is incrementally suggesting change to its structure in the face of a continuous influx of perturbation and disorder. Whilst the legal system internally constructs litigants in person as significant stressors and perturbations, it would appear that there is some evidence at pages 61-63 that the Court has reluctantly conceded that Government policy will not materially affect the phenomena of litigants in person. Therefore, the suggested changes at pages 61-63 indicate a reluctant structural change to its own operations in the face of this continuing phenomena and perturbation.

5.10 Griffith Legal Aid Report and Operatively Closed Systems Theory

I outlined the background for this important study of the impact of legal aid changes on family law practice in Queensland earlier. It is important to note that the ‘general article’ is a summary of the Griffith Legal Aid Report outlined by the same authors and found at ‘Impact of Legal Aid Changes on Family Law, Practice Australia’, Journal of Family Law (1999) p.33.

Is there some evidence of operative closure within the Griffith Legal Aid Report case study? At page 35 of the general article prepared by the authors in relation to the Griffith Legal Aid Report, they write:
Some private practitioners - still clinging to old ideas of level playing fields, but find themselves increasingly despairing of their ability to deliver it within the constraints of the rate they are paid and the bureaucratic oversight to which they are increasingly subject.

This bureaucratic transformation of the legal aid system, which is constituted by a structural coupling of the social justice mechanisms of the state and the supportive function of the legal system, is also reported by the authors at page 37 of the general article where they indicate that there has been a large-scale employment of assignment of officers who are administrative staff as opposed to qualified lawyers. They report that this change has had a large impact on practitioners’ perceptions of the system as a whole. The frustration felt and constructed by practitioners is reported at page 40 of the general article where the authors write:

The most commonly sighted reasons were the reductions since 1992 in rates of remuneration for legal work . . . and the ‘hassle’ of dealing with LAQ (including frustrations arising from ‘merits’ decisions being made by legally unqualified LAQ staff).

This increasingly bureaucratic operation of the legal aid industry reflects a culture change in legal aid decision-making. At page 23 of the Griffith Legal Aid Report 1998, the authors note that discretions are exercised in deciding whether to allow extensions of aid or unusual expenditure. They note and report that there seems to be unwritten changes in all of these areas in recent times. They report that although there may be regional differences in patterns of decision-making, this culture of legal aid decision-making involving discretions in accordance with unwritten guidelines constitute some type of bureaucratic closure. Furthermore, at pages 46-47 of the Griffith Legal Aid Report, the authors note there is a cultural shift in
decision-making whereby there are two sets of guidelines, namely, the published versus the unwritten or ‘real’ guidelines. They reported that they received evidence and noted submissions that with respect to the unwritten guidelines, what truly happened is that when funding is short, assignment officers are told to restrict the grants of aid and they do so. Furthermore, Legal Aid Queensland advised the Senate Inquiry Into Legal Aid (which I shall refer to later in this chapter) that the way in which Legal Aid Queensland operates the system is that they have a commitment budget each month and they must operate within the budget. Revised guidelines of 1998 provide that fully compliant applications may be refused legal aid solely for budgetary reasons.\footnote{This approach has been relaxed since.}

If I characterise operational closure as closure of its operations and internal reference, then realignment of the legal aid industry towards budgetary measures and bureaucratic principles provide some tentative evidence of operative closure. That is, if operative closure is defined as a circular and reciprocal conditioning of code and programs (Luhmann, 1992, p.1428) then the legal aid industry’s realignment of its operations to bureaucratic and budgetary codes and programs provides evidence of circular operative closure.

*Is there evidence within the Griffith Legal Aid Report of a domain of communication?* By this I mean, *is there evidence of authors acknowledging the importance of communication as a discourse as conceived by Luhmann and*
Teubner? Luhmann, for example, describes communication as the domain in which
the differentiation of a legal system becomes possible. There is some brief
reference to this importance within the Griffith Legal Aid Report. They write at
page 51:

Instead, there have been multiple changes which, we have
suggested, cohere around a ‘bureaucratised’ conception of legal aid,
but it is a conception that has yet to be made explicit to the very
people on whom the system so heavily relies.

Although this is a very brief reference to the importance of communication and the
domain of communication, it does provide some evidence of the importance of
discourse and its ability to differentiate the system. In this particular case, there is
evidence, scant as it may be, that whilst the operative closure of the legal aid
industry has been evidenced by the transformation of the industry into a
bureaucratic and budgetary program, the differentiation is not complete as it has
not been subject to the incorporation of these changes into discourse which has
been communicated throughout the system. To this extent, there is evidence of the
importance of discourse in differentiating the operative closure of the system. A
similar sentiment and evidence exist at page 35 of the same article.

Is there evidence within the Griffith Legal Aid Report of an epistemic trap?

At page 48 of the Griffith Legal Aid Report, they write:

Family Court judges also find they have to bend over backwards to
ensure that the LIP has an opportunity to put their case properly
which can also be time-consuming.
Furthermore, the authors note at the same page that the Family Court when involved in cases which are run by litigants in person would usually take much longer than parties which are represented, and litigants in person failed to understand the rules of evidence and procedures. It notes that Family Court judges need to, in effect, on the one hand, provide increased advice and assistance to litigants in person, but on the other hand, cannot deviate from its role as a Court engaged in legal discourse with programs constituted by legislation and the rules of evidence. This ‘bending over backwards’ does provide some evidence of the oscillations between the Court’s autonomy and heteronomy as described by Teubner (Teubner, 1989, p.4). That is, there is some tentative evidence that the judges and the Family Court, on the one hand, express autonomy in engaging in legal discourse in traditional forms of operative closure, but on the other hand, need to bend over backwards to assist litigants in person who do not engage in legal discourse and are not trained to engaged in legal discourse. There is, therefore, some evidence of an epistemic trap process in the Griffith Legal Aid Report. Further evidence is found at page 69 of the Griffith Legal Aid Report itself whereby report writers note that there have been strong recent criticisms by judges of the difficulties caused by unrepresented parties in court proceedings. They also note that Justice Frank Vincent of the Victorian Supreme Court considers it is almost impossible for a judge to act in part as counsel to one of the parties who is unrepresented in order to ensure that that person’s right is to be protected.
Is there some evidence of irritation and perturbation in the Griffith Legal Aid Report case study? At pages 50-51 of the general article written by the authors of the Griffith Legal Aid Report, the report writers note there has been a disintegration of the legal aid system traditionally conceived as the guarantor of level playing fields. I have also noted that at page 48 of the same article, the report writers note that the Family Court judges have had to bend over backwards to ensure that litigants in person have an opportunity of being properly heard, producing frustration and great delays.

Furthermore, the report writers note at page 50 of the general article:

Government policies still invoke the rhetoric of level playing fields - a rhetoric, we have suggested, which is at odds with the reality that successive governments have done so much to create.

They go on to say, ‘All of this points to a crisis in the legal aid system, at least insofar as it is conceived in traditional terms.’ At page 68 of the Griffith Legal Aid Report, the then-Commonwealth Attorney-General, Daryl Williams, describes the legal aid system as a ‘Rolls Royce’ scheme. The report writers noted that this comment was strongly criticised by legal aid agencies and the legal profession. One commentator suggested that the Attorney-General had shown a surprising lack of knowledge about Australia’s legal aid scheme, a scheme which is poorly funded in contrast to other legal aid schemes throughout the international community. There is some evidence here that a comment by the Commonwealth Attorney-General has been internally constructed by the legal aid industry as a irritation and a perturbation. Another comment by the Federal Attorney-General was reported at
page 69 of the Griffith Legal Aid Report whereby he was quoted as indicating that judges in his opinion should have the capacity to run a trial that is fair when an accused is unrepresented. He also indicated that if they could not, they should not be in the job. This remark was regarded by the Attorney-General himself as not necessarily controversial, but was internally constructed by the legal aid industry and judges themselves within the court system as highly problematic and unrealistic. Again, there is some evidence that whilst the environment itself (remarks by the Attorney-General and Government policies) do not in themselves constitute perturbations, when internally constructed by the legal aid industry, they are constructions of perturbation and irritation.

_IS THERE SOME EVIDENCE WITHIN THE GRIFFITH LEGAL AID REPORT CASE STUDY THAT A CONTINUOUS INFUX OF SUCH DISORDER AND PERTURBATION LEADS TO A CHANGE IN STRUCTURE OF THE LEGAL AID INDUSTRY INTERNALLY?_ Report writers of the Griffith Legal Aid Report in their general article note at page 50:

'It may be that we have to reconceptualise the aims and functions of a legal aid system. Perhaps the appropriate comparator is not the privately funded litigant, but a party with no legal advice at all. Compared with the latter, the assisted person may be better off to some degree.'

They go on to say at page 51:

'Our research suggest that the relationship between the profession and state funding bodies needs to be urgently addressed if the system is not to collapse entirely.'

Therefore, there is some evidence that if the traditional level playing field model of legal aid is not to be embraced and maintained, then an alternative conception of
legal aid services needs to be formulated in the face of continuous influx of
disorder and perturbation which has been evidenced above.\textsuperscript{15}

\section*{5.11 Operatively Closed Systems Theory and the Senate Legal
and Constitutional References Committee Inquiry into the
Australian Legal Aid System 1998}

The Senate Inquiry Into the Australian Legal Aid System 1997 comprised three
reports, of which the third report was the most comprehensive in terms of issue
analysis and consideration of submissions.

This report (hereafter referred to as the Senate Legal Aid Inquiry 1998) is
now to be examined in light of Hypothesis One and the OCST typology of research
questions.

\textit{Is there evidence of operational closure or circularity found in the Senate
Legal Aid Inquiry 1998?} When I refer to operative closure I also refer to circularity
and internal reference. Operative closure is nothing else but autopoiesis. That is,
there is simply a circularity or reciprocal conditioning of code in programs
(Luhmann, 1992, p.1428).

In relation to the Senate Legal Aid Inquiry 1998 at page 135, the
Committee refers to a ‘new management culture and its implications’. This new
management culture that the legal aid commissions have embraced reflects a
preoccupation with commercial management priorities that may operate at the

\textsuperscript{15} This alternative conception has yet to be fully monitored as at 2005.
expense of the social service priorities that should underpin all legal aid decision-making. Furthermore, at page 139, the Committee noted that witnesses had submitted that Legal Aid Queensland was becoming more efficient and management-orientated.¹⁶

Furthermore, the Committee noted at page 138 of the third report that the bureaucratic and excessive rigidity of Victoria Legal Aid was limiting the welfare role.

At page 141 of the third report, the Committee noted a periphery of accountants in legal aid commissions and that they were tending to operate as businesses as opposed to legal aid providers. This preoccupation with management and bureaucratic business models appears to provide some evidence that legal aid commissions are preoccupied and constantly refer to the rationality of business model and bureaucratic models. The ‘welfare’ role is no longer the standard reference for the delivery of legal aid services by the legal aid community, according to the Committee.

Indeed, whilst the Senate had as terms of reference the capacity of the Australian legal aid system to meet community demands for legal advice and other advocacy services in accordance with its international obligations and equity justice principles, it would appear that the Committee has noted that the welfare role has largely been abandoned by the legal aid commissions. They have noted a

¹⁶ But that was not necessarily beneficial.
new culture which constitute the new programming for the legal aid community or system. This reference to programs of bureaucratic efficiency and business modelling provides some evidence of operative closure or circularity.

*Is there evidence of structural coupling in the case study?* The supportive function of law coupled with the social justice programs of the state can comprise a structural coupling (Ziegert, 1995, p.508). The legal aid industry is an example.

In terms of the third report, Senate terms of reference for the Senate Legal Aid Inquiry 1998 is to be found in the preface of the third report. The terms of reference were in an abbreviated form:

(i) The capacity of the Australian legal aid system to meet community demands for legal advice and other advocacy services.

(ii) To inquire into the responsibilities of the respective Commonwealth and state governments in the provision of legal aid to the legal aid community.

(iii) The implications for Commonwealth responsibility for legal assistance arising from its international obligations and national equity and justice imperatives.

(iv) The nature of legislative and other impediments to the effective delivery of legal aid assistance.

(v) The levels of disparity between Commonwealth Government payment of legal services it uses as opposed to legal aid lawyer remuneration.

(vi) The relationship between the legal profession and the government in delivery of legal aid assistance services and the role of courts in minimising costs of those services.

(vii) The equity implications arising from the current tax deductibility regime.

(viii) The implications upon legal aid arising from the High Court *Dietrich* decision.
(ix) The capacity of the legal aid system to provide for separate representation of children where it is essential.

The terms of reference were spelt out in detail because they do indicate in a formal setting for the public record in the public domain that the delivery of legal aid through the device of the legal aid community is an important national and international priority with consequences for equity, justice and access. There is some evidence of structural coupling as acknowledged by the terms of reference in the preface to the third report. If structural coupling did not exist for the legal aid community, there is some doubt as to whether or not the terms of reference would have been so comprehensive and would have referred to the Government’s obligations to the supportive and welfare role in terms of disadvantaged members of the community when wishing to gain legal aid access and advice.

At page 182 of the report, the Committee noted that the National Association of Community Legal Centres submitted that the rationale for legal aid arises directly out of the role that the legal system plays in a democratic society. The Committee went on to note that a lack of effective access to justice leads inevitably to the marginalisation of the law and to the irrelevance of the court institution. They went so far as to point out that ‘legal aid is critical to the maintenance of justice and the rule of law, and ultimately democracy’ (Senate Legal Aid Inquiry Third Report, 1998, p.182).

Therefore, there is some evidence that the Committee is of the view that structural coupling constituted by the supportive function of law and the social
justice agenda of the state results in a structural coupling (legal aid system or legal aid community) which is essential for the proper maintenance of democracy and the rule of law.

*Is there evidence of some importance placed upon the domain of communication in the Senate Legal Aid Inquiry 1998 Report?* Communication is the domain in which the differentiation of the legal system becomes possible. The legal system cannot communicate as a unity, and society has no address (Luhmann, 1992). However, the operation of discourse in communication allows for operative closure.\(^{17}\)

At page 144 of the third report, the Committee notes a submission from the Legal Services Commission of South Australia. It notes pointing to that submission that restrictions on legal aid give rise to communication about such restrictions. The submission noted that there is an increasing number of people who will not access legal aid services because of the effect that these restrictions have had. The submission goes on to note that there is a self-fulfilling effect whereby demand will drop off as a result of the widespread communication of restrictions. Furthermore, at page 146, one of the effects of the restrictions will be the effects upon the law reform process. The Committee noted at page 146 that if access to justice is an accepted objective of Australian law, those who are denied justice by restrictions in the legal aid community must have a voice in the law reform process. One method

\(^{17}\) Therefore allows for the distinction of the legal system from its environment.
of facilitating this voice is through community consultation. The Committee notes that with decreasing resources, the commissions were finding it increasingly difficult to deliver services to the wider community. For example, in Western Australia the restrictions have reduced the capacity of the Commission to fund consultative groups such as the access and equity working party (Senate Legal Aid Inquiry Third Report, 1998, p.147).

There is some evidence that the Committee is of the view that the consultative and communications process is vital to (i) law reform; and (ii) education of users of the legal aid community. Furthermore, it is interesting to note that the communicated restrictions in the opinion of the Committee has the effect of modifying the behaviour of users of the legal aid community.

_is there evidence of an epistemic trap in the case study?_ The epistemic trap is the simultaneous dependence on and independence from other social discourses, and manifested by modern law permanently oscillating between positions of cognitive autonomy and heteronomy (Teubner, 1989, p.4). In particular, I am hoping to find an oscillation between competing discourses which may give some indication of an epistemic traps in the case study.

One discourse to which the Senate Committee is committed to is the discourse found in the terms of reference in the preface of the third report. I paraphrased at length the contents of the terms of reference earlier in the analysis.

It can be said that the contents of the said terms of reference are highly biased towards the ‘welfare role’ of the legal aid community. Furthermore, as
discussed, the Committee has made a strong statement that legal aid is critical to the maintenance of justice and the rule of law, and ultimately, democracy. In this context, the discourse of ‘welfare’ is the traditional discourse of the legal aid community.

A competing discourse which emanates from the environment and not the legal aid community is the discourse and culture of ‘efficiency and management’. Chapter Eight of the third report indicates the ‘changing legal aid community’. It is largely comprised of analysis of the new management culture and its implications. I have already indicated the various references by the Committee to the competing rationality of ‘efficiency’ and managerial business models. It is these competing discourses of managerial economics and business models which are referred to by Teubner as discourses of heteronomy. Business models and managerial efficiency models arise out of the economic system. The economic system originally constructed the coding of have/have not or money and no money.

Programs here are programs of efficiency and managerial research. Programs enhance the distinction between money/no money and the acquiring of greater amounts of money. The economic system is one with low normativity and low instrumentality which is otherwise known as adaptation (Ziegert, 1995, p.501).

In any event, the phenomena of the rise of economic rationality and optimal modelling is modelling or rationality which arises from the economic system (Brans & Rossbach, 1997, p.435).
The references in the third report to the competing rationality or discourse of business models or efficiency models are models of discourse which compete for autonomy but in fact, constitute heteronomy. There is, accordingly, some evidence within the third report of an epistemic trap.

*Is there evidence of irritation or perturbation in the case study?* That is, *are there irritations or perturbations channelled by structural couplings which are internally constructed by the legal system in its centre or periphery?*\(^{18}\) At page 76 of the third report, the Committee noted that one of the impacts of the new arrangements of legal aid restrictions would be that certain female complainants in domestic violence applications would be left with no funding to complete a case in the Family Court or the local court. This would exacerbate the existence of power imbalances between domestic violence victims and male defendants.

The Committee noted at page 159:

The failure of the Commonwealth Government to take into account the complex nature of legal aid services and the interdependency of the groups that provide these services have had a profound effect on a wide range of individuals and groups.

At page 166, the Committee noted that people would feel powerless as a result of restrictions in legal aid and increasing complexity of legislation. In particular, the Committee noted that the Administrative Appeals Tribunal provided a submission that legislative complexity was a problem for veterans. Therefore, the Tribunal requested that all laypersons have at least legal assistance.

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\(^{18}\) That is, ‘autopoiesis’.
Chapter 5: A Systems Theory Interpretation of the Reduction in Legal Aid Funding

The Committee also noted at page 168 that the Social Security Appeals Tribunal had provided a submission that due to the confusing and uncertainty experienced by people who had limited access to information, services and legal aid services, the Social Security Appeals Tribunal had noted a large number of appeals which would have been avoided but for legal aid restrictions.

The Committee noted at page 176 that the culture of management and the restriction in legal aid to the legal aid community have resulted in despair and anger. The Committee had noted that many witnesses had testified to the emotional effects of denial of services including tension, anger and frustration, at page 172. The Legal Services Commission of South Australia provided a submission at page 172, whereby it was reported:

>You need also to bear in mind the human cost - the cost and stress to the litigant, the person who sits in my office and cries or screams or thumps the table or threatens suicide because they cannot see how they can get justice without representation and there’s simply no alternatives open to them. (Senate Legal Aid Inquiry, 1998, p.172)

The Committee notes also in relation to the effects upon the family law area that Family Court judges had noted in their submissions to the Committee that funding restrictions had increased waiting times and meant that funds could be expended prior to hearing. In particular, it meant in a case study provided by way of submission to the Committee that a mother continued unrepresented for two-and-a-half weeks in a case that should have taken only three or four days, and ended up
with a result of joint residence as opposed to primary residence to the mother or father.\textsuperscript{19}

Furthermore, the Committee noted that where people are unrepresented and do not have the required skills or experience to cope, they will usually have a detrimental outcome.

The Committee notes:

A lack of effective access to justice leads inevitably to the marginalisation of the law and to increasing irrelevance of the core democratic institutions. It is not overly dramatic to assert that, legal aid is critical to the maintenance of justice and the rule of law, and ultimately, democracy. (Senate Legal Aid Inquiry, 1998, p.182)

Therefore, I can argue that there is some evidence of perturbation and irritation that is internally constructed in the legal aid system. The report provides submissions made by participants of the legal aid community or legal aid system regarding wide-ranging detrimental effects as interpreted by the legal aid community. The sources for these disorders and perturbations arise out of the environment, and the environment does not regard or interpret the original legal aid funding cut as an irritation or disorder. It is the internal construction by the legal aid community which renders the pressure a disorder and irritation.

\textsuperscript{19} Joint residence decisions are rare in the Australian Family Court after a disputed final hearing due to impractical considerations of two homes.
5.12 Summary

In Chapter Five, I applied four questions in the typology of OCST to the four case studies in order to test Hypothesis One, namely, 'That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST'.

The four OCST typology research questions were:

(i) Is there evidence of operative closure and circularity in the case study?
(ii) Is there evidence of structural coupling in the case study?
(iii) Is there evidence of the epistemic trap and the oscillation between autonomy and heteronomy in the case study?
(iv) Is there evidence of perturbation and irritation in the case study?

In each case, some evidence was found to answer each question in the positive. Hypothesis One was supported.
Chapter Six

Systems Theory and the Operation of Self-Steering by Subsystems: A Case Study

6.1 Introduction

In Chapter Five, I applied selected case studies and tested and analysed Hypothesis One of the research problem with the assistance of OCST. I made findings in Chapter Five that were positive with respect to each of the OCST typology research questions.

Hypothesis One is: ‘That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST’. The positive findings in the case study data support Hypothesis One of the research problem.

Hypothesis Two of the research problem is: That OCST will predict in the case study data the undesirability of attempts of direct steering of the legal system by the political system’.

Chapter Six will introduce the notion and concept of ‘steering’, ‘epistemic trap’ and ‘self-steering’. It will then analyse a case study.

The case study of King and Piper, How The Law Thinks About Children (1990) will be examined. I have selected the case study for a number of reasons. First, I practise in the children’s jurisdiction in New South Wales as an attorney, and I found the study research compelling. Second, there is little research in steering, apart from King and Piper and Paterson, as outlined in Chapter Two. I want to examine the research by King and Piper and extract from it their research
which may be used as a platform for testing Hypothesis Two and Three. As the remainder of this thesis is concerned with Hypothesis Two and Three, King and Piper’s analysis of steering and self-steering is highly valuable to understanding self-steering in OCST.

King and Piper come to certain conclusions about their own research questions. Their primary question was: *We want to see first of all whether this unfamiliar approach can throw light on current concerns over children’s issues in the courts, and secondly, what happens when ‘laws thoughts’ conflict with those of other social organisations’* (King & Piper, 1990, p.2).

King and Piper’s central research was the study of *Children in the Legal System*. They have articulated their understanding of Teubner’s writings as an aid in answering their primary question. They present a significant body of children law data which comprises the bulk of the case study for Chapter Six.

I will test King and Piper’s views on the development of steering theory and the epistemic trap. Teubner develops an escape route from the epistemic trap which is different to the solution by Luhmann. I will therefore select which escape route, in my opinion, presents the best solution for OCST.

Once I have chosen the best possible escape route from the epistemic trap, the resulting concept of self-steering will be seen in case studies in Chapters Six, Seven and Eight.
Hence, Chapter Six has three primary tasks:

(i) To introduce the concept of the epistemic trap, various escape routes from the epistemic trap and the different versions of self-steering and regulation.

(ii) To test the hypothesis: OCST will predict in the King and Piper case study data the undesirability of attempts of direct steering of the legal system (or any system) by the political system (or other systems) (Hypothesis Two).

(iii) To test the hypothesis: OCST will predict in the King and Piper case study the desirability of attempts of self-steering by the legal system (or any other system) (Hypothesis Three).

To achieve the above outcomes, the following questions are devised for this chapter:

(i) What is the child welfare/ justice dichotomy according to King and Piper?

(ii) What are the fundamental flaws in such a child welfare/justice dichotomy according to King and Piper?

(iii) What is King and Piper's understanding of OCST?

(iv) What is the ‘epistemic trap’ according to King and Piper, and Teubner?

(v) What are the possible escape routes from the epistemic trap and the different versions of ‘steering’ and regulation in OCST?

(vi) What is Teubner’s development of self-steering in OCST?

(vii) Do the findings of King and Piper support Hypotheses Two and Three?

(viii) Summary.

6.2 Methodology of King and Piper's Research

King and Piper's methodology is akin to multiple case study technique. They do not engage on a strict scientific quantitative study. Their methodology derives from
a type of ethnographic study where ethnographic means ‘cultural practices, praxis, social texts and subjectivities’ (Denzin & Lincoln, 1998).

King and Piper accept Teubner’s view that the function of strategic legal models is to produce criteria for the self-transformation of Law (King & Piper, 1990, p.34). As such, strict empirical falsification is not possible.

Accordingly, their qualitative research, which is experience based, is derived and formulated as follows:

Experience ... can be gained only in the form of social experiments in which those legal models are tried out. (King & Piper, 1990, p.34)

King and Piper then draw from the results of research, analyse all reported court cases and their own experiences to support the strategic model of Teubner and OCST.

The structure of their analysis in How the Law Thinks About Children is outlined as follows:

(i) Limits of welfare-justice dichotomy.
(ii) Law as a self-referential system.
(iii) The construction of children welfare science.
(iv) The child as a scientific artefact.
(v) The construction of conflict and conciliation in divorce proceedings.
(vi) The child as offender.
(vii) The law’s response and the responsiveness of law.
(viii) Child responsiveness legal systems.
Their research is wide-ranging and analyses reported cases in England, Canada, Australia, Europe and the United States. The research they draw upon is also wide-ranging.

6.3 **Background to King and Piper’s Child Research: What is the Child Welfare/Justice Dichotomy According to King and Piper**

The concept of state interference in the family is now well entrenched (King & Piper, 1990, Chap.1). Recent New South Wales legislation which outlaws the corporal punishment of children clearly demonstrates the extent to which state intervention has now become accepted and enshrined in law.¹ Throughout the western world there is a large child welfare industry comprised of numerous professionals undertaking life-long specialist training in child protection and juvenile justice.

There is a dichotomy in the theoretical paradigm in the child protection and juvenile justice systems (King & Piper, 1990, Chap.1). Policies and decisions in such cases are subject to two opposing ideologies. In the criminal justice system the ‘welfare’ concept is represented by the desire of law to diagnose the underlying sources of the children’s deviancy. The opposing concept of ‘justice’ is the

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¹ The first conviction under the amended NSW law was obtained in 2004, for a mother hitting a small child to the head in a supermarket.
traditional concern by the legal system for procedural fairness and appropriate punishment (King & Piper, 1990, Chap.1).

The welfare concept is generally embraced by the social welfare industry. These are social workers, juvenile justice officers and psychologists who are trained in non-legal therapeutic and counselling roles (Sinclair, 2002). The justice concept is embraced by none other than the professional body of lawyers and judges in the court system (King & Piper, 1990, Chap.1).

The framework of individualised justice which the concept of welfare asserts is inconsistent with formal legal rationality and the adversarial due process requirement of the justice or legal imperative (King & Piper, 1990, Chap.1). Accordingly, there is a welfare justice clash which arises out of the inconsistent theoretical frameworks.

King and Piper observe the clash of the welfare and justice frameworks in the care and child protection jurisdiction in their research. They note that in England and Wales, for example, campaigns for rights for parents and children have clashed consistently with the welfare of children lobbies. The appearance of lawyers to defend parents and their children against social work intervention is, as they note, a victory for the justice lobby. Essential to the justice lobby is the concept of ‘rights’ for parents and children. In England and Wales, the Children's Act 1989 was an attempt to balance the rights of parents and children against the intervention of the state and the removal of children on child protection grounds. King and Piper observe that the introduction of the Act, whilst progressive at the
time, has not diffused the inherent conflict and inconsistency of the welfare and justice models (King & Piper, 1990, Chap.1). They note that when a deadlock needs to be broken, the justice model inherent in the courts ultimately determines the outcome of the conflict.

In summary, King and Piper argue that the justice model is embraced and defended by the profession trained in adversarial due process and rights protection, whilst the welfare concept is embraced and defended by the child protection or welfare lobby made up of non-legally trained specialists in child protection. They outline policies for reforming the justice/welfare dichotomy which have been attempted in the last 20 years. They note that there have been two main attempts to reform the conflict (King & Piper, 1990, pp.6-8).

The first reform attempts is summarised as the separation of the two philosophies approach. King and Piper refer to the work of academics who interpret the juvenile justice system as an effective mechanism for defining welfare needs and delivering welfare services. They interpret the courts as less than ideal institutions for dispensing welfare or individualised justice. They argue strongly that the conflict between justice and welfare can be resolved by the elimination of either the justice or welfare concept through the imposition of legal rules and procedures (King & Piper, 1990, p.7). This would achieve the outcome of the separation of justice/welfare concepts.

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2 In New South Wales, the majority of these child welfare experts are case workers employed by the NSW Department of Community Services who are primary trained in social work.
The second major approach to the reform of the justice/welfare conflict can be sought through the integration of justice and welfare by ensuring the two philosophies are combined more effectively than has been the case in existing courts and institutions. For example, King and Piper note that the establishment of family courts in the area of matrimonial disputes is seen as a successful means of providing justice and welfare services in an integrated form (King & Piper, 1990, pp.7-9).

King and Piper then argue that whilst the first reform attempt of separation of justice and welfare concepts has had a strong lobby voice over the last 20 years, the second reform attempt of the integration of the justice and welfare concepts has pragmatically succeeded. They note the success of the Return to Justice Movement which was most influential in the United States in the mid-1970s and the United Kingdom in the 1980s. The Return to Justice Movement was able to insist upon the engagement of lawyers for children’s cases. This also reflects the United Nations Convention on Children’s Rights which has as one of its articles the requirement that children be represented in all legal proceedings by a legal representative.³

The welfare professionals referred to above have strongly argued for a humanising ideology in a legal world. King and Piper note that this strong welfare professional lobby has successfully integrated its humanising influence with the justice model successfully defended by the Return to Justice Movement (King &

³ See article 12 of the said Convention advocating legal representation for children in proceedings.
Piper, 1990, pp.8-9). Accordingly, King and Piper observe that the integration of the justice and welfare ideologies is the predominant reform outcome achieved in the mid-1990s. Accordingly, whenever a child protection case or a juvenile justice case is before the court, the court is required by legislative imperative, at least in New South Wales, to obtain a report from a welfare professional before determining sentence or child removal from a family.⁴

King and Piper refer to the work of Terry Carney⁵ in his then role as the Chair of the Victorian Child Welfare Practice and Legislation Review Body at page 8 of their work. They observe that that body had facilitated moves towards reducing the workload of the courts by filtering out those cases which would not require full-blown judicial determination. They then quoted Carney whose own view was that over-reliance on a judicative style of legal intervention should be addressed by ways of the substitution of facilitative laws. As King and Piper noted, Carney favours the integration and bond between the welfare and justice concepts.

King and Piper also note that in Australia and Victoria, the Family Court, which is a federal court, has been operating since 1975. The Family Court has rules and legislation which mandate counselling under Section 62 for all parties that commence proceedings or defend proceedings in that court. The Family Court funds a separate department within its own court structure staffed by specially

⁴ In NSW, the legislation requires a ‘Care Plan’ per S.78 and S.79.
trained psychologists or social workers who counsel parties in an attempt to resolve disputes at an early stage. This embraces the welfare philosophy. Furthermore, once proceedings are fully engaged, these same professionals prepare a Section 62G Family Court which assists the court prior to judicial determination. The fact that social workers or psychologists are involved in the preparation of reports which heavily influence judicial outcomes is a victory for the welfare industry. Statistics released by the Australian Law Reform Commission Report No. 82 reveal that approximately 85 percent of judicial outcomes are directly related to the outcomes of the family report prepared by psychologists or social workers in the Family Court under Section 62.

Furthermore, the *guardian ad litem* is observed as a further example of the bonding of the welfare and justice models in the courtroom. The *guardian ad litem* is a representative who is not usually a lawyer who provides advice to the court in relation to the best interests in protecting the child or a parent. In the child protection legislation of New South Wales as amended in 2001, the rights and duties of *guardians ad litem* are outlined in Section 99-100. The *guardian ad litem* is able to instruct a solicitor pursuant to Section 99 of the New South Wales Child Protection legislation.
6.3.1 What are the fundamental flaws in the child welfare/justice dichotomy according to King and Piper?

Despite the apparent success of the bonding and integration of the welfare/justice models, problems still persist. King and Piper argue that changes have made very little difference to the manner in which the courts, lawyers and court welfare professionals carry out their respective tasks and work roles. They note that some theorists have argued that a fundamental flaw or failure in appropriate outcomes is due to inadequate resources or the lack of cooperation between the professionals of the two respective ideologies. The example of the Family Court in Australia is a unique example in that they are a properly funded and resourced institution which gives dignity and recognition to the adherence of the justice and welfare models respectively.

King and Piper (1990, p.9) also note the useful example of the French 'juges des enfants' which is a French magistrate who incorporates both the welfare and justice ideologies in the one official from the ranks of the judiciary. These magistrates are trained in both legal rationality and the humanising influence of welfare concepts and ideologies. They arguably offer protection for the rights of citizens as well as the rights of children against the arbitrary intervention of the state. Similar institutions exist in Holland in the Office of the Child Protection Counsel and in France in the French Social Services Department in which both employ legally qualified officials. King and Piper (1990, p.10) note that this bonding has had some success.
However, King and Piper in their analysis, dig a little further and find that the fundamental flaw resides within the ways in which respective ideologies of justice and welfare construct their own realities. The justice model constructs ‘legal’ justice and is not at the same time able to construct what is better known by welfare professionals as social justice (King & Piper, 1990, p.10). They argue that the justice ideology constructs legal justice in terms of procedural fairness and rights being protected by appropriate sentencing. Social justice, on the other hand, embraces the wider notions of equity and social welfare and the balancing of these against the protection of rights. They then note and argue that legal justice is often an ideology to mask the existence and consolidation of social injustice (King & Piper, 1990, p.11).

Similarly, King and Piper (1990, p.11) note that the welfare professional industry has constructed the notion of ‘welfare’ which is quite broad and different to the notion of ‘welfare’ which is constructed within the law. They note that welfare offered by social workers is quite broad and approximates ‘social welfare’ and outcomes such as education, housing, healthcare and economic rewards. ‘Welfare’ within the legal system and within the law, however, is much narrower and is defined in terms of rights and duties (King & Piper, 1990, p.11).

Furthermore, the concepts of justice and welfare do seem to clash at an internal level. For example, King and Piper (1903, p.14) note that the legal

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6 Interestingly, ‘justice’ does not rate a mention in the child welfare legislation in NSW. The 1999 Act does repeatedly refer to the ‘safety welfare and well-being of the child’, as the test for a number of provisions in the child welfare legislation.
concept of welfare is far narrower than the broad concept of social welfare. They point out that the Australian Family Law acts as amended at sections 65 have a number of definitions with respect to the nature of ‘welfare’ of a child. These elements include:

(i) Nature of the relationship of the child with each of the parents
(ii) Effect of the child of any separation from either parent or any sibling
(iii) Desirability and the effect of any change in existing arrangements
(iv) Attitude of the child
(v) Capacity of each parent or of any other person to provide adequately for the needs of the child
(vi) Any other circumstances that in the opinion of the court the welfare of the child requires to be taken in account

In contrast, the English Law’s definition of child welfare is quoted by King and Piper as:

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\text{\ldots material welfare both in the sense of inadequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of adequacy of care to ensure that good health and due personal pride are maintained (King & Piper, 1990, p.13)}
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Accordingly, it would appear that the latter definition, which is similar to the United Nations Conventions on Children’s Rights definition of welfare of the child, is a broad social welfare one. It does not reduce the welfare of a child to ‘rights’ or ‘responsibilities’. Rights and duties are, however, mentioned frequently in the Family Law Act definition referred to above.
King and Piper (1990, p.14) conclude that those who advocate a welfare approach within the legal system cannot, in practice, deliver welfare as conceptualised by those who advocate welfare outside the legal system. Furthermore, they argue that those who call for the conception of justice are unable to provide a legal system dealing with children's issues which, in practice, operate according to social justice. They also observe that the integrated approach of justice/welfare concepts, in practice, is unable to explain the dynamics of the law and how it can respond theoretically to the relationship between children and their parents. In fact, they argue that there is a irreconcilable conflict between justice and welfare which leads to the ultimate flaw in the integrated approach of the welfare/justice model. Their question is ultimately: How do we reconcile the different views about the best institutional method to control children in care or family breakdown? (King & Piper, 1990, p.14). To answer this question, they attempt a radical new approach with a new paradigm.

6.4 What is King and Piper's Understanding of OCST?

King and Piper (1990, p.19) adopt the new theoretical framework and proposition that social reality is constructed, meaning there is no truth out there or there is no external objective social reality. The criteria for determining truth varies from organisations to organisations and from group to group, resulting in multiple versions of truth and reality.
They argue strongly that this multiple external reality applies equally to social institutions and organisations such as the legal system as it does to multiple realities for individual psychological persons. King and Piper (1990, pp.19-20) use the example in drawing upon the research of King and Garapon (1988) that where lawyers and childcare welfare experts meet in a court setting, the ‘facts’ that emerge are the results of negotiations as opposed to legal fact-finding methodology.

The number of possible truths are minimised due to formal and procedural characteristics for determining validity (King & Piper, 1990, p.20). This is similar to Luhmann’s notion of circularity in the internal binary code of a particular organisational system such as the legal system. Furthermore, programming within the legal system ensures that the truth of the legal system is either ‘law’ or ‘non-law’.

Accordingly, King and Piper (1990, p.20), drawing upon the work of Teubner (1989), see knowledge about the world as relative as opposed to absolute. This is the central benchmark of postmodernism in any event.

However, the radical aspect of Teubner’s work, according to King and Piper, is the proposition of social organisations and institutions such as the legal system thinking about themselves and about their interactions with their environments. King and Piper correctly point out that organisational thinking is a

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7 Which reduces the number of possible truths and limits them to the number of organisations which engage in truth-finding.
radical departure from most sociological theory and the way in which these traditional theories perceive the social world. King and Piper (1990, p.20) refer to the work of Luckmann (1967) and Mead (1934) which traditionally attempted to explain awareness of self and others through a process of internalisation of the social world and the social environment. The concept of an organisational thinking process detached and removed from the individual that may interact and to an extent comprise the organisation is a radical reformulation of social theory. The heavy emphasis upon ‘communication’ as the active constituting element of the ‘legal system’ is how Luhmann and Teubner differentiate and discriminate the organisation from the individual and psychological component of individuals in society. Drawing upon the classical work of Teubner (1989), King and Piper note that three theorists deal with the concept of discourse and communication in this new radical reformulation (Habermas, Foucault and Luhmann).

However, with respect to the work of Foucault and Habermas, Teubner with King and Piper note that there is a paradox of self-referencing and circularity (Teubner, 1989, pp.7-15). King and Piper (1990, p.21) point out that discourse, as explained by Habermas and Foucault, attempt to construct truth, knowledge and reality in ways whereby they obtain the knowledge of procedures for evaluating this truth, knowledge and reality by referring back to themselves. This result of circularity is sought to be excused and overcome by Habermas and Foucault in different ways. Habermas attempts to resolve the circularity paradox by reference to the ideal speech situation which is an abstract ideal position (Bausch, 1997,
pp.315-318). Foucault, on the other hand, invokes the process and concept of power to externalise self-referentiality. Teubner (1989, pp.7-9) has explained that neither of these attempts are satisfactory.

Teubner, with King and Piper consenting, argue strongly that Luhmann's approach of the doctrine and solution of self-reference by way of autopoiesis is a far better solution to the problem of circularity paradox. That is, rather than considering or determining that self-referentiality and circularity is a problem, it is far better to reformulate the problem as an essential characteristic of organisations in postmodern society (Teubner, 1989, pp.10-13). This reformulation and reversal of the problem into a self-determining solution, they say, is the brilliance of Luhmann's circularity theory (King & Piper, 1990, pp.19-22).

King and Piper acknowledge that the discourse will be an internal construction as perceived by Luhmann's autopoietic theory. Consistent with the notion of separate epistemies for different systems, each system will determine the validity of a particular epistemic knowledge through an internal procedure and process which has been constituted by the system's interaction with its environment (King & Piper, 1990, p.22).

Furthermore, King and Piper clearly indicate that Luhmann and Teubner strongly argue for an organisational or systemic process as opposed to a psychic and social autopoiesis. They note that Luhmann and Teubner's radical reformulation of social theory is exclusively based on communication and discourse (King & Piper, 1990, p.22). Accordingly, King and Piper make a clear
distinction between social constructions of reality and psychic constructions of reality.

Their conclusion is that social and psychic systems in no way relate directly to one another. Interestingly, King and Piper in quoting Teubner, note that 'psychic and social processes do co-exist, they are coupled by synchronisation and co-evolution but there is no overlap in their operations' (p.22). However, the important emphasis is that King and Piper's work by drawing upon Teubner, in effect, adopts Luhmann's primary concept of operative closure constituted by communications within each subsystem, including the legal system. The psychic system is not a part of the operative closure of the legal system and this is consistent with Luhmann's interpretation of the legal system.

King and Piper (1990, p.23) then note that Teubner's view of the separate episteme is a concept of postmodern society comprised of a fragmentation of society into autonomous discourses. In fact, they directly quote Luhmann and accordingly adopt Luhmann's concept of postmodern society and its fragmented communications (King & Piper, 1990, pp.22-26).⁸

Drawing upon my earlier discussion, if the legal system thinks: How does it think? I have already discussed the exclusion of the psychic system. Furthermore, King and Piper do agree with Luhmann that the legal system cannot deal directly with its environment or outside world. It can only reconstruct its environment or

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⁸ Teubner (1989) also adopts this separate epistemic approach which is consistent with our earlier discussion of fragmented multiple realities.
world in a form that is acceptable as legal communication or non-legal communication and accordingly deal with it with its internal binary code.

This has important consequences as far as King and Piper are concerned. They argue (p.23) that Luhmann’s approach creates problems for individuals who deal constantly with the legal system. According to King, Piper and Teubner, the legal system as an organisation does not deal with people in their psychic or actual physical state, but deals with them as semantic artefacts produced by the legal discourse itself (King & Piper, 1990, p.24; Teubner, 1989). This is a consequence of defining the legal system as effectively the result of operative closure of legal communications. If communications are in effect the essential ingredient of the internal circularity process, this would appear to exclude real flesh and blood people according to King and Piper. King and Piper note that this concept of a semantic artefact which is produced by legal discourse is often employed by the legal system in traditional doctrine. The concepts or devices of ‘the reasonable man’ or ‘the guilty party’ are some examples of these artificial semantic devices (King & Piper, 1990, p.24).

Furthermore, King and Piper do refer to other legal constructs such as ‘provocation’, ‘contributory negligence’ and ‘consent’ in rape cases. This reference by them to legal constructs do appear to at least in part give some validity to Luhmann and Teubner’s strong argument that the legal system when it operates with respect to operative closure does not communicate with its environment, but rather deals with its environment in a ‘domain of communication’ (Luhmann,
This concept of ‘domain of communication’ is referred to extensively in earlier chapters when I was dealing with peripheral operations.

King and Piper, consistent with Luhmann and Teubner, also adopt and accept that the legal system in its communications becomes an autonomous second order theory. King and Piper do accept that as the legal system is required to ‘resolve disputes’ with respect to issues in its environment, this drives it into a second order hierarchical position. Furthermore, King and Piper argue that it is the inability of the legal system to deal directly with the social world and its environment that relegate law to a second order autopoiesis or process. By this, I could argue that second order autopoiesis means that it is somehow detached or removed from its environment. As King and Piper note, it is ‘largely impervious to serious challenge from other knowledge fields, be they scientific, economic or commonsense’ (King & Piper, 1990, p.25).

It is now useful to consider, as a result of the foregoing discussion, the nature of legal discourse as interpreted by King and Piper. They again refer to Luhmann who in turn defines law as having the function of ‘stabilising congruent expectations’ (Luhmann, 1985). In my earlier discussion the function of law as perceived by Luhmann was indeed the stabilising of congruent expectations or similar such effect. King and Piper note, however, that Teubner takes the process one step further by developing the notion of ‘procedures’ for constructing reality. This notion of establishing legal procedures within the legal system will be referred to shortly when I discuss the different track that Teubner takes in developing
steering and self-steering within the theoretical paradigm of OCST. In summary, King and Piper adopt a view consistent with Teubner that OCST must be concerned with the epistemic trap, epistemies, reflexion and procedure.

6.5 What is the Epistemic Trap According to King, Piper and Teubner?

King and Piper (1990, p.26) grapple with a most crucial step in Teubner’s thinking. It is the concept of the epistemic trap. They draw upon Teubner’s earlier and most important article, ‘How the law thinks: Towards a constructivist epistemology of law’ (Teubner, 1989). In this important article, Teubner attempts to define his understanding of the ‘epistemic trap’. I have referred to this earlier in my discussion. Teubner has described this phenomena as the result of postmodern society’s tendency on one hand to fragment into different epistemies, and its other tendency to mutually interfere in these different epistemies. Therefore, legal discourse is caught in a so-called epistemic trap. The legal discourse’s simultaneous dependence on, and independence from other social discourses is a reason why modern law is apparently oscillating\(^9\) between cognitive autonomy and heteronomy (Teubner, 1989, p.4).

This description of oscillation between autonomy and heteronomy results in a irreconcilable conflict between epistemic autonomy and epistemic heteronomy.

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\(^9\) See also Rosenfeld (1992, p.1701) re the contemporary struggle for justice, a type of ‘oscillation’.
In other words, legal discourse has to produce reality constructions of its own under the theme of 'operative closure', but at the very same time the oscillation makes law dependent upon competing autonomous epistemies (Teubner, 1989, p.16). Consequently, Teubner describes a process whereby

... contracts, and the will, are only the tip of an iceberg of legal reality constructs drifting in an ocean of 'brute facts of diffuse social communication. (Teubner, 1989, p.17)

Therefore, legal discourse whilst self-constructing and self-creating at the same time apparently modifies the meaning of everyday world constructions and in case of conflict, replaces them by legal constructs in accordance with its internal binary code.

But in line with the oscillation between autonomy and heteronomy, in the world of non-legal communication, legal constructs inevitably lose in the world and discourse of society, particularly to the constructs of science (Teubner, 1989, p.19). He argues that science has the advantage of having specialised in procedures for pure cognitive operations and processes whilst law has not done so. Law uses cognitive processes as an afterthought. For example, while legal communication may internalise scientific constructs, juridical constructs are exposed to the so-called higher authority of science in cognitive questions (Teubner, 1989, p.19).

King and Piper (1990, pp.26-27) explicitly recognise the epistemic trap and the notion of enslavement of one discourse by another.

The enslavement can occur both ways. It appears that it can occur by way of the legal discourse enslaving the discourse of social welfare discourse, for
example, but on the other hand, social welfare or science can enslave certain components of legal discourse. This inability of legal discourse to immunise itself against realities produced by other discourses is the problem produced by the so-called epistemic trap.

King, Piper and Teubner agree that the law’s role is indeed to reduce complexity to manageable proportions in accordance with Luhmann’s own work (King & Piper, 1990, p.27). However, the oscillation produces from time to time enslavement of the legal discourse to other more developed discourses known as first order discourses, for example, science and economics. The conflictual process of legal discourse and its requirement to expose itself to non-legal discourses produces a great challenge for legal doctrine and legal theory. A number of so-called escape routes have been proposed which Teubner (1989, pp.20-24), King and Piper (1990, p.280) consider. They will now be considered below. It is important to note that the epistemic trap is a development of Teubner which Luhmann did recognise, but give little attention to.

At this point, I have arrived at the epistemic trap which is otherwise known as the so-called oscillation of the legal system and other systems between epistemic autonomy and epistemic heteronomy. King, Piper and Teubner then attempt to provide an escape route from the problems which the epistemic trap create for

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epistemic autonomies such as legal discourse in the legal system. I shall analyse this in the next section.

6.6 What are the Possible Escape Routes from the Epistemic Trap and the Different Versions of 'Steering' or Regulation in OCST?

Teubner describes a number of escape routes from the epistemic trap for the legal system. First, he describes Niklas Luhmann’s apparent escape route suggestion of ‘renouncing epistemic authority’ (Teubner, 1989, p.20). A second escape route is the so-called integration of law and social sciences. It is a so-called hybrid solution. Finally, there is a solution known ‘reflexive law’.

I shall first look at Luhmann’s apparent solution to the epistemic trap as described by King, Piper and Teubner.

Luhmann’s early background was his work and study of bureaucratic organisations. Indeed, Luhmann’s early work on publican administration and organisation theory provided a sound basis for his theory of social systems (Brans & Rossbach, 1997, p.421). Luhmann’s critique of organisational theory centred around his critique of command and control models. Luhmann argued that the command and control model of organisational theory do not correspond to empirical reality (Brans & Rossbach, 1997, p.420). He developed an alternative theory which attempted to explain the complexity of modern organisational reality. He noted that the function of an organisational system is precisely to make
complexity accessible by reducing it or by being selective. The system, therefore, selectively transforms problems that it finds in its environment as internal systemic irritations (Luhmann, 1993, pp.1428-29). He then made the developmental assertion that along with coding, an organisation has a goal program and a conditional program. However, he considers conditional programming to be more elastic than goal programming. This in turns leads to circularity which leads to operational closure which I have discussed previously. However, in terms of the implication of steering, Luhmann asserts that a mixture of centralised goal decision-making and decentralised conditional decision-making or programming is an ideal matrix for planners (Brans & Rossbach, 1997, p.423).11

*What does this have to do with renouncing authority when attempting to escape the epistemic trap?* The reader may recall that the epistemic trap is:

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\ldots \text{ the simultaneous dependence on and independence from other social discourses is the reason why modern law is permanently oscillating between position of cognitive autonomy and heteronomy. (Teubner, 1989, p.4)}
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Teubner argues that Luhmann has primarily based his discourse upon ‘renouncing epistemic authority’ (Teubner, 1989, p.20). Teubner, for example, argues that Luhmann believes that everyday interpretations and scientific constructs like ‘women’ and ‘inhabitants’ should be questions that are referred to philosophy or

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11 Reflexivity and its operation is important in ensuring the proper differentiation of the system and the reduction of complexity (Brans & Rossbach, 1997, p.424).
turned aside (Teubner, 1989, p.20). In other words, Teubner interprets Luhmann’s position as one of evasion or avoidance of interpretation of non-legal constructs.

Indeed, an examination of Luhmann’s work does tend to indicate that he certainly attempts to construct a structural purity contrasting legal and non-legal constructs. However, this can be easily explained by reference to his code, as opposed to reference to his peripheral programming or periphery which does have a greater interaction with influences which originate from the environment of the subsystem. Luhmann seems to indicate this when he writes:

All steering works against externally generated material - even if all structures are exclusively laid down by the system which is steering itself. (Luhmann 1997, p.49)

It is important to understand the links between the various elements which are under discussion. The epistemic trap as described by Teubner is one which is also recognised by Luhmann. The escape method from the epistemic trap is recognised by Teubner as one which is fundamental to the adoption of systems theory. That is, Teubner recognises that embracing of paradox or circularity allows one to escape the paradox of circularity. However, the resultant method or nature of steering theory is different with respect to Luhmann and Teubner. Luhmann embraces a purer form of escape methodology. He describes fully in his work, Limits of Steering (1997) his discourse on steering.

Luhmann’s 1997 work on steering appears to be a development of his work in Society’s Law (1993) which was referred to at length in my discussion in the earlier chapters of this work. In his earlier work, there were some references to
steering. He noted that the more that a political system attempts to use law as a regulatory instrument, the more of a problem this regulation becomes. He noted that comprehensive political goals have to be detailed in a form which can be referred to the legal system (Luhmann, 1993b, p.277). He also used the example of the difficulties in ecological or environmental regulation by the law (Luhmann, 1993b, p.277). He noted that the ability to achieve significant results is precluded by the necessity to relate all arguments to individually motivating obligations and rights. Furthermore, he noted that there is not any one system under the heading of the concept of a state since the Renaissance (Luhmann, 1993b, p.394). He noted under political theory there are indeed two different systems, both being operatively closed but having different functions, namely legal and political systems. He notes that all efforts to steer courts onto a politically desirable course must confront internal workings of the courts if they are to be successful. He notes that it is impossible to put political questions, for example, the conditions for reunification of Germany, to the legal system and expect a decision (Luhmann, 1993b, p.395). He then refers to the American example whereby the legal system accepts only cases and controversies for decision-making according to its own constitution. Further, Luhmann (1993b, p.452) discusses the political system and it subjecting itself to self-irritation by the possibility of stimulating a change in law. He noticed that the legal system is likewise exposed to political initiatives which it has to deal with such as legislative procedures, administrative regulations and legal decision-making.
However, apart from these references, his work in 1993 is primarily concerned with the development of the concept of circularity, the structural coupling and the consequences of structural coupling in terms of irritation and further development.

Luhmann’s development of self-steering was left in terms of a comprehensive discussion in his 1997 work. However, his 1997 work is again based upon a relatively pure concept of circularity and operational closure. It certainly does not leave any room for a hybrid understanding of an escape from the epistemic trap.

*What therefore is Luhmann’s resultant steering theory?* At page 48 of his 1997 work, Luhmann attempts to summarise his steering theory by reference to three criteria:

(i) Steering is always self-steering of systems and only in this framework, action and guiding so that one only has to look for the unit that steers itself, and this unit is not an action but a system.

(ii) Steering is the decreasing of differences within a distinction and is distinguished by this from other forms of using distinctions.

(iii) Programs to decrease differences in practical steering are understood not as programs of shrinking towards a middle level, but as an adjustment in a certain direction, so therefore steering presupposes the elimination of difference.

The above can be more easily understood by reference to the concept of driving. When a driver attempts to point a vehicle in a certain direction, he uses a steering

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12 His ‘Limits of Steering’ article is his best summary of the element of steering in OCST as he understands it. It is a theoretical exposition.
wheel to gain direction by reducing the difference between his desired direction and the direction in which he initially finds himself in (Luhmann, 1997, p.42). Programs in steering are used to reduce this difference to achieve a more aligned outcome.

Certainly, Luhmann strongly argues that external regulation in the form of instrumental rationality is to be avoided and ultimately futile. Again, referring to his earlier work in 1993, regulation of the legal system by the political system is problematic as it cannot properly refer questions to the legal system when they are framed in political terms. As a political system cannot frame questions in other than political terms, questions that refer to the legal system in the form of direct steering simply cannot be understood and processed by the legal system in a form which the legal system is itself coded and programmed for. Therefore, according to Luhmann, steering is ideally self-steering. That is, every functional system orientates itself by its own distinctions, its own construction of reality and therefore, by its own code (Luhmann, 1997, p.52). But every system has its own programs as well which operate at a periphery. Whilst the codes are invariant, programs can be varied under the condition that the code remains unchanged. Therefore, by way of an example, Luhmann notes that when a political system wishes to steer the economy, the intention always remains political programs. If they were to influence the economy, it is not sufficient just to observe politically relevant numbers.
Politics have no cybernetic mechanisms that could influence numbers in the economy. These numbers are the result of complex cooperation of self-steering institutions or difference minimising programs of the economy itself. Politics can therefore only create conditions, according to Luhmann, that influence the programs and in this way, the self-steering of the economy. The political system can prohibit something by way of programs. It can create costs, and the programs can also create conditions for utilities (Luhmann, 1997, p.53). Therefore, this has implications for direct steering by the state and/or by the political system. Instrumental rationality and purpose of rationality which is the basis for much governmental regulation in the last 50 years is radically challenged by Luhmann’s theoretical position on steering theory.

An observation by Luhmann is the possibility of self-steering within autopoiësis in postmodern society. However, it can be fairly said that Luhmann does not develop steering any further. As indicated, his 1997 work in conjunction with his other work does indicate the possibility of self-steering within his operative closure theory, but it does not detail the greater mechanics of it when confronted with complexities in postmodern society and the numerous critics of his work.\(^{13}\)

It is the author’s view that Luhmann’s work is not fully developed and it has been left for others to fully develop his steering theory. His writing suggests the

\(^{13}\) Luhmann implicitly appears content to leave the practical testing and formulation of self-steering to others, such as Teubner.
limits of steering, but it does not outline a practical program of self-steering. It merely suggests renouncing epistemic authority and a theoretical basis for system self-steering. Further development, however, in the author's view is required.

### 6.7 What is Teubner's Development of Self-Steering Theory in OCST?

As seen in the previous discussion, Luhmann does manage to develop a theory of self-steering as opposed to ordinary instrumental regulation. He does so by developing a pure form of self-steering theory whereby the minimisation of difference is premised upon the legal system not allowing itself to be subject to demands made upon it by the environment in relation to non-legal questions.

However, Teubner has a different view with respect to steering and the escape from the epistemic trap. The epistemic trap is defined as the simultaneous dependence on and independence from other social discourses which results in the permanent oscillation between positions of cognitive autonomy and cognitive heteronomy within the postmodern law system. Teubner notes another possible escape route from the epistemic trap is integration of law and social sciences (Teubner, 1989, p.21). This interpretation of a possible escape route from the epistemic trap is what has been most popular with respect to the sociology of law and sociological jurisprudence methods. The attempt is for the legal discourse to incorporate social knowledge into its constructions and permanently revise legal
models of social reality according to the developing knowledge or epistemies of social sciences or other such subsystems (Teubner, 1989, p.21).

For example, the economic analysis of law is a fusion of economic system theory and legal system theory. The Chicago School is most famous for the economic analysis of law and also for its conception of a more classical form of regulation.

King and Piper have already referred to the welfare conception of the construction of the child and its attempt to fuse or incorporate itself within legal doctrine or legal discourse. A battle between the justice model and the welfare model have already been outlined early in this chapter.

Accordingly, the multi-disciplinary approach is an approach which King and Piper have noted as being effectively subject to a 'hybrid mentality'. Teubner also describes the production of 'hybrid artefacts' as artefacts which have ambiguous epistemic status and unknown social consequences (Teubner, 1989, p.21). Furthermore, Teubner has identified 'interest analysis' as a fundamental success of sociology jurisprudence. He notes interest analysis legal decision-making in the courts today whereby the courts frequently attempts to reconcile or decide between conflicting social interests or the public interests and the interests of individuals party to litigation. Such an analysis has incorporated the analysis of sociological epistemies which have led to, in the view of Teubner, hybrid discourse (Teubner, 1989, p.22).
Teubner believes, and King and Piper strongly agree, that there is in fact a third or middle ground in terms of possible escape routes from the epistemic trap. Such middle ground is where the law neither takes over full epistemic authority of events or processes which occur within it or are put to it by the environment, nor does it totally delegate it to another social discourse, as perceived or proposed by Luhmann (King & Piper, 1990, p.31). This middle path is a response to the postmodern crisis and the legitimation crisis. Teubner favours this view because he has some difficulties with Luhmann’s renouncing of epistemic authority. Teubner has commented that whenever in the legal process, cognitive statements become controversial and legally relevant, then the legal system can no longer turn these cognitive statements aside or refer them to philosophy or any other subsystem in which they may have originally originated (Teubner, 1989, p.21). Teubner notes that the legal process must provide procedures to settle these conflicts, some of which arise out of cognitive statements which originate in the legal system’s environment. He also refers to the example whereby political and juridical conflicts in the environment law area require much extra legal scientific and technical expertise which show to a great degree to which legal decisions have to be based on a specifically juridical assessment of scientific controversies (Teubner, 1989, p.22).

Accordingly, in this attempt to derive a middle ground or third solution for an escape to the epistemic trap, Teubner proposes the legal system defines certain fundamental requirements relating to procedure and methods of cognition.
(Teubner, 1989, p.25). That is, he assumes that it is inappropriate for the legal system to impose its rationality upon the welfare system and vice versa. That is, King and Piper have noted that Teubner proposes a ‘reflexive’ role for the law which, instead of attempting to make law responsive to social problems, seek opportunities that allow legal regulations to cope with social problems without at the same time irreversibly destroying patterns of social life (King & Piper, 1990, p.31).

There is a focus by Teubner, King and Piper upon a ‘proceduralisation’ of the escape solution from the epistemic trap. Reflexive law will neither authoritatively determine the social functions of other subsystems nor regulate their input and output performances, but will foster mechanisms that systematically further the development of reflexive structures within other social subsystems (King & Piper, 1990, p.31).

The above attempts by Teubner, King and Piper in the elaboration of the alternative escape from the oscillating epistemic trap demonstrates a two-pronged approach.

The first approach is attempt to escape from the substantive rationality of instrumental rationality or direct regulations. Legal instrumentalism or the instrumental model of law involves accepting the scientific proposition that law can steer individual or social behaviour in desired directions, and the normative proposition that it should (Daintith, 1989, p.359). The instrumental model of law is concerned with purposive law and substantive rationality (Daintith, 1989, p.357).
The attempt by Teubner\textsuperscript{14} is to construct, upon the work of Luhmann in particular, a strategic model of post-regulatory law bearing in mind the failed legitimacy of postmodernism (Daintith, 1989, p.358).

Furthermore, rather than a ‘substantive’ rationality, a \emph{procedural} rationality is proposed. The reader must not confuse the concern for procedural rationality as a return to autonomous or formal law rationality. Autonomous or formal law rationality is classical legal rationality as perceived by positive lawyers. The Chicago School of Economics particularly embraces formal rationality whereby they deride the capacity of law to act as a conscious social mechanism (Daintith, 1989, p.359).

Furthermore, Teubner, King and Piper attempt to demonstrate the very important element of \emph{self-steering}. When the terminology of ‘reflexive’ is used, this is a reference to the self-transforming and self-reproducing nature of a subsystem. It also applies to the discourse which in effect constitutes the subsystem.

When Teubner, King and Piper refer to ‘but will foster mechanisms that systematically further the development of reflection structures within other social subsystems’, this is also by direct implication a reference to self-steering. Self-steering is the mechanism which Luhmann pointed out in his theory. Teubner does

\textsuperscript{14} Sometimes named ‘proceduralisation’ (Parker, 2002).
not in any way wish to deride or contaminate the element of self-steering in which Luhmann strongly argues in his overall theorem.

However, whereas Luhmann stops at the concept of self-steering as a theoretical exercise and pure exercise, Teubner, King and Piper argue for the development of procedures, organisation and competencies which enhance the development of a reflexive structure within another social subsystem. It is a reference to ‘procedural methodologies’ which is the particular development which is original within the work of King and Piper and Teubner. King and Piper argue that using the German consumer information law example referred to by Teubner in his 1984 work:

The task of the law is not to develop its own purposive program. Nor is it to resolve conflict between different policies. Rather, it is to guarantee coordination processes and to compel agreement. (Teubner, 1984, p.277 as quoted by King & Piper, 1993, p.31)

This is a rather clear and explicit explanation of the distinct purpose of steering within reflexive law. Its purpose is to distinguish between the purposive program and the procedural program of a subsystem.

Consequently, Teubner strongly argues that the promotion of self-steering within self-steering theory should be the promotion of procedural programs as opposed to the promotion of purposive instrumental programs (Teubner, 1989, p.25). When this distinction is achieved, an escape from the oscillating epistemic trap is theoretical and practically possible and competent.15

15 Presumably a reduction of oscillation as opposed to its eradication is achieved.
King and Piper therefore argue that an appropriate concept of self-steering which helps the legal system escape the epistemic trap would be whereby it is not the task of the law to either define or determine what are the best interests of the child, but rather to provide structures within social work and childcare systems which would guarantee coordination of those representatives towards some agreement in due course (King & Piper, 1990, p.31). Teubner also argues that with respect to the German Supreme Court determining economic organisations, the Court should correctly refuse to take a substantive position on various scenarios, including public interest scenarios. The Court should resort to a ‘procedural solution’ (Teubner, 1989, p.25). Teubner refers to recent cases in the 1980s within the German Supreme Court whereby the Court allocated risks of information and risks of prediction among the collective actors involved, and to abstain from material construction of reality and to *proceduralise* the legal solutions to the various delegates with different epistemic authorities. Teubner strongly argues that in doing so the conflict between epistemic autonomy and heteronomy in modern law is neutralised to a large degree.

6.8 **Do the Findings of King and Piper Support Hypotheses Two and Three of the Research Problem?**

King and Piper embrace the work of Teubner in relation to its consequences for self-steering and proceduralisation of issues and discourse within the legal system.
and other subsystems. The promotion of reflexive rationality as opposed to instrumental rationality is a key feature of OCST.

The question now is: To what extent does King and Piper’s work and their analysis of the child in legal discourse validate the self-steering element of OCST as understood by Teubner, and support Hypotheses Two and Three of the research problem?

The work is a wide-ranging work which refers to the construction of child welfare science, the child as a scientific artefact, the child as an offender, the law’s response and child responsive legal systems.¹⁶

It should be said at the outset that they embrace thoroughly the constructive reality interpretation of OCST. However, they do outline that as a result of the constructive interpretation by the legal system, the child has been interpreted to have a bundle of rights and is the bearer of rights. They argue that this has implications for the way in which children are interpreted as scientific constructs within discourse. They argue that:

Not only does the concept of rights allow the law to simplify and reduce complex relations to manageable proportions, but as King (1987) has pointed out, it has the advantage for lawyers ignoring almost entirely the context in which decisions take place and the effects of decision both upon those exercising their rights and those affected by their exercise. (King & Piper, 1990, p.69)

¹⁶ It is now the standard work for understanding the construction of the child in legal discourse.
It is from this premise that they continue their work of attempting to outline what are the best interests of children given self-steering theory.

They also do rightly point out that there are schemes where reflexive law could be seen to work in direct contrast to the responsive or substantive law model which at present characterises the law’s attempts to promote the welfare of children (King & Piper, 1990, p.121).

They point out in their data analysis that there are significant limits of law in securing a child’s well-being. They argue, for example, that law simplifies and reduces the social world to manageable concepts. Whilst this observation is consistent with the reduction of complexity required by autopoietic theory, it nevertheless simplifies a child’s circumstances and resultant understanding of their particular needs in any point in time (King & Piper, 1990, pp.122-123).

Furthermore, King and Piper argue that law individualises reality construction and places the individual or child in the centre of the wheel or causality. If a parent is under examination, the parent is then placed in the centre of causality (King & Piper, 1990, p.124). They note that in practice the law’s role is to play a mediatory role which balances the claim of individual parents against the rights of the child. Therefore, dynamics are reduced to attributes of individual actors. This has the disadvantage of reducing the complex dynamics involved between actors.

Furthermore, King and Piper have observed that law enslaves child welfare science and reduces the gains made in child welfare science to attributions of rights
and responsibilities only (King & Piper, 1990, p.126). They note that psychological concepts such as the *psychological parent* is a concept which makes good sense of research findings within a scientific discourse but then becomes reconstructed and immersed in the legal discourse as simple rules of thumb or normative rules dictating how actor should behave (King & Piper, 1990, p.126). King and Piper note that with this enslavement of child welfare science discourse, there is a lot of identity and assimilation within the dominant legal paradigm of the child welfare discourse.  

It can be summarised that King and Piper have found in their work an analysis that legal discourse can enslave child welfare science while attempting to be ‘responsive’. Such so-called responsiveness in effect does tend to colonise and do violence to other social institutions and does preclude any real transformation within legal discourse (King & Piper, 1990, p.127). Accordingly, King and Piper conclude that the epistemic trap and the oscillation between legal autonomy and legal heteronomy requires an escape method if transformation of the child construct within legal discourse is to be progressive and successful.

King and Piper then put a strong argument for the embracing of OCST’s proceduralisation escape from the epistemic trap.

If Teubner’s proposal for the proceduralisation of legal and social conflict is to be embraced, then King and Piper argue that decision-making institutions

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17 This has been referred to earlier in my discussion whereby there is a conflict between epistemic autonomy and epistemic heteronomy within legal discourse.
have to be found outside the legal system in relation to children’s welfare. They argue that the law may play reflexive roles within these different institutions in laying down the norms of procedure, organisation and competence (King & Piper, 1990, p.131). At the same time, legal discourse should not be permitted to colonise or destroy the procedures and rules for reality construction by substituting its own substantive rules and procedures of reality construction. The prospect of self-steering advocated by Teubner is somewhat more complex than the proposal of Luhmann’s. The process of legal discourse attempting to lay down the norms of procedure and competence without permitting legal discourse to substantively colonise the said discourse in relation to children’s constructions is a very delicate balancing act. King and Piper note that such delicate issues involve the vexed issue of parental or state authority and the interplay of such examples of authority. Furthermore, when such conflicts or issues are unresolvable, some independent authority is required to determine the issue, a task which ordinarily is assigned to legal discourse or legal institutions in the legal system. They argue it is not realistic for law to renounce totally its epistemic authority when it comes to determining issues such as conflicts in parental or state authority within non-legal institutions. Accordingly, Luhmann’s proposal in relation to self-steering is over-simplified according to King and Piper (King & Piper, 1990, p.132).

King and Piper strongly argue that the problematic nature of the legal system in handling children’s cases cannot simply be avoided by assigning to other more appropriate institutions the decisions for which traditional law has been
responsible (King & Piper, 1990, p.132). This is similar to the thinking of Bailey who argues that while each functional subsystem can control its resonance, it cannot control the environmental irritabilities which trigger the resonance which forms an internal construction within each subsystem (Bailey, 1997, p.96). That is, whilst the legal system may wish to avoid irritations from the environment which ultimately become ‘resonance’ within its own legal system, the complexity of postmodern society and in particular, complexity in dealing with children’s cases and issues inevitably leads to environmental irritations and perturbations translated into resonance in due course.\(^\text{18}\) Furthermore, the role modern society assigns to the legal system effectively means that it cannot avoid determining issues which are put to it. Luhmann does accept this but at the same time suggests the renouncing of epistemic authority where the issues are intertwined with non-legal implications. Such a pure interpretation whilst desirable is not achievable in practice in all cases. Therefore, King and Piper’s suggestion that self-steering is better served and formulated by the legal system only laying down norms of procedure and competence is a refinement of OCST steering theory.

Accordingly, self-steering is formulated as:

What needs to be done rather is to restrain and restrict the self-reproducing regularities of law in ways which allow the special nature of children, as developing human beings to respond to the environment and are affected by that environment differently to

\(^{18}\) *Not all* ‘noise’ is translated by the system as the system selects noise which will be *internally* constructed as ‘irritation’ or ‘information’ (Luhmann, 1992, pp.1432-33).
adults, to be addressed and accommodated. (King & Piper, 1990, p.132)

King and Piper then engage upon a comparative account of self-steering attempts in children’s law internationally. King and Piper examine several aspects of the comparative framework in dealing with children’s law internationally. They do so in order to identify those procedural features and conceptual approaches which allow the law to incorporate and apply scientific knowledge or social welfare knowledge in ways which do not harm the epistemic authority of the legal system, whilst at the same time not harming the very children and adolescents which it seeks to protect (King & Piper, 1990, p.133).

King and Piper note that in France and Holland a structure has been provided whereby children’s panels consist entirely of part-time laypersons which attempt to resolve lower order conflicts. They note that professional reports collect certain facts and presents them to panel members in a form which provides a framework for rapid decision-making (King & Piper, 1990, p.139). These children’s panels in Scotland, for example, sit for a very short period of time to ensure that evidence is taken very quickly and decisions are made in a prompt manner. Furthermore, at least one panel member of the three members sitting on the Scottish panel must be present at all subsequent hearings to ensure continuity.

King and Piper argue that English magistrates courts which do not have a children’s specialist court fail to address self-steering requirements in a complexity of cases. They note that the bench may differ from each of the various preliminary
hearings and indeed, the final hearing, and there is no guarantee that the magistrate sitting at the final hearing will have any prior knowledge of the matter.\textsuperscript{19} King and Piper have noted:

The structure of the court organisation is such that it is difficult to conceive a system of justice which is less child-responsive than that operating in English magistrates courts where the broad rights of children receive less consideration than the need to maintain the court’s organisational structure. (King & Piper, 1990, p.140)

It is important to note that in New South Wales, the Children’s Court is a specialist court staffed by specialist children’s magistrates and parties are represented by lawyers who are required in the main to be members of a special legal aid children’s panel. To become a member of the panel, lawyers are required to undergo certain criteria in relation to experience, knowledge of children’s legislation, knowledge of issues in relation to discrimination and disability, and embrace the important ideals of the \textit{Children and Young Persons (Care and Protection) Act 1998 (NSW)}. This is more responsive and effective in dealing with children’s welfare than the English example.

King and Piper note at page 143 that France has also created a specialist children judiciary in the form of the \textit{juge des enfants}. They handle all child protection and juvenile delinquency cases which reached the courts in France. The said judges have made a positive decision to specialise in children’s issues and will attend lectures and conferences and receive training in these areas of knowledge.

\textsuperscript{19} Furthermore, the strict procedural requirements for evidence ensure that only lawyers can participate in the process.
(King & Piper, 1990, p.144). In the early 1990s, several other European countries have introduced specialist branches of police and special prosecutors to handle child abuse and neglect cases such as Holland, Germany, Spain and Belgium (King & Piper, 1990, p.144).

King and Piper then argue that perhaps the different functions of the judiciary in the Anglo-American system may be one of the reasons for the failure of the Anglo-American Common Law system to produce a specialist judiciary for children’s issues. However, as noted above in my foregoing discussion, the specialist Children’s Court in New South Wales is an exception to this. Furthermore, as demonstrated in earlier chapters, the Family Court of Australia is touted as an excellent example of responsive law resulting in an appropriate legal institution. It may be the case that Common Law jurisdictions slowly do evolve by way of permitting themselves to lay down within the legal system procedures and competencies for determining issues, but at the same time permit social welfare experts and other lay participants to self-execute the resolution of conflict between state and parental authorities with respect to children’s issues. As indicated, this has already occurred in France and Scotland with respect to children’s panels.

King and Piper wryly note that ultimately within the self-steering model proposed by Teubner, lawyers may be precluded from acting as lawyers in the procedural process. They pose the question:

This would appear to be a major problem in any attempts to make lawyers more child responsive, since true child responsiveness, over and above the acquisition of superficial skills of communication
really demands that they stop being lawyers. Does this indeed happen when lawyers operate outside the confines of the court? (King & Piper, 1990, p.147)

King and Piper then go on to conclude that only where the power of the legal profession is severely restricted and where the ultimate adjudication is made according to child welfare science rather than legal principles is the possibility of enslavement of discourse avoided (King & Piper, 1990, p.147). It should be noted that whilst this self-steering model is a development which ensures the minimisation of the enslavement of non-legal discourse, it is subject to constitutional constraints from province to province or state to state. Nevertheless, education of lawyers with respect to their needs to make the children’s welfare paramount when they engage in non-legal processes is important to ensure that the lawyer does not bring to a non-legal process legal discourse and epistemic authority.

The development in the English system of the guardian ad litem is an example of the development whereby a non-lawyer advocates for the child. Such non-lawyer would have the appropriate skills, training and experience to be appointed to represent children’s interests in legal proceedings (King & Piper, 1990, p.147). Other examples of the legal system permitting self-steering of non-legal discourse is the Victorian Children’s Court clinician, as well as the New South Wales Children’s Court clinician20 who is called upon by the Courts to

prepare an assessment of issues and recommendations for the child’s future to the court based upon non-legal discourse and based upon issues closer to the welfare of the child, including psychological and emotional developments. King and Piper argue that this activity in self-steering is preferable rather than trying to convert lawyers into social workers (King & Piper, 1990, p.148).

King and Piper certainly do not argue that there are easy solutions to the justice/welfare conflict which was outlined earlier in this chapter. Furthermore, they certainly do not argue that there is a easy solution despite the theoretical proposals by Teubner that self-steering should avoid imposing substantive impositions on non-legal discourse, but should restrain itself to laying down procedural competencies only when dealing with issues which require the consideration of non-legal discourse.

King and Piper do argue that comparative analysis of the construction of the child internationally indicates that the following features of international systems do promote child responsiveness and are better ways of handling complex child construction issues in the overall context of self-steering within OCST as understood by Teubner (King & Piper, 1990, p.149):

(i) Out-of-court conciliation and mediation processes which limit legal involvement initially.

(ii) The ultimate decision-making forum should be child welfare science as a dominant discourse in contrast to legal discourse as, for example, in the Scottish and French children’s panels.

(iii) The necessary provisions of a child representative in any formal decision-making forum.
(iv) Particular attributes and needs of each child are examined by the process rather than imposing a general ‘one will fit all’ methodology.

Accordingly, there is evidence within the King and Piper case study which validates the self-steering model within OCST, particularly expounded by Teubner. This evidence supports Hypotheses Two and Three of the research problem.

6.9 Summary and the Way Forward

This chapter was concerned with the need to analyse a case study and work, namely the case study of King and Piper’s seminal work, How The Law Thinks About Children. With the view to testing and analysing Hypotheses Two and Three of the research problem with the assistance of OCST, I studied the development of the element of ‘steering’ or ‘self-steering’ within OCST. The epistemic trap or the oscillation between epistemic autonomy and epistemic heteronomy has been observed by postmodernists such as Luhmann, Teubner and Habermas. In demonstrating the link between the epistemic trap and the escape of the epistemic trap, I demonstrated a link in self-determination for separate epistemies.

I was able to demonstrate that there are various ways to escape from the epistemic trap and that Luhmann’s development of self-steering or reflexive theory is indeed a most fundamental and important development. However, I also demonstrated that Luhmann’s development was not sufficient to permit a genuine exposition of self-steering within reflexive theory. Furthermore, his solution of ‘renouncing epistemic authority’ is regarded by the author as too simplistic.
The case study of King and Piper was useful in demonstrating an attempt to apply Teubner’s model of procedural self-steering (which in itself is a development of Luhmann’s model of self-steering). Whilst Teubner, King and Piper attempt to describe the model as a modification of Luhmann’s self-steering proposal, in effect it is a development upon Luhmann’s theoretical model of self-steering. Proceduralisation is something that Luhmann may not have contemplated, as Luhmann primarily was concerned with the preparation of a theoretical structure.

The case study of King and Piper demonstrated that Teubner’s proceduralisation of self-steering indeed does provide better ways (as opposed to Luhmann) of dealing with the complex issues of children’s cases. It also demonstrated that there would inevitably be an irritation and friction in the justice model and the child welfare model of child construction. That is because they belong to different epistemies and reconciliation is not possible at a theoretical or practical level.

The case study demonstrated that child construction within legal discourse is insufficient and better outcomes are possible if legal discourse is restricted to setting down competencies and procedural issues whilst substantive issues in relation to the child and the child’s best interest are determined by non-legal discourse such as social welfare discourse. This is not a hybrid discourse but rather a separation of different epistemies which is required by circularity and self-steering/operational closure in OCST. This ensures the child is not maligned and
reduced by the reductionist effect of legal discourse beyond what is absolutely necessary.

Chapter Seven will apply a further case study to models of OCST self-steering in order to consolidate my findings. Importantly, the question was posed: *Do the findings of King and Piper support Hypotheses Two and Three of the research problem?*

I found evidence within the case study which supports *both* Hypotheses Two and Three of the research problem.
Chapter Seven
Elements of Self-Steering Further Explored

Chapter Six was able to conclude that there was evidence in the case study which supported both Hypotheses Two and Three of the research problem. In Chapter Six, I selected a preferred OCS model of the concept of 'self-steering' of subsystems. This element of OCS describes how the legal system, for example, can be self-steered. I discussed the notion of direct steering as opposed to self-steering.

I was able to demonstrate, with the assistance of King and Piper's case study, that Teubner's model of OCS self-steering was the preferred choice. In particular, the model better demonstrated how the legal system, for example, could escape the epistemic trap. That is, it is able to better articulate a method by which the legal system, for example, could escape the constant oscillation between autonomy and heteronomy.¹

Of the three possible escape routes from the epistemic trap that were available, Teubner's view was more sophisticated than Luhmann's interpretation. Teubner was able to demonstrate with some success that the legal system may achieve a better and more sustainable form of escape from the epistemic trap by way of proceduralisation of certain methods of cognition and adopted procedural

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¹ Although it is unclear whether the escape involves a reduction or eradication of the oscillation.
solutions to issues of substantive conflict. This subsequently provides for a method of reflexive law which fosters mechanisms through proceduralisation that systematically further the development of reflexive structures within other social subsystems otherwise known as ‘self-steering’.

This chapter, like Chapter Six, is concerned with testing and analysing Hypotheses Two and Three with the assistance of OCST. They are:

(i) **Hypothesis Two**: That OCST will predict in the case study data the undesirability of attempts of direct steering of the legal system by the political system.

(ii) **Hypothesis Three**: That OCST will predict in the case study data the desirability of attempts of self-steering by the legal system.

### 7.1 Methodology

In this chapter, four central questions will be researched in order to test Hypotheses Two and Three:

(i) Is there evidence in the case study of a direct steering attempt by the political system of the legal system?

(ii) If there is evidence of direct steering, what is its desirability or otherwise?

(iii) Is there evidence of self-steering attempts as understood by OCST in the case study?

(iv) If there is such evidence, is it desirable or otherwise?

I will examine the phenomena of court reorganisation and the response by the judiciary to this recent development. The case study was chosen because: (i) the
data is qualitative, but is produced by leading judicial officers; and (ii) the case study has high illustrative utility of subsystem interaction.

The advantage of this case study is that I have the opportunity of further corroborative testing of the OCST model of self-steering of subsystems.

The outlines of Chapter Seven will be as follows:

**PART A**

(a) Case Study: Phenomenon of Court Reorganisation in Australia in the Last 15 Years

(b) Response of the Judiciary and Others to the Phenomena of Court Reorganisation

**PART B**

(c) Case Study Evidence of Direct Steering Attempts and Its Undesirability (Hypothesis Two)

(d) Case Study Evidence of Self-steering Desirability (Hypothesis Three)

(e) Findings Made by the Research

**PART A**

7.2 **A Case Study: Phenomena of Court Reorganisation in Australia in the Last 15 Years**

Judges in Australian Commonwealth or Federal courts are appointed pursuant to Chapter Three of the Australian Federal Constitution. Chapter Three provides, as amended, that judges have tenure until the age of 70. This concept of tenure is concurrent to the notion of judicial independence which is based on the doctrine of
separation of powers. This was an underlying assumption upon which the Australian Constitution settlement was established (Connolly, 1997, p.215). State judicial officers are appointed with a similar reverence for judicial independence. State judicial appointments derived formally from the practices of the colonies which were in turn derived from the practice of judicial appointments and their tenure from United Kingdom.\(^2\)

In particular, judicial independence was severed by the twin pillars of tenure and security of remuneration, both being familiar since the *Act of Settlement* (Connolly, 1997, p.216). Furthermore, the Federal judiciary is expressly recognised and guaranteed by Section 72 of the Constitution which not only provides for tenure, but also requires that prior to removal occurring, there must be a Governor General executive act on an address from both Houses of Parliament for removal on the grounds of proven misbehaviour or incapacity. The remuneration of members of the Federal judiciary shall not be diminished during their continuance in office according to Section 72.

While the State judicial appointment framework does not have a specific equivalent to Section 72 of the Federal Constitution, the *Act of Settlement* and the practice in the Federal jurisdiction is extremely persuasive in these State jurisdiction.

\(^2\) In NSW, only since 1996 have appointments become more transparent, with publication of Short Lists now more readily available.
In the last 15 years, there has been a phenomena of court reorganisation which challenges the very foundations of judicial independence as understood by the legal system itself. For example, the Compensation Tribunal of Victoria was a body which had appointed to it a number of judicial officers. Ten judges of great repute in a jurisdiction of compensation were dismissed from judicial office by the Victorian Government. This occurred in 1993 by way of abolishing the Tribunal (Kirby, 1993, p.65). The judicial officers were given letters of thanks for their services to Victoria and a package to compensate them for the unforeseen abolition of their appointments (Kirby, 1993, p.65). As Kirby has noted, the promise which Parliament had given them of tenure in accordance with the Act of Settlement was conveniently overlooked by the Victorian Government. Rather than specifically abolishing the judge’s individual appointments, they reorganised the court by simply abolishing the Tribunal upon which they served. By abolishing that Tribunal, appointments were subsequently also abolished by legal fiat. This case attracted international attention from the Centre for the Independence of Judges and Lawyers in Geneva, as well as civil litigation brought by the judges themselves before the Supreme Court of Victoria (Kirby, 1993, p.65).

A second example of court reorganisation is the controversial case of the removal of Justice Staples from the Australian Conciliation and Arbitration Commission and its subsequent replacement by the Industrial Relations Commission. In that case, the widely held convention at that time (early 1990s) was that when a court structure is reorganised, existing judicial officers are
reappointed to a new body. The abandonment of this principle in the case of Justice Staples suggests that judges in any State of Australia may be vulnerable to removal by reorganisation (Connolly, 1993, p.217).

Furthermore, in 1986, the New South Wales Government decided to reorganise inferior jurisdictions in New South Wales which consisted of the then-known ‘Courts of Petty Sessions’. The new body under reorganisation became to be known as the Local Court of New South Wales. One hundred magistrates were reappointed to the new Court, but five were not. This led to two cases being brought before Kirby himself as President of the Court of Appeal (Kirby, 1993, p.65). The Court of Appeal noted that the magistrates did have a legitimate expectation that they would be reappointed based upon the convention derived from independence of judicial office (Kirby, 1993, p.65). On appeal, the application of the five magistrates was before the High Court of Australia in Attorney-General New South Wales v. Quinn (1990) 170 CLR 1. Regrettably, the High Court reversed the New South Wales Court of Appeals’ reasoning and decision that the magistrates who were omitted should have been reappointed to the new body. The New South Wales Parliament amended the Constitution Act to ensure that in future where courts or tribunals in New South Wales are abolished, their judges must be appointed to a court or tribunal of equivalent rank or higher (Kirby, 1993, p.66).

The Compensation Court of New South Wales was abolished in 2002. This Court and its predecessor had made decisions with respect to the entitlements of
workers in New South Wales since 1906. All the judges on that Court were dealt with by way of either appointment to the District Court of New South Wales or they took voluntary retirement. This body was replaced by the Workers Compensation Commission of New South Wales in 2002.\footnote{The Commission has as its decision-makers ‘arbitrators’, who are solicitors appointed on a five-year short-term contract without tenure.}

A further example of court reorganisation is the 1991 reorganisation of the Queensland Supreme Court which while not involving failure to reappoint any judicial officer, did significantly alter the authority of the Chief Justice of that court (Connolly, 1997, p.217).

Finally, the genesis of the Supreme Court of the Australian Capital Territory will be examined. This was a reorganisation of the judiciary structure of the Territory with the abolishing of the Magistrates Court and its replacement with the Canberra Court.

The above examples give some indication of the phenomena of court reorganisation in the last 15 or so years in Australia. They were instigated by the executive governments of the States or Commonwealth. They involved at times the non-reappointment of judicial officers to subsequent bodies which are largely tribunals and executive in character. I can summarise by noting that court reorganisation often occurs with little community input. For example, the removal of Justice Staples from the Australian Conciliation and Arbitration Commission occurred with little community consultation and little judicial input. Furthermore,
the reorganisation of the New South Wales Court of Petty Session also occurred without input by the judicial officers themselves nor the community. It could be said that these court reorganisation events are pre-planned by the executive governments with little regard for community consultation and input.

It is not the purpose of this chapter nor this paper to fully analyse and consider the phenomena of court reorganisation. However, it is my aim to consider it from the point of view of Teubner's model of self-steering of subsystems within OCST, and test Hypotheses Two and Three of the research problem.

7.3 Response by the Judiciary and Others to the Phenomena of Court Reorganisation

In the previous section, I was able to describe examples of court reorganisation in Australia in the last 15 years.

The response of the judiciary and others to the phenomena is useful insofar as it provides data, albeit on a limited scale, which is valuable in the desired application. The data is useful in that it is published and it is provided by certain highly respected members of the judiciary of the legal system in Australia. If I adopt the OCST interpretation of the centre and periphery, these particular responses by the judiciary are unique glimpses of the operation of the centre of the legal system in Australia. Whilst traditionally the judiciary in the Commonwealth law tradition felt restrained and exercised great reluctance in voicing their views
and interpretations of events in its environment, there has been a gradual reversal of this traditional position in recent years.

The provision of this relatively limited data by high ranking members of the judiciary in relation to issues which are extra legal and extrajudicial are highly probative in understanding the legal system’s central construction of the irritation of ‘court reorganisation’. Furthermore, the interpretation of the centre of the legal system is particularly probative in relation to court reorganisation as the centre of the legal system.

The data and opinions of the judiciary in relation to court reorganisation provides a hitherto unpublished and unobservable public comment. In the Common Law tradition, judicial views of the extra legal and extrajudicial processes in society have been largely unpublished and kept hidden from the view of greater society. This was the price to be paid for judicial independence and its twin pillars of tenure and security of remuneration in accordance with the Act of Settlement. Furthermore, in Australia at least, the doctrine of separation as entrenched in the Australian Constitution coupled with responsible government as inherited from United Kingdom ensured that the judiciary very seldom made public comments in relation to developments initiated by policy. Therefore, the recent spate of published response by the judiciary to the phenomena of court reorganisation is particularly unique and valuable in that it brings to the public eye and the public domain a hitherto closeted interpretation and opinion.
Chapter 7: Elements of Self-Steering Further Explored

In regard to the phenomena of court organisation as outlined, the Honourable Justice Michael Kirby AC CMG, Justice of the High Court of Australia has provided significant public comment in relation to the phenomena. It is most noteworthy to provide a quote from a paper that he presented at the Judicial Conference of Australia in 1998:

The really serious challenges to judicial independence in Australia in the past quarter century has arisen from outside the Constitution and statutory text. They have arisen from (i) the abolition of courts and tribunals and the non-reappointment to the new body of all members of the former body; (ii) the growing practice of some States of appointing acting and part-time judges instead of supplementing the permanent tenured judiciary; (iii) the unprecedented, public and personal attacks on the courts and on individual judges emanating from the Executive Government, the media and others who should know better. (Kirby, 1998, p.186)

The above three elements provide a summary of the judicial response to the phenomena of court reorganisation. Element (i) outlined above is interpreted by the judiciary as a clear serious challenge to judicial independence in Australia. The remaining two elements are also of significant concern to the judiciary, however, I shall not focus upon the latter two elements in the remaining part of this chapter. There is insufficient space to address adequately the case study if all three elements are pursued.4

Clearly, however, Kirby has written significant articles and published opinions from time to time with a high degree of clarity and persuasion. But more

4 Kirby himself was subject to an unprecedented personal attack by an Australian senator in Parliament exercising privilege. The attack was subsequently withdrawn in 2002.
importantly, as one of the members of the Bench of the High Court of Australia, he publishes an internal interpretation of at least a part of the High Court of Australia as it sits at the very apex of the centre of the legal system.

Element (i), as defined by Kirby above, is a useful definition of ‘court reorganisation’. This definition involves the abolition of a court or a tribunal (such tribunal having judiciary members appointed to it) and subsequent non-reappointment of judicial members to the new body.

Furthermore, a judicial response in the Australian Capital Territory is also worthy of note. In 1990, the then-Attorney-General of the Australian Capital Territory proposed a major reorganisation of the judicial structure in the Territory with the abolition of the Magistrates Court and its replacement with a new ‘Canberra Court’ which would combine the jurisdiction of the former Magistrates Court, the Administrative Appeals Tribunal and the majority of the first instance jurisdiction of the Supreme Court of the Australian Capital Territory (Connolly, 1997, p.217). Connolly notes that the Supreme Court would be limited to appellate duties and some important undefined first instance jurisdiction. This arose out of the context of considerable criticism by the then-members of the Australian Capital Territory Government about some town planning decisions made by the Supreme Court at that time. Connolly quotes the then-Chief Justice Miles in relation to the proposed restructure and court reorganisation, as follows (Connolly, 1997, p.217):

The suggestion that the Supreme Court should be reconstituted essentially as an appellate court with limited first instance jurisdiction yet to be defined, and the dissatisfaction of the
executive government with the Supreme Court’s performance in town planning cases, raised questions about judicial independence in a self-governing territory. In a situation where the government was considering drastically reducing the jurisdiction of the Supreme Court and there was no expressed impediment to the Assembly abolishing the Supreme Court altogether, the spectre of the Staples affair was clearly visible and could not be ignored.\(^5\)

In a response that is similar to that expressed by Kirby, Chief Justice Miles interpreted the proposed court reorganisation insofar as it removed jurisdiction and did not necessarily involve the reappointment of former members as a issue of interference with judicial independence. This is broadly similar to Kirby’s concern that court reorganisation is a serious challenge to judicial independence in Australia.

Furthermore, at the time, Chief Justice Miles has noted in *Justice at the Seat of Government* that the legislation does not necessarily prohibit the future Assembly to abolish the Supreme Court. However, Connolly notes that there would be an implied prohibition to such an abolition of the court. The Government’s attempt by way of reorganisation of the Supreme Court would perhaps be struck down as being inconsistent with the *Self-Government Act of the Australian Capital Territory* (Connolly, 1997, p.219). This is somewhat different to the New South Wales position whereby notwithstanding the 1992 amendments to the New South Wales Constitution, the Constitution does permit the abolition of the judicial office provided the holder of that office is entitled to be appointed to another judicial

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\(^5\) Chief Justice Miles’ opinion and argument can be found in full at *Justice at the Seat of Government* (1992) 66 ALJ 555.
office in the same court or in a court of equivalent or higher status pursuant to
Section 56 of the same Constitution (Connolly, 1997, p.219).

Kirby summarises the phenomena of court reorganisation again in 1993
soon after the controversial changes outlined in the beginning of this Chapter. He
has published the following comments:

The year passed has not been a particularly good one for the
Australia judiciary. For the first time in the history of our country
since Federation, ten undoubted judges of your rank have effectively
been dismissed from judicial office. (Kirby, 1993, p.65).

He then goes on to say after recounting the several instances of court reorganisation
in various States and the Commonwealth:

I simply call attention to a disgraceful chapter in the history of
political interference in the independence of the judiciary of this
country . . . Again, I protested this action. This time there was
greater alarm for these were undeniably judges exercising judicial
functions. Again, judges of the District Court joined in letters of
protest. Where judicial independence is concerned, it behoves the
judiciary to speak out for them not defending themselves so much as
a judicial institution and the rule of law. (Kirby, 1993, p.66)

The above recorded comment by Kirby is noteworthy for the following reasons:

(i) They are published by one of the leading judicial members of the centre of
the legal system in Australia.

(ii) He publicly mandates public protest by the judiciary.

(iii) He identifies the court reorganisation phenomena as a distinct executive
attack upon judicial independence.

(iv) Judicial members in publicly protesting are not defending themselves but
are defending the judiciary and the rule of law, namely fundamental legal
institutions in the function of a coherent constitutional monarchy.
Chapter 7: Elements of Self-Steering Further Explored

It is also noteworthy that Kirby has publicly recorded that despite his describing the court reorganisation phenomena as ‘tragedy’, he laments the fact that there is a subsequent and consequent tragedy of the lack of protest of judges and some lawyers.\(^6\) He notes that the tragedy of court reorganisation does not excite popular support of the judiciary by way of defence. Furthermore, he notes that the once reliable media have descended to self-interest, so much so that Kirby writes, ‘We should not look with any confidence for the support from the print media of Australia’ (Kirby, 1993, p.66).

Another response to the court reorganisation phenomena was provided by Mr D. Meagher QC in an address in London in July 1992 which Kirby also notes, who has published the following:

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\text{Indeed, throughout the States of Australia, there is a legislative and executive strategy of removing their jurisdiction and placing it in tribunal to which, so it is said, more appropriate appointments may be made . . . The government has treated the judiciary more as a political competitor than a separate arm of government whose proper function is vital to the health of democracy. (Kirby, 1993, p.72)}^7
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Another judicial response is provided by Justice G.L. Davies, a Judge of Appeal of the Court of Appeal in Queensland. He provided a published account of the changing face of litigation in 1996. In that particular account, he was focused in particular upon civil litigation. Whilst Justice Davies does not specifically respond

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\(^6\) In NSW, the 2002 abolition of the Compensation Court resulted in no protests whatsoever by the 20 or so judges and commissioners on the bench.

\(^7\) Also published by D. Meagher QC in Appointment of Judges (1993) No. 2 JA 190.
to court reorganisation as defined by Kirby, Meagher, Connolly or Miles, as in my previous discussion, he does predict that court reorganisation may be inevitable if the courts do not provide the fulfilment of certain functions. In particular, he writes:

Unless we provide more interest based solutions to disputes, cheapen the means of resolution by trial, make costs transparently fair and reasonably predictable and become active in promoting a wider range of early and cheap dispute resolution services within the courts, the judiciary will become increasingly irrelevant to the process of civil dispute resolution. (Davies, 1996, p.185)

Justice Davies above clearly implies the phenomena of court reorganisation although he does not make this clear. However, the phenomena of court reorganisation is the executive solution to the fulfilment of the above-said community requirements in legal dispute resolutions if the legal system somehow is perceived to have failed the political system. Justice Davies also gives one possible explanation for the basis for court reorganisation by the executive. He writes:

The most important of these is the complaint that the judiciary is interfering with policy or political considerations or, which may amount to the same thing, that the judiciary has failed to appreciate the administrative or budgetary consequences of the decision. I suspect that, in this country, the judiciary has been largely unaware of the resentment which decisions of this kind have caused in the executive. (Davies, 1996, p.187)

Accordingly, Justice Davies concludes that courts may cease to be used for the purpose of civil dispute resolution in light of the fact that there has been a tendency towards court reorganisation or tribunal creation in place of court organisation and
judicial function. Justice Davies does lament the phenomena of court
reorganisation and the removal of jurisdiction to tribunals when he writes that a
consequence of postmodernism is the relaxation of the doctrine of precedence and
the development of broader standards, including interests policy. For example, he
refers to the development of unifying common law themes such as the general
principles of unjust enrichment, use of proximity as the general principle in
negligence and a gradual subsuming of other torts into the general tort of
negligence (Davies, 1996, p.186). As a result of the increase in sophistication of
decision-making for judges, it would appear that Justice Davies clearly implies that
tribunals that are staffed by administrative assessors or bureaucrats are ill equipped
to interpret statutes and apply common law developments as outlined above.
Furthermore, he implies that tribunals do not have the judicial independence which
is exercised by judicial institutions.

Davies argues that the tensions which occur and are created by judicial
control of executive power will be conveniently minimised by executive creation
of tribunals in place of judicial exercise of similar jurisdiction (Davies, 1996,
p.186).

This tension between the judiciary and executives was commented upon by
Sir Francis Bacon as perhaps a healthy phenomena:

Sir Francis Bacon may well have said it is 'a happy thing in the state
when kings and states do often consult with judges, and again when
judges do often consult with king and state'. (Connolly, 1997,
p.223)
The Honourable Justice Daryl Davies, Acting Judge and Acting Judge of Appeal as he then was in the Supreme Court of New South Wales published a valuable judicial opinion in August 2001. In an article titled *The Administrative Appeals Tribunal and the Rule of Law*, the Honourable Justice Daryl Davies (not to be confused with Justice G.L. Davies of the Court of Appeal of Queensland whom I referred to earlier in my discussion) writes regarding his experience and theoretical position on the Administrative Appeals Tribunal. The Administrative Appeals Tribunal is a Commonwealth body, and was the first attempt at bringing Commonwealth administrative law under the umbrella of judicial treatment. The Tribunal was specifically and purposefully directed towards administrative law.8

While I will focus upon the opinion of Justice Daryl Davies to a greater extent subsequently in this chapter, suffice to say for this section of the discussion that Justice Davies is of the view that a reorganisation of the Administrative Appeals Tribunal as proposed in the Administrative Review Tribunal Bill of 2000 would have been a most negative and retrograde Bill in terms of its impact upon the Administrative Appeals Tribunal. The Administrative Appeals Tribunal was then a body headed by a Justice of the Federal Court and the rule of law was heavily emphasised by the said judicial President of the Tribunal. The first President of the Tribunal was Sir Gerard Brennan who later became the Chief Justice of the High Court of Australia. Justice Davies writes that the Tribunal

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8 Justice Davies's argument is interesting reading and contrasts sharply with the view of Professor Peter Bailey in his work, 'Is administrative review possible without legalism?' to be found at the *Australian Journal of Administrative Law* (2001) vol.1, p.163.
under the leadership of Brennan applied the rule of law with greater vigour

(Davies, 2001, p.178). However, the Administrative Review Tribunal Bill of 2000 proposed:

(i) Members appointed to the Tribunal be the responsibility of the Minister of
the Crown as opposed to being responsible to the judicial President.

(ii) The President is not required to be a judge and indeed is not required to be
a lawyer, and no member of the Tribunal has security of tenure. Rather they
are to be appointments limited to seven years by way of contract based
upon performance agreements. (Davies, 2001, p.181)

Justice Davies concluded, given the legislative requirement that directions of the
Minister prevail over directions of the President that:

This new proposal, if it had been enacted, would radically have
altered the balance which currently exists as between the interests of
citizens and those of the Government . . . Under the Bill, the model
of administrative rather than judicial control prevails. (Davies,
2001, p.181)

Suffice to say the judicial response by Justice Davies is characterised as one of
great concern for the model of judicial control of administrative law.

PART B

7.4 Case Study Evidence of Direct Steering Attempts and Its
Undesirability

Derived from Hypothesis Two of the research problem are the questions to be
examined: (i) Is there evidence in the case study of a direct steering attempt by the
political system of the legal system; and (ii) What is its desirability or otherwise?
In this case scenario, the judiciary is in the legal system and the Government is in the political system.

The purpose of this chapter is to further analyse OCST’s interpretation of the element of self-steering of the legal system or any other subsystem in society. It may be useful to revisit the theoretical position of direct steering as it will then be contrasted to self-steering in a logical progression.

This particular section of the chapter will focus upon the often observed phenomena of attempts of direct steering of the legal system by the political system. The theoretical position underlying direct steering is worth revisiting.

Selznick’s analysis of the progressive development of legal jurisprudence towards responsive law outlined three stages of law, namely: (i) repressive; (ii) autonomous or formalism; and (iii) responsive or purposive. The final stage in his view was developing with some vigour in the middle part of the 20th century.

Daintith writes that the responsive or purposive phase of law broadly corresponds to Weber’s ideal type of substantive rationality as applied to law (Daintith, 1989, p.357). Daintith then argues that the purposive or responsive stage of law corresponds to the instrumental rationality model. Daintith, relying upon the work of Teubner, in particular, After Legal Instrumentalism? strategic model of post-regulatory law\(^9\) clearly distinguishes the purposive phase of law as a regulatory model of law. He writes:

Defending the instrumental model of law, for example, involves accepting the scientific proposition that law can steer individual or social behaviour in desired directions, and the normative proposition that it should: identifying the character of law as in fact instrumental, and considering what implications this character has for the evaluation of actual rules of law or other elements of the legal system. (Daintith, 1989, p.359)

It can be said with some confidence that the direct model of steering arises out of the instrumental model of legal rationality. The normative dimension of the instrumental law model could be identified as social welfare, which explains in part Roscoe Pound’s passion for ‘social engineering’ (Daintith, 1989, p.360).

Furthermore, from a systems point of view, the interpretation of systems as open and adaptive preconditions the logic of direct steering. That is, if the argument goes that environment has an effect on the open legal system, it is only logical to then argue that politics and administration can use the medium of law for the purpose of guiding all areas of society (Michailakis, 1995, p.331). This accords with OCST’s own view of direct steering. Michailakis argues that the implications of social engineering or the steering of society were two-fold, namely: (i) a question of making a system to be regulated as flexible as possible; and (ii) involves and enabling the regulating actors, namely, government and administration of the State to intervene directly by defining environmental constraints (Michailakis, 1995, p.331).

Direct steering is the ‘reduction of a difference’. In everyday life, for example, steering a car involves the reduction of a difference in a direction of movement (Luhmann, 1997, p.42). This definition of steering is itself based upon
the command and control model implicit in Weber’s analysis. Weber’s command and control model which was applied to legal rationality in bureaucratic organisations is a foundation of Luhmann’s earlier work (Brans, 1997, p.420). Nevertheless, the device of ‘command and control’ is also a useful definition of steering of the legal system by the political system.

Under the command and control model, which is consistent with the open and adaptive system’s interpretation, law is viewed as open to the demands of the environment and political system and as having the capacity to adapt to changes in the environment (Michailakis, 1995, p.331). Under the command and control model, or open model, the failure to obtain a political goal with certain regulations imposed by the political system can be explained by viewing the legal rules as not sufficiently purpose rational (Michailakis, 1995, p.331). From the point of view of programs, direct steering can be defined as a ‘goal program’ which are programs that take a particular systemic response as invariant and accordingly select causes that bring it about\(^{10}\) (Brans, 1997, p.423).

Now having revisited the theoretical understanding of direct steering as understood by Luhmann, Teubner and others, is there evidence of direct steering by the political system of the legal system in the phenomena of court reorganisation?

Turning towards Justice G.L. Davies, I can certainly find instrumental rationality well perceived by His Honour’s public opinion. Instrumental rationality

\(^{10}\) Luhmann (1997, p.48) also defines it like a motor vehicle action of the ‘decreasing of differences’ or adjustment in a certain direction achieved by the programmer.
arises out of a welfare conception. When Justice Davies refers to a need to cheapen the means of resolution by trial or make costs transparently fair and reasonably predictable, he is referring to certain aspects demanded by the welfare model of law. This must weigh heavily on his mind when he writes, ‘The judiciary will become increasingly irrelevant to the process of civil dispute resolution’ (Davies, 1996, p.185). Justice Davies also refers to the phenomena of direct steering in court reorganisation when he writes:

Changes in the political philosophy of the Australian community . . . to one emphasising themes of collective well-being, social welfare and government regulations of potentially exploitative situations which commenced even before the Second World War resulted in an exponential increase in the volume of legislation produced annually . . . particularly in areas such as health, social security, industrial safety, accident compensation, unfair competition . . . (Davies, 1996, p.185)

His Honour writes that this instrumental model of law which arises out of the great strides forward in the welfare state have led to a direct model of regulation in the classic interpretative sense of positive liberty. Therefore, it is reasonable to argue that Justice Davies perceives direct steering as a well used tool of the political system newly applied in the phenomena of court reorganisation or evidence of a direct steering attempt by the political system of the legal system.

Connolly wrote that judicial independence is founded upon the twin pillars of tenure and security of remuneration drawn from the Act of Settlement (Connolly, 1997, p.216). Judicial independence was designed to provide a framework upon which the doctrine of separation of powers could operate within a constitutional
setting. Section 72 of the Commonwealth Australian Constitution enshrined judicial independence as outlined in terms of tenure and security of remuneration. However, Connolly notes that the Australian example of the removal of Justice Staples from the Australian Conciliation and Arbitration Commission and his non-reappointment was an abandonment of the principle of judicial independence. Connolly perceives that judges in any State therefore may be vulnerable to removal by reorganisation (Connolly, 1997, p.217). He therefore perceives the ability of the political system by way of a goal program being able to select a cause that brings about a certain systemic response in the classic formulation of command and control. Furthermore, the social engineering instrumental model of law would justify, at least internally in the operations of the political system, the abolition of the court insofar as it satisfies a political goal.

The response by Chief Justice Miles, *Justice at the Seat of Government*, in relation to the proposed reorganisation of the Australian Capital Territory judicial structure indicates evidence of a perception of direct steering attempts by the political system of the legal system. He noted that the proposed Bill was brought about as a result of dissatisfaction and criticism arising out of some town planning decisions in the Supreme Court of the Australian Capital Territory. Chief Justice Miles noted that the Executive Government wished to attain a certain goal, and in doing so, required the judicial structure of the Supreme Court to adapt to the demands of the political system and the said political goal of better outcomes in certain town planning decisions. Certainly, Chief Justice Miles argued that the
linking of a political goal to the judicial structure and its reorganisation is an example of direct interference and steering of the legal system and the judicial centre of that legal system. His phrase ‘raised questions about independence in a self-governing territory’ leaves little room for interpretation other than direct steering of the legal system and the courts by the executives.

Justice Kirby’s view of direct steering is indisputable and unequivocal. He writes:

I simply call attention to a disgraceful chapter in the history of political interference in the independence of the judiciary of this country. (Kirby, 1993, p.66)

Kirby writes in response to the termination of the appointments of the judges of the Compensation Tribunal of Victoria, the abolition of the Australian Conciliation and Arbitration Commission and the reconstitution of the Local Court of New South Wales from the Court of Petty Sessions involving the non-reappointment of five magistrates.

Furthermore, Kirby makes it plain that the achievement of a political goal with respect to certain welfare State purposes cannot be properly achieved by unconstitutional interference and forced adaptation of the legal system by the political system. He writes:

Where judicial independence is concerned, it behoves the judiciary to speak out for they are not defending themselves so much as the judicial institution and the rule of law. (Kirby, 1993, p.66)

Here, Kirby is strongly defending the legal system and the court which is at the centre of the legal system against instrumental rationality and its manifestation in
the reorganisation of the court by the political system. The political goal of the phenomena of court reorganisation is the attainment of certain outcomes such as cost minimisation and policy achievement. The legal system, through the phenomena of court reorganisation, is subsumed and eliminated by the political system insofar as opposition to policy enactment and cost minimisation can be neutralised.

The Honourable Justice Daryl Davies notes that the Administrative Appeals Tribunal in the Commonwealth was constituted and formed to exercise at all times the rule of law. He writes:

The *Administrative Appeals Tribunal Act 1975* places the Administrative Appeals Tribunal on the judicial side of the line between the judicial and administrative models. (Davies, 2001, p.178)

This was, in his view, consistent with Friedmann's view that 'the phrase rule of law contrasts the supremacy of law with the supremacy of arbitrary power' (Davies, 2001, p.176). As judicial President of the Administrative Appeals Tribunal, Davies followed the judicial model set by the first President of the Tribunal, Justice Gerard Brennan, who later became Chief Justice of the High Court of Australia.

Davies notes that Peter Bayne, a lecturer in law at Australian National University and a senior member of the Administrative Appeals Tribunal has

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11 And enhancement without legal and constitutional constraints.
published an opinion in relation to the Tribunal.\textsuperscript{12} Davies notes, consistent with the command and control model of instrumental regulation, that Bayne is unhappy with the Administrative Appeals Tribunal which from time to time makes decisions, including value judgements, with which the relevant government agency has disagreed and which the agency has been reluctant to apply as a general rule (Davies, 2001, p.181). Bayne is effectively endorsing a model whereby the political goals of the executive should be achieved at the cost of the judicial independence of the Tribunal. If law, in accordance with the instrumental model of regulation, is viewed as opened to the demands of the environment and as having the capacity to adapt to changes in the environment, then Bayne’s view of a reorganisation of the Administrative Appeals Tribunal in the form of an administrative justice model is legitimate and valid according to the political system. This has all the elements of direct steering as defined by us earlier. Davies implicitly recognises this perception of direct steering and its undesirability when he writes:

The point that Mr Bayne made is there is less likely to be tension between a review tribunal and an agency if the agency has involvement in the tribunal structure. (Davies, 2001, p.182).

Professor Peter Bailey of Australian National University writes in \textit{Is administrative review possible without legalism?}\textsuperscript{13} that the Administrative Appeals Tribunal

\textsuperscript{12} In that opinion, Bain draws a distinction between ‘administrative justice’ and ‘justice’ and Davies notes that Bain argues the judicial process is not necessarily the best way to formulate and give normative effect to the rules which govern the community in the administrative field.

\textsuperscript{13} Found at 2001 AJAL V8 p.168.
should take into account but not be bound by the policy of government. He locates the Tribunal review process squarely within the administrative paradigm. He argues strongly that the administrative paradigm involves the reviewing of facts or law and their consistency with policy, as well as assessing fairness to the individual in pursuit of a preferable decision. He contrasts this with the judicial paradigm which reviews legality, considers the rights and obligations of parties, as well as applying the law to the facts as determined and found (Bailey, 2001, p.170). In locating the Tribunal within the administrative paradigm, he then puts a case for the reorganisation of the Administrative Appeals Tribunal and its reconstitution as a body that operates at the apex of government. This is consistent with the command and control model of law of direct steering. It prioritises political goals and certain invariant outcomes at the cost of judicial independence.

It is clear from this discussion that judicial commentators have commented negatively upon the phenomena of court reorganisation as discussed above. They have certainly noted with concern the increasing phenomena of direct steering which has been embraced by governments which favour the now-long accepted view of instrumental view of rationality and regulation. They note with concern, however, the increasing use of such a model of rationality in rationalising the courts and the phenomena of court reorganisation.

I have already noted that the Honourable Justice Daryl Davies has disagreed with Bayne, and argued the undesirability of the reconstituted Administrative Appeals Tribunal within the administrative justice model. He noted that this form
of regulation only realigns the once-judicial body with political goals defined and sought by the political executive.

I have noted that Kirby describes the direct model of steering and its political interference in the independence of the judiciary of this country as ‘disgraceful’. He argues that the erosion of judicial independence can only lead to an imbalance in the carefully thought-out democratic model that resides within the Federal Constitution and achieved at great cost.

Clark writes that the drawback of informal tribunals is that they cannot effectively manage conflict and remain informal. If they take the latter course of informality, they will atrophy, but if they choose the former of formality, they will have to remain more open and coercive (Clark, 1992, p.117). Furthermore, the increasing reorganisation of courts and the placing of reviews of decision within administrative bodies draw criticism from commentators. Again, Clark notes:

In recent years, it has been noted with increasing frequency that there are major contradictions between the rule of law and certain regulatory and administrative demands of the intervention of State. (Clark, 1992, p.118)

The undesirability arises from the non-reconciliation of the rule of law and administrative goals as expressed within the performance requirements of certain newly-created tribunals.

I also have noted that Connolly has viewed the court reorganisation phenomena as one that, unchecked, seriously challenges judicial independence as described within the tenets of tenure and security of remuneration. Chief Justice
Miles commented adversely on the proposed Supreme Court restructure impact upon judicial independence in the Australian Capital Territory.

It would be fair to summarise the judicial response, as well as the response of some commentators, as one of profound concern for continuing healthy functioning of judicial office and judicial independence in Australia and its States as a result of the phenomena of court reorganisation, Court reorganisation, when it is perceived as direct steering by the political executive of the centre of the legal system, is viewed generally as an attempt to achieve certain outcomes in policy. This attempted achievement of an outcome which is invariant as far as the political system is concerned, is perceived by the courts of the legal system as one of profound interference and a serious threat to the continuing healthy functioning and operation of the courts and the legal system. Published opinions as noted above in my discussion by eminent judicial officers provide some evidence that direct steering is causing considerable irritation and concern as well as resonating profoundly within the corridors of the courts and the legal system in Australia.14

In summary, the case study provides evidence of direct steering attempts by the political system of the legal system as understood by OCST. Furthermore, the case study provides evidence that the attempts are undesirable from the point of view of the targeted system.

14 In the sense of the centre of the legal system in Australia.
7.5 Evidence of Self-Steering Desirability in the Case Study

The previous sub-section was concerned with discussing whether there was some evidence of direct steering in the case study of court reorganisation. I found evidence of direct steering of the legal system in the case study of court reorganisation and the judicial response and its understanding.

This section is concerned with the questions of: (i) Is there any evidence of self-steering as understood by OCST in the case study of court reorganisation and the judicial response; and (ii) Is such self-steering that may be evident in the case study desirable or otherwise? (Hypothesis Three of the research problem.)

I will now revisit the topic of the element of self-steering in accordance with Luhmann and Teubner's interpretations. There was considerable discussion in Chapter Six of the nature and outline of self-steering as opposed to direct steering. My discussion in Chapter Six focused upon the nature of instrumental regulation and its critique by OCST. As a result of separate epistemies and the consequent phenomena of normatively closed autopoietic systems, the idea of social engineering is seriously questioned (Michailakis, 1995, p.331). Furthermore, OCST is able to argue strongly that one of the escape routes from the epistemic trap is the procedural model of self-regulated steering (Teubner, 1989, p.25). The discussion in Chapter Six also focused some deal upon the fundamental requirements of the proceduralisation of self-steering in OCST.
I was able to demonstrate in Chapter Six that Luhmann seemed to stop short at a theoretical position whereby he concluded:

Steering of the system is thus always self-steering regardless of whether the steering refers to the system itself by internally constructed distinction of self-reference and outside reference or whether the steering refers to the environment of the system. (Luhmann, 1997, p.46)

I then discussed Teubner’s practical development of Luhmann’s theoretical position which resulted in a proceduralisation or ‘optional regulation model of self-steering’ without OCST (Brans, 1997, p.433).

A useful OCST definition for self-steering is as follows:

Regulations should not prescribe specific actions but should offer a spectrum of options out of which the affected system can choose one according to its own rationality. (Brans, 1997, p.433)

This definition is consistent with a system following its own rationality and epistemic coding.

Therefore, having summarised the position of self-steering in OCST, which is consistent with the fundamental concept of normative closure, I shall now address the case study question, testing Hypothesis Three.

The previous sub-section noted the often quoted reference by judges of ‘judicial independence’ and ‘rule of law’. These terms were frequently resorted to by various judges whom were formulating strong arguments against the fundamental thrust of court reorganisation as exercised by government. The notion or principle of ‘judicial independence’ and ‘rule of law’ are extremely relevant and
powerful metaphors in the construction of legal reality.\textsuperscript{15} They represent centuries of convention and constitutional imperative as understood by the common law as practised in United Kingdom and to a lesser extent, United States of America. Indeed, the Act of Settlement and associated revolution is often sourced as the period commemorating the beginning of a truly substantive model of judicial independence and rule of law (Connolly, 1997, p.216).

If I utilise the notions of ‘judiciary independence’ and ‘rule of law’ as metaphors for self-steering of the court system, I may then have tools that will assist me in discussing and analysing the case study with greater effectiveness.

Whilst the normative closure of the legal system is predicated upon the code of law versus non-law, it is useful to remember that programming devices of legislation and constitution remind us that the total operative context of the legal system comprises the centre and the periphery, and its consequence complexity. Accordingly, it may not be of significant benefit for us to resort to analysis on the basis of law versus non-law when I am attempting to confront the element of self-steering. This is because the complexity of various legal programs which arise out of structural coupling do not readily respond to analysis on the simple binary criteria of law versus non-law.

Accordingly, resorting to the principle of judicial independence, \textit{does this case study provide us with examples of the court’s apparent and manifest needs to}

\textsuperscript{15} They symbolise ‘autopoiesis’ and ‘self-reference’.
'self-steer'? That is, can we demonstrate that the court system, as a centre of the legal system, will always follow its own rationality as opposed to rationalities embraced by other epistemic systems? (Brans, 1997, p.432)

Kirby’s view of judicial independence could be equated with OCST’s model of self-steering. For example, Kirby strongly submits that court reorganisation is a ‘disgraceful blow to judicial independence’ (Kirby, 1993, p.65). Whilst Kirby does not outline the basis and foundation for judicial independence, he does make reference to the desirability of its continued existence by reference to the requirement that judges hold office until the statutory retirement ‘save for removal in the constitutional manner hammered out in the aftermath to the glorious revolution in England’ (Kirby, 1993, p.65). It would appear by his reference that the legal system and the court centre in particular, requires independence from executive and political interference to ensure its continued stability and constitutional health. This interpretation would appear to be consistent with his subsequent remarks, namely:

I simply call attention to a disgraceful chapter in the history of political interference in the independence of the judiciary of this country. (Kirby, 1993, p.66)

Furthermore, this important constitutional principle that apparently underpins the system as understood by Kirby is enhanced by his remark ‘it accords to the international principle for the independence of the judiciary’ (Kirby, 1993, p.66). It may be said that it is rather fortunate for this analysis that the principle or instrument that I have selected to highlight the element of self-steering is in itself
quite indicative of self-regulation. That is, the word ‘independence’ is in itself strongly resonant of the notion of self-regulation and self-determined steering.

Kirby quoted with approval a remark by Mr D. Meagher QC who addressing a London audience, indicated:

The government has treated the judiciary more as a political competitor than a separate arm of government whose proper function is vital to the health of a democracy. (Kirby, 1993, p.72).

This particular remark appears to be consistent with a desire by judiciary for separate function and independence from the government and the legislature. In other words, self-steering is consistent with the notion of ‘judicial independence’, which in turn is arguably a desire for self-steering and self-determination. Furthermore, the desire by the judiciary can be interpreted as a desire encompassing two components, namely: (i) institutional self-determination and self-steering; and (ii) financial and other incidental jurisdictional self-determination and self-steering.

Kirby, who is one of the great reformist judges of Australian judicial history, publishes his thoughts in relation to what is most helpful in constructing an independent judiciary which appears to the author as equivalent to self-steering. His views are that the independence of ‘thought’ of my judiciary is what may be essential to the assurance of my inherent and developed liberties (Kirby, 1993, p.73). Furthermore, he is most cautious and anxious to ensure that my judiciary does not simply develop into another group of highly paid public servants who are appointed, like any other public servant, as a result of a committee of bureaucrats.
and upon application (Kirby, 1993, p.73). These remarks clearly place the self-
determination and self-steering of the judiciary within another category entirely
operatively separate to the political and legislative category of the political system.

There were passages earlier in this chapter which refer to the work of Terry
Connolly. He published his thoughts in relation to the appropriate relations
between the judicial and executive branches of government. His view of judicial
independence is that it is presumed to be fundamental to the Australian
Constitutional settlement which has been established.\textsuperscript{16} As Connolly noted, Federal
Constitution and the \textit{Act of Settlement} as inherited law, provide for tenure of
security and remuneration.

Interestingly, the Commonwealth Constitution apparently provides for
notions of self-steering to a large extent for \textit{Federal} courts. Federal courts are
provided with security of tenure and security of remuneration as per Section 72 of
the \textit{Australian Federal Constitution} as well as the judicial independence doctrine
inherited since the \textit{Act of Settlement}. Regrettably, the same cannot be said for State
courts as they have no constitutional guarantee. As Connolly and Kirby have noted,
the Queensland Supreme Court was reorganised with the consequence altering of
authority of the Chief Justice in 1991 (Connolly, 1997, p.217). Furthermore, I have
already noted the New South Wales reorganisation of the Local Court with the
non-appointment of five magistrates. Other examples were indicated in reference to

\textsuperscript{16} See also the basis of judicial independence and the separation of powers doctrine
discussed in the case of \textit{State Chamber of Commerce and Industry Versus Commonwealth}
(second fringe benefit tax case) (1987) 163 CLR 329 at 362 per Brennan J.
the Victorian situation, namely, the Compensation Tribunal of Victoria and its non-reappointment of judges. These examples of State courts which do in fact enjoy openly acknowledged judicial independence nevertheless have significant attacks upon the judicial independence by court reorganisation. Regrettably, few judges from the State jurisdiction have commented upon the desire for self-steering and self-determination.

Some comment perhaps should be made addressing the apparent lack of State judges publishing concerns regarding the phenomena of court reorganisation and the desire for judicial independence.

With the spate of court reorganisation in the last 15 years, State judicial members somewhat fear the nature and scope of the executive's legislative reform for the judiciary and the court's structure. Indeed, this could be inferred by the rather anxious comments of Justice G.L. Davies of the Court of Appeal in Queensland who in 1996 wrote:

Unless we provide more interest based solutions to disputes, cheaper means of resolution by trial may cost transparently fair and reasonably predictable . . . the judiciary will become increasingly irrelevant to the process of civil dispute resolution. (Davies, 1996, p.185)

Furthermore, in contrast to Kirby, Connolly and D. Davies, Justice G.L. Davies is primarily concerned with the perception of the political system and the executive in relation to performance and outcomes of the judiciary. He writes:

The most important of these is the complaint that the judiciary is interfering with policy or political considerations or, which may
amount to the same thing, that the judiciary has failed to appreciate the administrative or budgetary consequences of its decision. (Davies, 1996, p.187)

This sentiment and concern is in stark contrast to the above other writers who are primarily concerned with the independence of the judiciary and the rule of law. Although there is by no means compelling evidence that the State judiciary is broadly concerned with its own survival in contrast with their Commonwealth brethren, there is some evidence that these issues and discussions may warrant further investigation.

I can conclude this sub-section in relation to the court’s desire for self-steering and self-determination by referring to remarks of the Honourable Daryl Davies, president of the Administrative Appeals Tribunal, as he then was, in 2000.

He wrote:

I refer again to the remark of Lord Denning that tribunals are ‘part of the judicial system of the land under the rule of law’ and to the remark of Wolfgang Friedmann17 that the extent to which tribunals are independent ‘is an important indicator of their value as judicial institutions’. (Davies, 2000, p.182)

Clearly, there are some members of the judiciary who write strongly in the public domain for their desire for the judiciary and the court system to continue to protect, cherish and operate judicial independence and a rule of law as their everyday legal function. This is consistent with the desire of all courts of record to enjoy the protection of a court of record (Campbell, 1997, p.256).

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17 See Friedmann (1964) Chapters 11-13 on Public Law and its evolution, an excellent exposition.
An additional difficulty which may explain in part the difficulty for the State judiciary to public concerns as opposed to the Federal judiciary is due to the fact that many aspects of the constitutional requirement of separation of powers at the Commonwealth level have no written recognition at the State level, which consequently means there is no constitutional prohibition on an executive body exercising judicial power at the State level (Sharp, 2003, p.181). In contrast to the Administrative Appeals Tribunal at the Commonwealth level, it has been possible for New South Wales Parliament to invest the Administrative Decisions Tribunal of New South Wales, for example, with an original jurisdiction and appellate jurisdiction in relation to a merits review jurisdiction (Sharp, 2003, p.181). This in turn means that this body, which is established as a tribunal as opposed to a court, has functions that are broadly consistent with the judicial power as understood in Huddart, Parker and Company Pty Ltd v. Moorehead (1909) 8 CLR 330 at 357. Therefore, in relation to the Administrative Decisions Tribunal of New South Wales, it primarily supports and is legislatively endorsed with three functions and jurisdictions. It receives an original jurisdiction which is conferred with judicial power. It also receives a review jurisdiction in relation to administrative decisions, as well as a appellate jurisdiction on questions of law.

The State judiciary has some difficulty insofar as separation of powers are not consistently applied nor indeed expressly provided for at the State level in Australia. This contrasting situation does have serious implications for the ability of the State judiciary to openly and publicly protect judicial independence and the
Chapter 7: Elements of Self-Steering Further Explored

rule of law in response to the phenomena of court reorganisation and the rise of jurisdiction transfer to Tribunals.

7.6 Findings Made by the Research

In the previous three section, I selectively assessed the phenomena of court reorganisation in Australia over the last 15 years. Furthermore, I analysed and to an extent interpreted the judicial response at both State and Federal levels on a selective basis. I was able to state in a qualified way that there was evidence of direct steering by the Executive Government through legislation and other means of the court system through the phenomena of court reorganisation. This reorganisation was conducted without input of either the community or the judiciary and was often accomplished in great haste. Furthermore, I was able to demonstrate, again on a qualified basis, there was some evidence in the data of the expressed desire, at least at the Commonwealth level, of the judiciary for self-determination and self-steering, at least on the basis of immunity from court reorganisation.¹⁸

I was able to draw tentative conclusions based upon the study due to the limited nature and scope of the case study. The case study has consisted of the analysis and discussion of the selected writings of a number of prominent judges and scholars. By no means is the case study exhaustive, but the case study

¹⁸ Interestingly, the opinions read as if they were interviews. It is possible that the voluntary submission of their concerns denotes a specific objective in mind.
comprises a cross-section of prominent and highly influential judges throughout the Commonwealth. The relative lack of State-based judicial officers in the case study was commented upon in the discussion and a preliminary conclusion was drawn to the effect that due to the fact that the judicial independence of the State-based judiciary is not enshrined in legislation, a qualified conclusion can be drawn to the effect that State-based judicial officers are much more reluctant to publish their concerns and criticisms of executive action which interferes with judicial independence. Regarding Hypotheses Two and Three, *is there evidence in the case study supporting these two hypotheses?*

There was found in the case study evidence supporting Hypotheses Two and Three. Certainly, certain members of the State judiciary, as well as most members of the political system believe that increasing control of the judicial bodies or tribunals which review government decisions is favourable and desirable. Professor Peter Bailey of Australian National University makes a strong case for administrative review of government decisions without judicial interpretation (Bailey, 2001, p.163). He strongly argues for tribunals that review administrative decisions to adopt an administrative paradigm as opposed to a judicial paradigm. He wishes to in effect exclude the judicial power as far as is possible. Furthermore, he wishes to exclude, more importantly, the concept of the rule of law in the deliberations of the relevant tribunals. This opinion is widely embraced by departmental heads of government bodies, as well as government itself. These powerful heads of government departments resent decisions of the Administrative
Appeals Tribunal or the courts which tend to increase government expenditure as opposed to reducing government expenditure (Davies, 2001, p.180). Furthermore, Bayne argues that the Administrative Appeals Tribunal from time to time makes decisions with which the relevant agency has disagreed and which that relevant agency has been reluctant to apply as a general rule.\textsuperscript{19} If, therefore, the most influential members of government, as well as departmental heads of government departments resent the negative impacts of judicial decision upon government budgets and government programming, the political system will engage in interference of the legal system. This interference is designed to minimise negative impacts of judicial decisions upon government expenditure in relevant departments as well as policy developments.

A matter which complicates the discussion is the nature and scope of ‘judicial power’. On the one hand, the nature of judicial power and its foundation is to be found in Australia at least in the judgement of Griffiths CJ in the authority of 

*Huddart and Parker* (1909) 8 CLR 330 at 357. This authority gave priority to the private law aspect of judicial power and Chief Justice Griffiths stated:

\begin{quote}
I am of the opinion that the words ‘judicial power’ as used in Section 71 of the Constitution mean the power which every sovereign authority must on necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. (Hall, 1994, p.17)
\end{quote}

\textsuperscript{19} See Bayne’s article at Bayne, P. (2000) *The Proposed Administrative Review Tribunal - Is there a silver lining in a dark cloud?* 7 AJAL 86 as referred to in Davies’ article at page 181.
Another aspect of exclusive judicial power is the secondary aspect of public law.
The authority of *Huddart and Parker* fails to adequately address this aspect. This is
understandable given that *Huddart and Parker* was decided in 1909, and there has
been an explosion of administrative law and public law function in the years since
the decision. In respect of controversies over statutory rights, privileges and
liabilities, the function of the superior courts and judicial power is one of
containment, namely, ensuring legislative and executive arms of government, as
well as of the inferior courts and tribunals exercise their powers within the proper
ambit of those powers (Hall, 1994, p.19). As stated by Rich J in the authority of
*Rola Company (Australia) Pty Ltd versus Federal Commission of Taxation* (1945)
69 CLR 185 at 204:

A superior court exercises original judicial power when, in its
supervisory jurisdiction, by the use of the prerogative writs of
prohibition or certiorari it keeps inferior courts or bodies within the
limits of their jurisdiction or authority, or constrains them to
observe the principles of natural justice. (Also in Hall, 1994, p.19)

Consequent to this supervisory jurisdiction is the response outlined above which
concerns the executive. That is, government department heads and executives
resent judicial supervisory review which notwithstanding the just legality of a
judicial decision, nevertheless may give rise to negative impacts upon budgetary
constraints and policy initiatives in the political system.

Accordingly, if a ‘matter’ has a duality of function of both judicial and non-
judicial elements, this gives rise to complex questions and interpretation by the
political system when it deals with the courts and its functions.
The usefulness of the interpretative models of OCST lie in their describing the device of centre and periphery of the system. The centre of the legal system is constituted by the courts only which operate in a normatively closed fashion. On the other hand, the periphery of the legal system which comprises amongst other things, the legislature and legislation, as well as the devices of rules and programs constitute the periphery of the legal system. The periphery is comprised of programs of the legal system which in turn operate in a cognitively open fashion. The political system in turn at its centre is comprised of the government as opposed to the opposition and political power defines the centre of the political system.

The 'contact zone' is the area defined by the periphery of each of the relevant systems. OCST describes the periphery as where dynamism occurs and where such a periphery is a important conduit for mutual influences running amongst the legal system and other systems (Baxter, 1998, p.2035). Furthermore, the problem of how the legal system might be reciprocally related to other organised social systems such as the political system is explained by structural coupling with devices such as legislation and contracts (Baxter, 1998, p.2036). Structural coupling was indeed discussed in earlier chapters.

Consequently, the element of self-steering is not an accidental or abstract concept which arises out of a partly constructed model of OCST. On the contrary, it arises out of a carefully developed comprehensive analysis of actual operations of each system including descriptions of the centre and the periphery and their
mutual reciprocal relationships.\textsuperscript{20} What the model does not prescribe is when and how the traditionally powerful political system, which is an arm of the State, constrains itself. Whilst I noted above that there is authority in Australia for the supervisory jurisdiction of the Supreme Courts over the executive and inferior tribunals and courts, this does not guarantee judicial independence. Furthermore, the above authority and its traditional exercise by the superior courts is arguably a great cause for concern for the executive and heads of government departments which are primarily concerned with policy and reduction of government budgets. Consequently, the phenomena of court reorganisation is understandable given this partially sketched background.

Furthermore, it is also understandable that the judiciary has responded in the manner that it has if I apply the interpretative model of the element of self-steering as understood by Luhmann and Teubner to the judicial response. The judicial response is cast in terms of ‘judicial independence’ and ‘rule of law’. Every author and judicial officer referred to in the case study used such terminology as a basis for their concern and their response to the phenomena of court reorganisation. It was also explained by the writer that it was indeed fortunate that the concept of self-steering of a system coincides with the symbolic text of ‘judicial independence’.

\textsuperscript{20} That is, structural coupling of subsystems and their co-evolution in time.
Luhmann perhaps explains this best when he writes:

Under the condition of the social structure of functional differentiation, the removable starting point is a self-referential autonomy of functional subsystems besides which there is not a society and thus no representation of the entire society. (Luhmann, 1997, p.52)

He describes, therefore, the basis for the judicial response. The judicial response, not only refers to self-determination and self-steering, but refers to itself insofar as it refers as ‘judicial independence’. It is important to note that it does not refer to models of economic imperative and more importantly, does not refer to models of political or policy decision-making. Finally, it does not refer to government budgets. It restrains its judicial response to the relative autonomy of the legal system and its operative programming. Its code, furthermore, is concerned with law versus non-law. It is therefore understandable and persuasively relevant that the judicial response embraces the symbolic text of ‘judicial independence’ and ‘rule of law’. This self-reflection and self-steering is both understandable and vital for the continuing survival of the legal system. If such judicial response was not couched in the terms that it was, Michailakis predicts:

Taken to its logical conclusion, the adoption of an alien code for operations which are unique to a particular system means the disintegration of that system. (Michailakis, 1995, p.332)

\[21\] In this specific case, translated to ‘autonomy’.
In this chapter, I have tested Hypotheses Two and Three by way of investigating the court reorganisation phenomena in Australia. Evidence was found which supports Hypotheses Two and Three of the research problem.

In the next chapter, I will examine whether OCST self-steering is impacting traditional regulation discourse.
Chapter Eight

Self-Steering and Traditional Regulation Discourse: A Selective Contemporary Study

Further to the case studies presented in Chapters Six and Seven, an important question that may be posed is: *Is the element of self-steering as proposed by OCST impacting traditional regulation discourse?* Chapters Six and Seven of this paper were concerned with the testing of Hypotheses Two and Three of the element with regard to direct steering as opposed to self-steering. The element of self-steering was shown to be an element which arises out of OCST in terms of operative closure and cognitive openness of each functional subsystem. It was also shown to be an element which Teubner, in particular, preferred as one possible escape route from the epistemic trap of oscillation between autonomy and heteronomy of the legal system. Chapters Six and Seven also provided case studies which assisted in discussing the nature and scope of self-steering and provided some evidence of the appropriateness or otherwise of self-steering as an element in OCST and its association with the research problem.

Chapter Eight is designed to build upon the case study of self-steering and the further testing and analysis of Hypotheses Two and Three with the assistance of OCST.

Chapter Eight will, in a selective manner, attempt to provide some answer to the question: *Is the element of self-steering as understood by OCST impacting traditional regulation discourse?* In other words, *what is the recent relationship*
between the element of self-steering as proposed by OCST on the one hand and traditional regulation discourse on the other? This case study will be examined in light of Hypotheses Two and Three.

It is important to note that I shall not be engaging in a fundamental study of traditional regulation discourse and the impacts of OCST in a comprehensive fashion. A comprehensive study and discussion of discourse regulation would be a thesis in its own right. Instead, for the purposes of this chapter, a summary of traditional regulation discourse will suffice.

8.1 Traditional Regulation Discourse – A Summary

The purpose of Part A is to provide a summary of traditional regulation discourse.1 By no means will it provide a comprehensive description or discussion of regulation discourse as it stands at the present time.

A good place to start in the brief analysis of regulation discourse is to look to the work of the sociologist Max Weber. Weber based a large part of his early work upon the notion of authority in modern society. He also referred to three bases for legitimacy in society. They were: (i) traditional authority; (ii) charismatic authority; and (iii) legal rational authority (Weber, 1977).2 For Weber, legal rational authority was the form of authority which was most characteristic in large

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1 The summary is primary focused upon the last 80 years of regulation discourse.

organisations in modern society. Within bureaucracy and government, a command is held to be legitimate and authoritative if it has been issued from the correct office under the appropriate regulations and according to appropriate procedures (Bentham). Consequently, the authority of officials depends not on tradition or charisma but on consensus as to the validity of rules of procedure which are perceived to be rational, fair and impartial (Abercrombie, 1988, p.234).

When this notion of legal rational authority is coupled with the notion of rationalisation, one arrives at the master concept as understood by Weber in his analysis of modern capitalism. The ‘iron cage’ which is often a metaphor used by Weber describes the notion of calculation, measurement and control which forms the basis of the command and control model of instrumental rationality (Abercrombie, 1988).

From a different perspective, the notion of positive law also evokes a supporting rationale for the command and control model. If positive law is defined as law as a command supported by sanctions and the cohesive apparatus of the State, then positive law provides a corroborating rationale for a command and control structure. This is precisely what Bentham and Austin strived for when they wrote as positivists using the tools of sovereignty and command as parts of a structural coupling of sorts (Freeman, 1994, p.209).

Consequently, the fusion of the notion of command and coercive apparatus under the guise of positive law and the element of rationalisation as understood as a driving force in modern society resulted in a notion of instrumental rationality.

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That is, the instrumental model of law involves accepting the scientific proposition that law can steer individual or social behaviour in desired directions, and the normative proposition that is should identify the character of law as in fact instrumental (Daintith, 1989, p.359). This notion of instrumental regulation is referred to as one of the three modes of law described byNonet and Selznick referred to earlier in my discussion. It corresponds to purposive law or regulatory law. The fusion of rationalisation and positivism, as well as the accepted notion of scientific faith resulted in very positive objectives embraced by social jurisprudence exponents such as Roscoe Pound (Freeman, 1994, p.524).³ Pound saw law as a form of social control to be adequately employed in enabling just claims and desires to be satisfied. These just claims and desires to society must be related to existing social needs. They must also rely upon social science in studying the place of law in society in identifying special needs. It resulted in the often quoted term of ‘social engineering’ of which Pound was fond of. He was concerned primarily with the effects of law upon society and to a lesser extent, the social determination of law (Freeman, 1994, p.525).

Pound and other exponents of social jurisprudence were concerned primarily with theory of society and its relationship with law and the important program by which interests, as they could be identified, should be satisfied by an appropriate program. Consequently, Pound has had a monumental influence in the

³ See also Pound, R. (1943) *Outlines of Lectures on Jurisprudence*, Harvard University Press.
development of a concept of instrumental law and regulatory law. His model is more purposive than the positivist model of law which is primarily value neutral and formal. Pound sought to provide a significant and substantial link between law and society. Society's ills in a sense could be remedied by the great remedy of an appropriate legal command and program (Pound, 1943).

A consequence of Pound’s massive influence in the development of the model of instrumental law was that the social engineering theory of law conceived law as a system of rules open to the environment (Michailakis, 1995, p.331). The social engineering model of law viewed law as open to the demands of the environment and as having the capacity to adapt to changes in the environment (Michailakis, 1995, p.331). Upon this open view of the system, which is somewhat similar to the input/output model adopted by Parsons, the legal system simply adapts to environmental stimuli. Therefore, it could be argued based upon this model that the failure to obtain a political goal with certain regulations are simply explained by the rationale that the instrument or regulations were not specifically purpose rational and effective to achieve the desired outcome (Michailakis, 1995, p.331). Accordingly, the traditional model of regulation discourse was built upon an open model of the system coupled with social engineering theory of law. Regulation discourse was furthermore built upon the earlier model of positivist law which was fundamentally a model simply coupling command and sovereignty. It was an authoritative model backed by the sanctions of a powerful State apparatus.
Weber's analysis of command and control and his master concept of rationalisation complicates the traditional regulations model. Because I have described a fusion of sorts of the elements of Weber's concept of rationalisation on the one hand and the legal model of command on the other (culminating in the instrumental model of law or instrumental rationality), I have as a result a rather durable and resilient model of regulation which is supported not only by legal models of positivism and instrumental rationality, but furthermore with modern theories of bureaucracy and rationality (Abercrombie, 1988). This durability has provided the traditional regulation discourse with a far greater longevity than had perhaps been foreseen by Weber.

Accordingly, the direct steering of society was an implication of social engineering as understood and perceived by Pound. If, as Pound did, one accepts the scientific proposition that law can steer individual or social behaviour in desired directions, and one simply needs to identify the character of law as in fact instrumental, then one has defined the notion of steering of society through law (Michailakis, 1995, p.331). This steering of society through law or direct steering of any system of another system simply requires making the systems to be regulated as flexible as possible (Pound, 1943). Furthermore, it required enabling the regulating actor such as the government or administration to intervene directly by defining environmental constraints (Michailakis, 1995, p.331).

Sociological jurisprudence, which sought substantive justice, favoured direct steering whereby a system, for example, the government through legislation
can engineer a program of action by gearing individual and social needs to the values of Western democratic society (Freeman, 1994, p.532). Consequently, if the command and control model of traditional regulation discourse is embraced, then one also embraces the implications of such a traditional model. This model includes the notion of an open system in society, the notion of a presumption of unified values and norms within the wider societal context, and a notion that the regulating system has legitimacy and implementation capacity to regulate the regulated system.

One does not have to discuss with much vigour before I arrive at a substantial critique of the above assumptions in traditional regulation discourse. Certainly, Pound’s assumption in relation to unified values and norms or a ‘consensus model’ has been subject to much criticism (Freeman, 1994, pp.529-531). Some attention to the notion of means/ends schema which is inherent in much traditional regulation discourse is warranted. Weber conceived the means/ends schema as instrumental in the conception of a bureaucratic organisation which is hierarchical and top-down (Brans, 1997, p.420).

Weber was to define a bureaucratic system as rational to the extent that it was able to fulfill its current ends at any particular time by certain means (Brans, 1997, p.419). These ends are prescribed by the authorities within the system and therefore commands are the form of communication that underlies rationalisation.

\footnote{There are difficulties, however, with Parson’s model insofar as identifying the interests or needs of society are now confounded by the overproduction of norms.}
In this bureaucracy, decisive communication always run vertically and from top to bottom (Brans, 1997, p.419). As a result, the means/ends schematic became embedded in the notion of the command and control model of rationalisation and legal rational authority. The element of means/ends and the notion of command to control were therefore inseparable and were fundamental in the understanding of a legal rationality as understood by Weber.

Therefore, in summary, I have described selectively and in summary a number of influences dating back some centuries which have given rise to the 20th century traditional model of regulation discourse. Because the influences are several, the traditional regulation discourse has been quite durable and resilient and has been embraced not only by lawyers in social jurisprudence but also by sociologists and governments keen on achieving certain desired ends within a hierarchical concept of bureaucracy and the State.

The preceding sub-section has not been by any means a comprehensive analysis of traditional regulation discourse. Its purpose is to provide a summary to enable us to engage in a selective discussion of the relationship between the OCST self-steering element and traditional regulation discourse.

8.2 Case Study: Possible Implications of the OCST Self-Steering Model for Traditional Regulation Discourse

I do not have sufficient space in this chapter to deal with and discuss the contemporary debate in relation to ‘regulation’ of systems, legal communications
or entities in great depth. Rather, traditional regulation discourse will be used as a vehicle to demonstrate some possible and probable impacts of the OCST interpretation of self-regulation upon contemporary regulation discourse. This case study will support Hypothesis Three if there is evidence of discourse which indicates the desirability of self-steering of subsystems.

Consequently, I need to be selective with respect to my discussion of impact sites of OCST’s interpretation of self-regulation upon contemporary regulation discourse. In line with this selective discussion, it is proposed that I focus to some extent at least upon two contemporary writers in the mould of regulation discourse. Some further reference will be made to one other author in contemporary regulation discourse to a lesser extent.

I will first look at the work of Julia Black who is a leading regulation discourse author from the London School of Economics. I will then turn to Christine Parker who is also a leading regulation discourse writer, in particular in relation to corporations in the modern regulatory state who is from the University of Melbourne. Finally, I will make some brief reference to the work of John Paterson who has authored a persuasive work in his doctoral thesis discussing the topic of regulating health and safety in Britain’s offshore oil and gas industry.

The aim of the remaining portion of this chapter is to enquire into the probable impacts and effects of OCST’s interpretation of self-regulation by systems and legal communications. To the extent that the OCST self-regulation model has had an impact upon traditional regulation discourse in contemporary
writings, I can possibly come to the preliminary conclusion that Hypothesis Three is valid and supported by the case study. That is, if there is evidence within the case study of the desirability of self-steering by subsystems, Hypothesis Three will be supported.

8.2.1 Julia Black and regulation discourse

Julia Black is a prominent regulation discourse writer based at the London School of Economics. She lectures at University College, London and her version of regulation discourse is widely disseminated throughout academic literature.\(^5\) She has written in the area of regulation discourse a number of thought-provoking pieces, including a book, *Rules and Regulators*, and a series of articles in *The Oxford Journal of Legal Studies* concerning proceduralising regulations.\(^6\) Black’s work is primarily concerned with an analysis and discussion of the role of the State in the definition and concept of ‘regulation’. In my previous discussion, the notion of the post-regulatory state or new regulatory state whereby modern government is concerned with regulating service providers who provide services which the government formerly provided in the welfare state was observed. Building upon


this notion, Black then provocatively discusses the possibility that regulation is no longer centred on the 'state' but rather is 'decentred'. That is, Black discusses the possibility that regulation in the post-regulatory state is diffused throughout society (Black, 2002, p.2).

In common with the first part of this chapter, Black agrees that traditional regulation discourse is centred upon a Weberian notion of command and control which is centred in the 'state'. This traditional conception of regulation assumes that the state has the capacity to command and control instrumentally outcomes in various different segments of society (Black, 2002, p.3).

She notes, however, that there has been effective research which demonstrates instrumental failure and the phenomena of poorly targeted rules as well as the unintended consequences of over-enforcement. Furthermore, one of the primary criticisms which is demonstrated empirically of regulation under the traditional notion of command and control is the notion that government has insufficient knowledge to be able to identify the causes of problems and consequently is unable to design solutions that are appropriate (Black, 2002, p.3).

Therefore, as a result of her dissatisfaction with traditional regulation discourse, Black focuses upon discussing and promoting a 'decentred' understanding of regulation discourse. This decentred understanding of regulation discourse is a reference to regulation which is 'decentred' from the State.

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Furthermore, this understanding of ‘decentred’ regulation discourse result in a number of perspectives or manifestations of this new conception. Her purpose in doing so is to develop an understanding of decentred regulation that will enable us to recognise better how certain forms of power and control are exercised through society and its various subsystems (Black, 2002, p.4).

Black’s first notion of the conceptual core of a decentred understanding of regulation is the notion of complexity. A decentred understanding of regulation emphasises both causal complexity and a complexity of interactions of actors in society or systems (Black, 2002, p.4). This notion does reflect in part at least OCST’s claim of the overproduction of norms and Luhmann’s discussion of legal communications in a postmodern society constituting systems in society. Black argues that social problems are the result of various interacting factors in postmodern society, not all of which may be known and which change over time.

Black’s second central notion of a decentred understanding of regulation in postmodern society is the notion of fragmentation. Black argues that fragmentation refers to the fragmentation of knowledge, power and control in various segments and sectors of society (Black, 2002, p.5). She argues that not only is knowledge fragmented, but information is socially constructed and therefore there are no such things as ‘objective’ social truths.

Black’s third central notion of her understanding of regulation discourse in a postmodern regulatory society is the central notion of autonomy and ungovernability of systems. She argues that autonomy is not used in the sense of
freedom from interference by governments but rather the idea that systems will continue to develop or act in their own way in the absence of intervention (Black, 2002, p.6). This notion, she argues, is otherwise consistent with the conception of systems as self-regulating and regulation therefore cannot take the behavioural or conduct of a system as a constant or fixed notion. Furthermore, as a result, regulation may produce changes in behaviour and outcomes that are unintended (Black, 2002, p.6). She argues that unintended consequences of regulation is a well-known empirical phenomena. Such empirical evidence is often sighted in the works of P. Grabovsky, *Counterproductive Regulation* *International Journal of Sociology of Law* (1995) v.23, p.347. This unintended consequence of regulation is compounded by the empirically relevant fact that no single actor can hope to dominate the regulatory process amongst differing systems in society which have their own epistemies and knowledge processes.

Black’s fourth central notion which relates to her understanding of a decentred regulation discourse relates to multiple nodes in communication. As opposed to the command and control model which constructed a state which provided solutions to a society which had needs, Black sees both the government and society as each having problems and needs and as each having solutions and capacities to solve those needs (Black, 2002, p.7). Accordingly, she sees regulation which is decentred as a three- or four-way process between all those involved in the regulatory process, and she sees regulation as ‘co-produced’. Consequently,
Black sees decentred regulation as a process which involves complex interactions and interdependencies.

Finally, Black notes that there is a fifth central aspect of the decentred perspective. She sees it in the collapse of the public/private distinction in socio-political terms (Black, 2002, p.8). By this she means that whereas once it was common and somewhat straightforward to distinguish between private formal law and public regulatory law, in a regulatory state, private law has recently been affected by public law instrumentalism (Black, 2002, p.31).

A decentring analysis opens up new possible conceptions of ‘regulation’ in a new regulatory state. Figure 11 draws from the Organisation for Economic Cooperation and Development (OECD) definition of instrumental regulation and proceeds to non-government actors or systems which impose or are involved in regulation in decentred conception.  

Black provides a preliminary definition of decentred regulation which we can consider. Her essential definition is a generalised abstraction as follows:

Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of introducing a broadly identified outcome or outcomes which may involve mechanisms of standard setting, information gathering and behaviour modification. (Black, 2002, p.26)

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6 The definition interestingly is an open-ended definition which evolves over time, and will continue to evolve and expand. See the bottom grid for example of Figure 11.
Figure 11: Regulation - An ever-expanding concept (Black, 2002, p.16)

<table>
<thead>
<tr>
<th>What is regulation?</th>
<th>Who or what does it?</th>
<th>What form does it take?</th>
<th>With respect to what actors or area of life?</th>
<th>How is it done, via what instruments or techniques?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A type of legal instrument</td>
<td>State institutions (regional, national, 'extra' national), government</td>
<td>ministries, departments, agencies</td>
<td>economic (firms, markets)</td>
<td>rules (legal, 'quasi-legal') non-legal, universal, sectoral, bi-lateral</td>
</tr>
<tr>
<td>A process of:</td>
<td>altering or controlling with reference to some standard of purpose (OEC)</td>
<td>supra-national bodies (EU)</td>
<td>any other: family</td>
<td>other instruments (financial, market-based, information)</td>
</tr>
<tr>
<td>• controlling, governing or directing (OED)</td>
<td>international bodies (WTO)</td>
<td>- education</td>
<td>monitoring</td>
<td></td>
</tr>
<tr>
<td>• enabling/facilitating</td>
<td>courts</td>
<td>- health</td>
<td>sanctioning</td>
<td></td>
</tr>
<tr>
<td>• coordinating</td>
<td>Non-state institutions/actors, non-government</td>
<td>• economic</td>
<td>• rules (legal, 'quasi-legal'), non-legal, multilateral, bilateral, unilateral</td>
<td></td>
</tr>
<tr>
<td>• influencing</td>
<td>Examples:</td>
<td>• any other</td>
<td>other instruments (financial, market-based, information)</td>
<td></td>
</tr>
<tr>
<td>• conferring a pattern on something, ordering</td>
<td>• associations</td>
<td>monitoring</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• rendering constant</td>
<td>• communities</td>
<td>sanctioning (trust)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>And the process is:</td>
<td>• firms</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• intentional</td>
<td>• individuals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• goal-directed, problem-solving</td>
<td>• epistemic communities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Economic forces</td>
<td>Market</td>
<td>• economic</td>
<td>• interaction of rational actors</td>
<td></td>
</tr>
<tr>
<td>Social forces</td>
<td>Examples:</td>
<td>• any other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• norms</td>
<td>• institutions</td>
<td>• economic</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• language</td>
<td>• language</td>
<td>• any other</td>
<td>Examples:</td>
<td></td>
</tr>
<tr>
<td>• cognitive frames</td>
<td>• culture</td>
<td>• structuring</td>
<td>• enabling</td>
<td></td>
</tr>
<tr>
<td>• culture</td>
<td>• systems</td>
<td>• framing</td>
<td>• coordinating</td>
<td></td>
</tr>
<tr>
<td>• networks</td>
<td>Technologies</td>
<td>• networks</td>
<td>• ordering</td>
<td></td>
</tr>
<tr>
<td>Understanding of and ability to manipulate physical and human environment</td>
<td>• any</td>
<td>• translating</td>
<td>• self-referential reproduction</td>
<td></td>
</tr>
<tr>
<td>• products of these understandings, e.g., statistics, probabilities, engineering, IT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

It is now appropriate to consider the impact of OCST upon Black's decentred regulation discourse. It is interesting to note that Black writes that the analysis that underpins her decentred regulation conception draws together a number of themes from a range of writings in law and regulation. She argues that this decentred
understanding has no single exposition, but central to her analysis developed are
certain writings which to a great extent include the work of Teubner (Black, 2002,
p.3, FN 4).\textsuperscript{9} She refers to Teubner’s edited work, *Juridification of Social Spheres:*
*A comparative analysis in the areas of labour, corporate, anti-trust and social
welfare law.* She also relies upon Teubner’s other works which she enumerates.
For example, when Black refers to decentred regulation perspective, she writes:

> Thus the information systems possess the other systems is simply
> that which they have themselves constructed in accordance with
> their own criteria. (Black, 2002, p.5)

In relation to this autopoietic conception, she relies upon Teubner’s work, *Law as

Black writes in relation to the ungovernability of systems, the central notion
in decentred regulation discourse that no system can act directly upon another, and
that attempts to do so will result in Teubner’s well-known regulatory trilemma,
namely, the indifference of the target system to the intervention, the destruction of
the target system itself or the destruction of the intervening system (Black, 2002,
p.7). Her reliance upon Teubner’s model of self-steering is quite obvious in this
section.

In another section of her 2002 work, Black writes:

> The diagnosis of regulatory failure provided by the decentring
> analysis suggests that regulation should be a process of
> coordinating, steering, influencing and balancing interactions

of California Press.
between actors/systems and creating new patterns of interaction which enable social actors/systems to organise themselves using such techniques such as proceduralisation. (Black, 2002, p.9)

This particular passage does incorporate a number of elements of OCST autopoietic theory. It certainly does acknowledge generally that self-steering is the most appropriate form of regulation given the qualified diagnosis of regulatory failure in the traditional command and control sense. It then proceeds to adopt Teubner’s specific technique of proceduralisation in the framework of regulation. OCST’s impact upon Black in this section is somewhat significant and persuasive.

Writing in relation to the debate regarding the appropriate range of techniques available for regulation, Black writes:

Alternatively, normative goals are sometimes framed functionally as in Teubner’s version of systems theory . . . to prevent the entropy or self-destruction of systems and to stimulate system integration. (Black, 2002, p.10)

Again, it is noteworthy that Black provides explicit recognition of the influence of Teubner upon her conception of normative goals in a new regulatory state.

Most notably, the essentialist or generalist definition provided by Black with respect to her conception of decentred regulation provides us with most telling evidence of the influence of OCST upon her understanding of decentred regulation discourse. Interestingly, the following passage is most insightful: ‘mechanisms of standard setting, information gathering and behaviour modification’ (Black, 2002, p.9). This particular passage is somewhat different to the standard conception of command and control regulatory discourse or traditional regulation discourse. Ogus
defined regulation as 'in which standards, backed by criminal sanctions, are imposed on suppliers' (Ogus, 1994, p.5). Black herself defines command and control traditional regulation discourse as 'regulation by the state through the use of legal rules backed by criminal sanctions' (Black, 2002, p.2).

The passage that I have referred to in relation to the decentred definition of regulation involves mechanisms of standard setting, information gathering and behaviour modification. They are arguably mechanisms which are aligned with the self-steering conception of regulation. They also appear to have some alignment with Teubner’s conception of proceduralisation whereby the legal system defines certain fundamental requirements relating to procedure and methods of cognition as opposed to the imposition of substantive cognitions (Teubner, 1989, p.25).

Black writes that the definition is not neutral and her definition does come with certain assumptions which are both theoretical and empirical. She argues that the definition is intentional, problem-solving and attempts to alter behaviour of others using a range of mechanisms (Black, 2002, p.27). However, the definition has much to commend it as it provides us with a radical transformation of the traditional understanding of regulation discourse. Despite its clear limitations with respect to its abstract generalisation, it does afford us with a working model for a decentred conception of regulation discourse in a new regulatory state.

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In summary, Black concludes that a decentred understanding of regulation is stimulating and perplexing, whilst at the same time acknowledges that there is no commonly accepted usage of ‘self-regulation’ or indeed ‘regulation’ in a post-regulatory state (Black, 2002, p.34). However, Black finds that this preliminary conclusion is somewhat liberating as it opens up certain implications for regulation discourse and legal theory generally. Black provides us with the possibility that a poly-contextual understanding of regulation discourse and legal theory is possible and probable in accordance with OCST. To this extent, there is considerable evidence that OCST’s interpretation of self-steering in society has had a significant impact upon traditional regulation discourse and decentred regulation discourse as understood by Black. There is, therefore, some evidence in this case study supporting Hypothesis Three of the research problem. Self-steering is regarded as viable and positive.

8.2.2 Christine Parker and contemporary regulation discourse

In this sub-section, I will look at the possible implications of OCST’s self-steering model for contemporary regulation discourse as understood by Christine Parker. In a most thought-provoking work, The Open Corporation, Christine Parker discusses widely effective self-regulation and democratic models of corporations in a new regulatory state.\footnote{Parker, C. (2002) The Open Corporation: Effective Self-Regulation and Democracy, Cambridge: Cambridge University Press.}
I do not have sufficient space in this sub-section to comprehensively deal with the thesis of Christine Parker in *The Open Corporation*. However, it will be useful to briefly discuss the main thrust of her discussion and thesis. Then I shall look at the possible implications of OCST’s interpretation of self-steering for her research and the influence it may have had in her conceptual understanding of regulation and legal systems.

**Parker’s research methodology**

It is worthwhile to outline Parker’s research methodology in *The Open Corporation*. The quality of her research methodology will have an impact on the quality of my research.

The primary empirical research conducted by Parker was through unstructured, in-depth interviews with government regulators and self-regulation professionals (Parker, 2002, p.302). They were conducted in four different areas, namely, sexual harassment, consumer protection, financial services and environment. Parker’s sampling for interviews was not random but deliberately sought to elicit best corporate self-regulation practice (Parker, 2002, p.303).

Companies where interviews took place included:

(i) Banksafe Australia
(ii) Big Bucks Australia
(iii) Credit 4 Oz
(iv) Good as Gold
(v) Aussie Dollars
(vi) Trustees
(vii) Oz
(viii) Pets and Health
(ix) Adviser Five

The research is largely based on the above qualitative fieldwork of interviews and participant observation with compliance practitioners in Australia, Europe and the United States (Parker, 2002, p.ix). My own research design has also been driven by my experiences as a participant in the courts in New South Wales. The conclusion drawn by Parker are primarily sourced from the field qualitative work which she employed.

Parker’s research

One of the case studies analysed by Parker deserve special mention. It involves a case study of the Australian Competition and Consumer Commission which is a regulator of anti-trust and consumer protection pursuant to the Trade Practices Act 1974. She notes after interviews with the regulators that during the 1980s, the said Commission became more strategic in the cases it chose to investigate and simultaneously focused on nurturing compliance through industry codes of practice and individual corporate compliance regimes (Parker, 2002, p.249). They noted that, for example, in the fruit juice industry, adding water or sugar to drinks labelled ‘100% Juice’ was a common practice and difficult to police. The
Australian Competition and Consumer Commission (ACCC) responded by drafting a code of practice that was self-monitored. She notes that the manager of the appropriate scheme could correct any breaches from the code prior to compliance action being taken.

Furthermore, the ACCC has sought orders from the Australia Federal Court to the effect that breaching companies implement self-compliance corporate programs as a condition of settlement to give added effect to the small penalties which are available under the Trade Practices Act. These additional measures have been reported as highly useful by the ACCC. Furthermore, the ACCC in 1995, according to Parker and according to the field interviews, had developed in consultation with Standards Australia an appropriate Standard on complaints handling as a result of breaches by corporations. Accordingly, the ACCC according to the field research has developed significant self-compliance and self-regulatory schemes which are not often seen in other regulators in Australia (Parker, 2002, p.251).

Parker’s important thesis commences with a traditional critique of command and control regulation. She notes, amongst other weaknesses of command control regulation, that it provides for a tendency towards unnecessarily complex rules that are too difficult or costly for businesses to access (Parker, 2002, p.8). Furthermore, these complex and strict uniform applications of command and control rules also entail compliance costs which decrease competitiveness according to Parker. Parker notes that research has indicated that excessively
legalistic regulations can be ineffective because its very legalism dissipates voluntary responsibility (Parker, 2002, p.9).

Parker also discusses at some length regulatory capture, which is empirically difficult to test for observation. It is a pathology of regulation whereby regulatory staff may be subverted to pressure, influence or bribery to protect the interest of regulatees or others (Parker, 2002, p.10).\textsuperscript{12}

Like Black, Parker notes that the new regulatory state has brought forth a number of new regulatory techniques which have spelt a paradigm shift in traditional regulation discourse. She does agree with Majone that instead of the State providing basis infrastructure and welfare services for the unemployed or other disadvantaged groups, the State now specifies the outcomes it wants from either private or public providers of those services and then the State regulates to secure those outcomes through audit, inspection, grievance handling and judicial review (Parker, 2002, p.13). She also makes the observation that techniques for controlling privatised public entities have now flown over into private sector regulations where regulatory compliance and marketing incentives are used to steer corporate conduct towards certain outcomes without wishing to overtly interfere with corporate autonomy (Parker, 2002, p.14).

Consequently, the adoption of certain public sector techniques in the management of the private sector largely heralds the arrival of the new regulatory

\textsuperscript{12} Also see Ogus, A. (1994) \textit{Regulation: Legal form and economic theory}, Oxford: Oxford University Press.
state. This involves an increase in arms length regulation or regulatory styled
controls which are decentred and compliance-orientated (Parker, 2002, p.15).
Within this context, Parker attempts to develop a corporate model of self-
regulation along the compliance route. That is, alongside traditional sanction of
command and control techniques, she investigates the increasingly emphasis by
OECD governments of experimenting with four programs that provide incentives
for voluntary implementation of sophisticated compliance systems by business and
sanctions for lack of a program (Parker, 2002, p.16). She notes that OECD nations
and power nation states are experimenting with a proliferation of voluntary codes
of practices and standards promulgated by international bodies with respect to
corporate enterprises, regulation of such enterprises within domestic boundaries
and across international boundaries (Parker, 2002, p.17).

For the purposes of my discussion, I will briefly discuss her model for
corporate social responsiveness. This is her equation for a proposed open
corporation which integrates effective self-regulation and democracy in law. She
bases her work upon the work of Chaganti and Phatak who in 1983 with their
work, *Evolution and the Role of Corporate Environmental Affairs Function*¹³ argue
that in their opinion there are three phases in the managerial process of dealing
with dilemmas raised by social issues. They are summarised briefly as: (i)
commitment to respond by management; (ii) existence of specialised skills and

Policy*, vol.5, pp.183-203.
knowledge which should translate to the existence of self-regulation personnel within the organisation; and (iii) institutionalisation of purpose or integration of compliance responsibilities into procedures, operations, reward and performance review systems. (Parker, 2002, pp.57-58).

For the purposes of this chapter, Parker argues that the goal for corporate regulators is one that does not imply an ever-expanding legalistic colonisation of regulation over corporate business decisions. Rather, the goal for regulators is that organisations should be effective *self-regulators* within the context of democratic liberation over competing values and regulatory requirements. She goes on to write that the success of corporate regulation depends crucially on a corporation’s ability to institutionalise responsibility and other corporate citizenship values (Parker, 2002, p.61). This sophisticated and difficult three-stage process, she writes, will be due to the success of the integration of management priorities, permeation of legal and community values through legal incentives and regulatory pressures, and the dedication of internal compliance core of specialist officers (Parker, 2002, p.61). She then tackles in her book the argument fleshing out the three elements outlined above and attempts to provide empirical and pragmatic evidence in relation to the sustainability of her argument.

In summary, Parker’s work is one, like Black’s, which shares an enthusiasm for a de-emphasis on regulation. This enthusiasm arises out of the context of the new regulatory state which indeed provides a momentum for non-traditional regulation discourse. Of course, Parker does not propose the absence of regulation
but rather promotes ‘meta-regulation’ whereby regulators regulate at an arms-length and provide incentives to promote commitment to compliance (Whincop, 2003, p.150).

There are also other aspects of her contemporary regulation discourse which I have no time to enter into for the purpose of this chapter. Whincop provides a brief critique of Parker’s work which the reader may resort to for further analysis on corporate regulation. Most of Whincop’s critique concerns the topic of regulation with respect to corporations in particular. Perhaps Whincop’s greatest assistance is in focusing upon non-legally enforced rules and standards as a topic of discussion in a new regulatory state. These are similar to the decentralised regulation complied mechanisms available to regulators which were referred to earlier in this discussion. As I have now provided a brief synopsis of contemporary regulation discourse argued by Parker, it is now useful for us to examine possible implications of OCST’s self-steering interpretation for her discourse. In doing so, I shall analyse whether this case study supports Hypothesis Three of the research problem.

The title of Parker’s work, *Effective Self-Regulation*, appears to be strongly aligned with self-steering as interpreted by OCST. Furthermore, her overt repudiation of traditional command and control regulation is also aligned with OCST’s self-steering interpretation for regulation in the legal system. However, the elements which she describes do not necessarily comprehensively adopt

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autopoietic theory as understood by Luhmann and Teubner. For example, Parker argues that corporations should communicate with their environment. Clearly this is inconsistent with operational closure as understood by Luhmann and Teubner.

However, it is interesting to examine the theoretical underpinning for her work. She writes:


Parker provides the theoretical underpinning of her mode of self-regulation discourse and clearly recognises Luhmann and Teubner's impact upon her understanding and conception of self-regulation for corporations within a new regulatory state. Again, she writes:

Teubner (1987) proposes that only corporate 'reflexion' can integrate autonomous business organisations with other social subsystems. Reflexion internalises the corporation's external effect and puts the responsibility on the corporation to integrate itself with other subsystems and society as a whole. (Parker, 2002, p.297)

Therefore, whilst Parker provides the theoretical underpinning of her self-regulation and democracy conception of the modern corporation in a regulatory state quite late in her thesis, she nevertheless concedes that Luhmann and Teubner are primary amongst others in their impact upon her regulation discourse.15 She refers to their work when attempting to deal with the critique of those whom

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15 Regrettably, she does not critique in any real way OCST. She largely leaves it to her fieldwork.
question the ethical and practical consequences of self-regulation dialogue and discourse. However, she notes that regulatory compliance programs and voluntary self-regulation systems are increasingly popular with management as a means to manage legal and social responsibilities in the context of the new regulatory state (Parker, 2002, p.292).

However, it is interesting to discuss the similarities of Parker’s work with OCST’s understanding of self-steering in society apart from her explicit recognition of Luhmann and Teubner’s influence.

I mentioned her repudiation of traditional command and control regulation earlier. I have also noted her repeated use of the central notion of ‘self-regulation’ in a new regulatory state as an appropriate foundation upon which modern corporate regulation should proceed. Furthermore, the tools which are available in a new regulatory state appear to have all the hallmarks of self-steering. That is, if self-steering is a mechanism by which certain inducements, programs and influences are provided by the regulators, then regulatory compliance programs and voluntary self-regulation systems which are utilised in compliance-orientated regulations clearly correlate to conditional programs. Maximising voluntary compliance by business from the beginning is consistent with Luhmann’s conception of self-steering when he writes:

Politics can therefore only create conditions that influence the program and in this way the self-steering of the economy. It can prohibit something, it can create costs, it can create conditions for utilities, etc. (Luhmann, 1997, p.53)
Consequently, the tools available to regulators such as education, persuasion, incentives and compliance systems are conditional programs. The periphery is the ‘contact zone’ with the legal system’s environment and numerous conditional programs are available through structural coupling which enable self-steering from the points of view of the legal regulator. Parker and Whincop’s discussion on the topic of non-legally enforced rules and standards (NLERS) is strikingly similar to OCST’s conception of programming and external reference within the context of structural coupling.  

The above leads us to come to a point where I could argue that there is considerable evidence found in the work of Parker as outlined above in the open corporations self-regulation thesis that OCST’s conception of self-steering within systems theory has had a significant impact upon her traditional regulation discourse. Apart from Parker’s explicit recognition of the prime influence of Luhmann and Teubner’s work late in her thesis, the tools used by Parker, such as ‘self-regulation’, ‘non-legally enforced rules and standards’ and ‘new regulatory state’ signify strong conceptual parallels with OCST’s self-steering conception for subsystems and the legal system in particular.

Contemporary regulation discourse as formulated by Parker also appears to embrace proceduralisation regulation and responsive law as framed by Teubner and as discussed earlier in Chapters Six and Seven. Embracing proceduralisation

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16 Found at Whincop (2003, p.164 onwards) who also gives an account of the theory of the firm as a background to NLERS.
regulation as formulated by Teubner indicates a certain direction in Parker which lends itself to procedural as opposed to substantive law regulations by the regulators. Whilst it may be said that the work of Parker does not embrace the various elements of OCST's comprehensive understanding of the legal system in society, from the point of view of self-steering as opposed to direct steering, it appears that Parker is heavily influenced by OCST and does not merely pay lip service to their work. Her conception of the corporation as a self-regulating body, coupled with democracy, whilst violating certain aspects of the elements of normative closure, nevertheless is a work which is reasonably loyal to the conceptual understanding of self-steering by systems in society if they are to be preserved and protected from ultimate degradation.

Hence, Parker's case study provides some support for Hypothesis Three of the research problem, and indicates the growing impact of OCST for traditional regulation discourse.

8.2.3 John Paterson and regulation discourse

I will now turn to a very brief discussion of a third contemporary regulation commentator. Space only allows a brief glimpse of the work of John Paterson. In his titled work, *Behind the Mask: Regulating Health and Safety in Britain's Offshore Oil and Gas Industry*, Paterson prepared a thesis for submission under the supervision of Teubner in May 1997.
Paterson’s task is the analysis of traditional rationality constructs within the terrain of Britain’s offshore oil and gas industry. In particular, he examined external evaluation of law within a number of British reports, and he then compares these external assessments of regulation law with internal assessments of the same legal discourse. The case studies include assessment of the following reports:

(i) Carson - The Other Price of Britain Oil
(ii) Wright - Routine Deaths: Fatal accidents in the oil industry
(iii) Tombs - Piper Alpha: A case study in distorted communication
(iv) Woolfson, Foster and Beck - Paying for the Piper
(v) Prescriptive Regulatory Regime in the UK
(vi) Cullen Inquiry into the Piper Alpha Disaster

However, his ultimate project is to construct a ‘new rationality’ for the assessment of regulation discourse in Britain’s offshore oil and gas industry (Paterson, 1997, Chap.1). On this road to a new rationality, Paterson takes into account a number of postmodern theories, including Urlich Beck, in which Beck attempts to reverse the traditional conception of the relationship between industrialisation and the logic of risk production. He does accept that a ‘reflexive modernity’ is an appropriate construct if a constructivist paradigm is adopted by the observer (Paterson, 1997, p.45).

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17 Becks celebrated reversal of risk conception is acknowledged in part by Luhmann and other OCST scholars.
Paterson then demonstrates that autopoiesis explains the limitation of the instrumental model of traditional regulatory policy and in doing so demonstrates the process whereby political and economic approaches construct the data that they collect. By doing so, Paterson argues that autopoietic theory can assist us to see that more than one rationality may be significant in a regulatory problem (Paterson, 1997, p.63).

**Figure 12: Cognitive map - Industry management (1986-1996) by Paterson (1997)**

A cognitive figure used by Paterson when attempting to understand risk management dynamics in one of his case studies drawn from the Piper Alpha accident, a UK oil platform in 1989.

In the second half of his work, Paterson then attempts to construct the re-interpretation of regulation discourse by way of cognitive mapping techniques and his re-conceptualisation of possible regulation in Britain’s offshore oil and gas industry. Paterson’s work is a very sophisticated analysis of aspects of Britain’s
offshore oil and gas industry utilising the advanced technique of cognitive mapping. This is a diagrammatic and graphic representation of a systematic observation within an environment metaphor. Cognitive mapping was developed by Axelrod and is primarily used as a means of examining decision-making processes with a view to improving the performance of policy makers (Paterson, 1997, p.67). However, the new rationality which Paterson attempts to apply to traditional regulation discourse within Britain’s offshore oil and gas industry is heavily influenced by OCST. Luhmann and Teubner provide an explicit and primary influence for a new rationality in Paterson’s work. As Paterson writes:

Teubner proposes instead that law must abandon the claims of command and control or prescriptive regulation and adopt a reflexive orientation. In such an orientation, law recognises the dual closure of the legal system and the system to be regulated and develops regulatory strategies on that basis. One possible approach might be the implementation of an ‘option policy’ . . . which involves law in making alternatives available to regulated systems but not obliging them to accept them. (Paterson, 1997, p.60)

This rationality is the new rationality which Paterson attempts to apply to traditional regulation discourse, and in doing so, constructs a possible new or contemporary regulation discourse for Britain’s offshore oil and gas industry. In particular, Paterson attempts to use autopoietic theory to unmask the dominating and deterministic rationality which has prevailed in traditional regulation discourse. Consequently, it can be stated with some confidence that Paterson’s work demonstrates another example whereby Luhmann’s and Teubner’s
interpretation of the self-steering model has had a significant impact upon traditional regulation discourse.

8.3 Summary

The aim of this chapter was modest. The chapter is an extension of the discussion of OCST’s interpretation of self-steering of the legal system in society. To demonstrate its impact, I chose a further case study. The case study was traditional regulation discourse and contemporary regulation discourse. The discussion revolved around examining some case studies, in particular, Black, Parker and Paterson. I was able to demonstrate that each of these writers who are active analysts in contemporary regulation discourse were influenced to a greater or lesser degree by OCST’s conception of self-steering by subsystems within the societal system. It is conceded that the analysis is quite selective and has not provided us with a broad discussion of regulation discourse.

The mini case studies, however, have provided some evidence of the desirability of self-steering by systems in the postmodern state. There was evidence that supports Hypothesis Three of the research problem. Impacts of OCST were also examined.
Chapter Nine
Conclusion and Implications

9.1 Introduction

Chapter Nine concerns the contribution to knowledge made by the findings in this research (Phillips & Pugh, 1994, p.60). Whether this research is a distinct contribution or not will be pivotal in assessing the value of the research.

Chapter Two outlined the parent fields of the research problem. I concluded that structural functionalism and autopoietic theory in science were the parent fields of operatively closed systems theory (OCST). OCST is the immediate field of inquiry and the setting for the research problem.

Chapters One and Two outlined the research problem which is: How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia?

The research problem was arrived at after some experimentation by me. A number of assumptions and limitations were designed into the research problem. These assumptions and limitations were defined in Chapter One, Section 1.7.

The research problem requires a solution. The solution was attempted by the formulation, testing and analysis of three hypotheses with the assistance of OCST. They were:

(i) **Hypothesis One**: That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST.
(ii) **Hypothesis Two**: That OCST will predict (in the case study data) the undesirability of attempts of direct steering of the legal system by the political system.

(iii) **Hypothesis Three**: That OCST will predict (in the case study data) the desirability of attempts of self-steering by the legal system.

The research problem and three hypotheses were formulated to cover a gap or relatively neglected area of research in the OCST field. This gap was outlined in Chapter Two, Section 2.4.3 onwards.

Chapters Four to Eight of the research was conducted to test the hypotheses. I also formulated additional research questions for some of the case studies. The overall research, however, was guided by the need to test and analyse one or more of the hypotheses with the assistance of OCST.

To answer the question as to whether the research has made a distinct contribution to knowledge, I will outline in the remainder of this chapter ‘conclusions’ about the findings in Chapters Four to Eight. By ‘conclusion’, I mean ‘qualitative findings about the research questions, hypotheses analysed and research problem developed during the research including insights discovered and contributions’ (Perry, 1998, p.31).

I will apply the findings within the context of this research and other research outlined in Chapter Two. The guiding principle will be the researcher’s contribution to knowledge in the OCST field (Perry, 1998).
9.2 Conclusions About the Three Hypotheses

This section will concern the findings for each of the hypotheses as tested and analysed by the research in Chapters Four to Eight. Conclusions or explanations will then be drawn from the findings in an attempt to answer the question as to whether the research has made a contribution to the OCST field.

9.2.1 Hypothesis One and Chapter Four

Hypothesis One of the research problem was ‘that certain patterns in the Australian case study data will match predictor elements in the typology of OCST’.

The typology of OCST comprised certain research questions first defined at Section 4.1.1. These research questions were:

(i) Is there evidence of subsystems in the case study?
(ii) Is there evidence of overproduction of norms in the case study?
(iii) Is there evidence of operational closure in the case study?
(iv) Is there evidence of structural coupling and peripheral operations in the case study?
(v) Is there evidence of an epistemic trap and self-description in the case study?
(vi) Is there evidence of irritation registered internally in the case study?

The case study I presented in Chapter Four comprised ALRC Discussion Paper No. 62, ALRC Report No. 89 and the Family Court of Australia Submission No. 348.

In this case study, certain quantitative and qualitative data were interpreted to form the basis of my methodology. In this regard, my methodology was qualitative.
research. At the end of Chapter Four, I was able to find some positive evidence for each of the research questions 1-6 outlined above in the case study. I was able to find, therefore, that certain patterns in the Australian case study matched in the affirmative predictor elements in the typology of OCST. I was able to find Hypothesis One appears to be supported in the context of the case study at hand.

The relevant question then is: *What is the contribution of these findings?* Firstly, I was able to demonstrate the possibility of the positive use of qualitative research methods in the understanding of OCST. Some scholars argue that empirical observations of OCST is impossible (Sinclair, 2000, p.56). One scholar has written ‘What I learnt from those fields of study was that no research has ever been designed, or can be at this time, that can prove Luhmann’s theory’ (Sinclair, 2000, p.56).

The above view contrasted with the views of other scholars who have argued that OCST can be tested or observed externally by qualitative research methods and design (Lemercier, 2003; Paterson, 1997; Brans & Rossbech, 1997).

The contribution of my research is that it supports the view that modified qualitative methodological research involving OCST is possible and fruitful. External observation of patterns in societal subsystems can be tested and observed in research to seek findings with the assistance of OCST. Whilst in my own research, my observations were restricted to the observation and interpretation of data collected by field researchers, the above observation can still be made.

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Secondly, I was able to make a contribution to the Australian scholarship in OCST. OCST scholars such as Lemercier, Ziegert and Sinclair have made robust contributions to OCST in the Australian setting. These contributions are small in contrast to the international OCST field.

9.2.2 Hypothesis One and the Chapter Five case study

I applied Hypothesis One to the additional case studies presented and observed in Chapter Five. These case studies were smaller in scope than the case study in Chapter Four but they were sourced in origin from the same setting as the Chapter Four case study, namely the legal aid industry. Four case studies were employed. Each focused upon the data collected in relation to the observed effects of the reduction in Australian legal aid in the legal aid industry and the Australian courts.

Again, I sought to find patterns in each of the case studies which would match certain relevant questions developed as a typology of OCST. I undertook a very similar matching regime to that I employed in Chapter Four.

The findings for each of the case studies in Chapter Five were encouraging. In each case study, some positive evidence was found for each of the elements of the OCST typology. I accept, however, that the nature and scope of these case studies would, due to their smaller scale, give rise to a caution when interpreting the findings. In this regard, I have presented the case studies as a qualitative researcher as a bricoleur. As a bricoleur, I produce a bricolage to piece together close-knit set of practices that may provide a solution to problems outlined in the
research problem (Denzin & Lincoln, 1998). As opposed to the strict scientific positivist method which is logical deductive grounded and produced in a scientific report, I have employed a qualitative constructivist model which provides for interpretative case studies as well as acknowledging my ethnographic experience as a participant in the court process in New South Wales over a period of 14 years. The case study I have employed which resort to the interpretation of raw data as well as the interpretation of research is, I submit, consistent with the methodology of interpretative case studies.

Consequently, I was able to find that certain patterns in the Australian case studies match in the affirmative predictor elements in the OCST typology. Hypothesis One was found to be supported in the context of the mini case studies in Chapter Five.

The contributions that were made by the findings are the same as outlined in Chapter Nine, Section 9.2.1 above. That is, the findings support the view that qualitative research is possible when designing a test which utilises OCST. Further, it adds to the research available in the Australian legal setting. It also supports the research problem solution as will be explained below.

9.2.3 Hypothesis Two and Three and the Chapter Six case study

In Chapter Six, I introduced the English King and Piper case study. Their research was qualitative research and focused upon the construction of the child in the legal discourse in the English and European settings. Their research methodology was
qualitative, observational and largely focused upon resorting to published research in the field of children welfare law, the analysis of reported cases and their own experiences in observing child welfare law and action.

The specific research questions for Chapter Six in the context of the hypotheses were:

(i) To test the hypothesis that OCST will predict in the King and Piper case study, the undesirability of attempts of direct steering of the legal system (or other systems) by the political system or other systems (Hypothesis Two).

(ii) To test the hypothesis that OCST will predict in the King and Piper case study, the desirability of attempts of self-steering by the legal system (and the child welfare system) (Hypothesis Three).

I formulated several sub-questions which helped me to introduce and make sense of the case study data in the context of the above hypotheses. My findings were encouraging. First, OCST positively predicted in the case study the undesirability of attempts of direct steering of the child welfare system by the legal system and vice versa. Second, OCST positively predicted in the case study the desirability of attempts of self-steering by the child welfare system. Their reference to English, Australian and Canadian cases and research findings as well as court practices supported the above findings. Consequently, there was good evidence found in Chapter Six to support Hypotheses Two and Three of the research problem as modified by the specific questions in Chapter Six.

The contribution of the findings are three-fold. First, they support the desirability of OCST self-steering of systems, at least in the context of the case
study parameters. Second, it adds to the limited research available on OCST self-steering (Paterson, 1997). Third, the findings add to the limited Australian research on OCST self-steering of systems.

Australian OCST research has, to date, focused upon open corporations (Parker, 2002), OCST generally (Ziegert, 1995) and changes in the legal system (Lemercier, 2003).

9.2.4 Hypotheses Two and Three and the Chapter Seven case study

In Chapter Seven, I employed another Australian case study to qualitatively analyse and test Hypotheses Two and Three. The case study comprised:

(i) The phenomena of court reorganisation in Australia in the last 15 years.

(ii) Response of the judiciary and others to the phenomena of court reorganisation.

In the context of Hypotheses Two and Three of the research problem, I formulated the following questions for the case study interpretation and test.

(i) Is there evidence in the case study of direct steering attempt of the legal system by the political system?

(ii) If there is evidence of direct steering, is it desirable or undesirable?

(iii) Is there evidence of self-steering attempts as understood by OCST in the case study data?

(iv) If there is such evidence, is it desirable or undesirable?

I then applied each of the above research questions to the case study data. The case study comprised the written opinions of a number of eminent judges and scholars
on the topic of Australian court reorganisation in the last 10-15 years. This was not an interpretation of data collected by other scholars. In Chapters Four, Five and Six, I interpreted the data collected by scholars and researchers in the field. As such, that exercise was original in that I interpreted the qualitative research data for the first time.

In Chapter Seven, a slightly different approach was taken. I interpreted the expressed views and observations of eminent judges and scholars directly affected by court reorganisation in Australia. Whilst the sample is small, for the purposes of my research in Chapter Seven, the sample was sufficient for a qualitative exercise in interpretative case study analysis and interpretation (Denzin & Lincoln, 1998, p.27). To the extent that it is qualitative, it is scientific. However, I concede that it is not empirical in the strict positivist sense in terms of direct observation or direct interview. I am using alternative methods such as the case study interpretation method to bring a solution to a specific problem. Furthermore, the judges whom are drawn in the sample validate the research insofar as they express their concerns as active participants in the process of court reorganisation. Their internal perspective gives weight to the research exercise. Furthermore, their opinions do not contradict my own experience in the jurisdictions.

The findings of the research were positive. The case study did provide evidence of direct steering attempts of the legal system by the political system. The evidence also indicated that these attempts were highly undesirable from the internal point of view of the legal system itself. Whilst there was some evidence of
attempts of self-steering of the legal system, the evidence in the case study was compelling. Self-steering of the legal system is *highly desirable* and necessary for the maintenance of a healthy rule of law in the Australian setting. The central concept of ‘judicial independence’ served to symbolise the legal system’s need to self-steer.

The contributions of the findings are three-fold:

(i) The findings support Hypotheses Two and Three of the research problem.

(ii) Findings give scholarly interpretation to the hitherto misunderstood and rarely discussed phenomena of court reorganisation in Australia in the last 10-15 years.

(iii) The findings further support steering research in OCST.

Again, certain scholars would disagree with my findings. They may argue that the design in Chapter Seven is fundamentally flawed. They could also argue it is not observational research in the strict positivist sense. I can retort by restating that the perspective of the judges in the case study are those of internal participants in the phenomena of court reorganisation and consequently validate the case study as useful and of value.

**9.2.5 Hypotheses Two and Three and the Chapter Eight case study**

In Chapter Eight, I employed a further case study to analyse and test qualitatively Hypotheses Two and Three of the research problem with the assistance of OCST. The case study involved an examination of research conducted by other scholars. They were useful, however, insofar as their research was not theoretical, but
primarily based upon observation and interviews in the field using qualitative methodology.

The case study in Chapter Eight involved the process of interpreting qualitative data collected by researchers in the field such as Parker and Paterson. Accordingly, the case study in Chapter Eight is a review of selected scholars in the OCST field. In Chapters Four, Five and Six, whilst I indirectly and directly interpreted the data collected by researchers in the field in an original sense, in Chapter Eight, I am re-interpreting the interpretation of scholars who have collected data in the field. Notwithstanding this, I believe the research is useful as there is little other research available in the field of OCST and regulation in Australia.

Chapter Eight was designed to build upon the case study analysis of self-steering in Chapters Six and Seven and further test Hypotheses Two and Three.

In the context of Hypotheses Two and Three, the central research question for Chapter Eight was: *Is the element of self-steering as understood by OCST impacting traditional regulation discourse?*

The findings made were that the answer to the above questions was to the effect that OCST self-steering was having an impact on traditional regulation discourse. Caution was provided in Chapter Eight due to the mini size of the case study review and the fact that the case study consisted of re-interpretation of original interpretations of the scholars. However, given that the case study was designed to test the question as to whether or not scholars have been impacted by
OCST in the field of steering, the case study is valid and useful. The actual subject in the case study which is being observed by me is the scholar as opposed to the empirical findings of the scholar. Whilst reference will be made to the findings of the scholar, the scholar’s interpretation and the methodologies and theories that they bring to bear upon their observations is the actual subject of my case study.

The effect of the findings were that there is some evidence in the mini case study of the *desirability* of self-steering of systems in the postmodern state. There was evidence found in the mini case study that support Hypotheses Two and Three of the research problem.

The contributions of the findings were three-fold:

(i) The research gives some insight into the impact of OCST on traditional regulation discourse in the Australian setting (e.g. Parker).

(ii) The research further supports OCST’s understanding of self-steering in the Australian postmodern legal system.

(iii) Findings further support Hypotheses Two and Three of the research problem.

### 9.3 Research Problem Conclusion

The essential research problem driving the entire thesis was: *How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia?*

Three hypotheses were formulated to help answer the central research problem. These three hypotheses were restated at the beginning of this chapter. The
findings made as outlined by me in the previous sub-sections seemed to lead to a clear consensus.

All the case studies employed by me to test the three hypotheses resulted in positive support of the relevant hypotheses tested whether they were Hypotheses One, Two or Three. While certain case studies were limited in sample size and comprised mini case studies, and were a mixture of data analysis and research analysis, they were notwithstanding useful in illuminating the testing of the hypotheses and research questions employed.

The result is that the answer to the central research question is found and constrained by the nature and scope of the three hypotheses themselves. That is, the answer to the research problem: How can OCST be used to effectively explain the dynamics of the postmodern legal system in Australia? is answered by the positively tested hypotheses themselves, namely:

(i) **Answer A - Hypothesis One**: That certain patterns in the Australian case study data will match certain predictor elements in the typology of OCST.

(ii) **Answer B - Hypothesis Two**: That OCST will predict (in the case study data) the undesirability of attempts of direct steering of the legal system by the political system.

(iii) **Answer C - Hypothesis Three**: That OCST will predict (in the case study data) the desirability of attempts of self-steering by the legal system.

These answers formulate a tool which can be employed for further research. The contributions of the findings are as follows:

(i) First, I submit that the OCST typology formulated can be used to explain certain dynamics of the postmodern legal system in Australia. The findings
and answers in the research are useful in explaining system dynamics in the legal aid industry and the regulation discourse literature.

(ii) Second, the research helps fill the gap in OCST literature regarding Australian research. Australian research is limited and restricted to a handful of empirical qualitative studies. My research shows an insight into the Australian OCST field.

(iii) Third, steering theory is not particularly well developed in the Australian OCST field (King & Piper, 1990; Paterson, 1997; Parker, 2002). The theory itself has some limited attention, but the empirical or qualitative testing of such theory is very limited. My research should positively contribute to the field.

(iv) Fourth and specifically, the findings support the OCST understanding of self-steering in the Australian postmodern legal system. Regulatory failure can be better understood by the application of the findings in Chapters Six, Seven and Eight and a testing of Hypotheses Two and Three. This is a particularly important contribution in my opinion.

(v) Fifth, the positive testing of the three hypotheses provides a formula and method for designing further Australian OCST research. The positive testing of the three hypotheses gives confidence in the future application of the methodology employed.

(vi) Sixth, qualitative research analysis utilising OCST in Australia employing case study interpretations have been shown to be possible and useful. This is a rebuttal of certain research which disparages qualitative research testing using OCST (for example, see Sinclair, 2002).

Critics have suggested that qualitative research testing utilising OCST is impossible (Sinclair, 2002), is without foundation (Rottleuthner, 1989) cannot be conceived in terms of autopoiesis (Munch, 1992) and is conservative (McCarthy, 1992). My research has demonstrated through the use of a number of different but related case studies involving data collected by competent scholars doing competent research in the field, that Australian qualitative research utilising OCST can be useful and validly undertaken. Naturally, the boundaries of the research
problem must be complied with. These contributions are specifically outlined in
Chapter Two. In Chapter Two, I outlined certain gaps and neglected areas in the
immediate OCST field. The hypotheses and contributions I have outlined address
in part those gaps and neglected areas identified in the immediate OCST field.

9.4 Implications for Wider Theory

*Are there contributions made by my research to the wider field, including the
parent fields of structural functionalism and autopoietic theory in science?*

OCST has clearly limited the ongoing viability of open structural
functionalism as an intellectual framework. My research was not undertaken to test
structural functionalism, but the findings corroborate the literature insofar as OCST
is incompatible with open structural functionalism. I prefer the OCST model for
the reasons outlined in Chapters One, Two and Three.

The findings also interestingly provide a controversy and dispute with
Varela, one of the founders of autopoiesis in science. The argument is that
autopoietic theory only applies to biological systems, not social systems (Varela,
1981). My findings contradict this view insofar as autopoietic theory is embedded
in OCST, and OCST has been shown to be useful and prognostic in my research.
Whilst not conclusive, my research contribution is to the effect that autopoietic
theory in science can be cautiously expanded to ‘autopoietic theory in science and
social science’. This has significant possibilities for the regeneration of certain
fields in the social sciences, such as child welfare law and family law.
Whilst not a design feature of my research, OCST in the natural sciences is possible and interesting. Certain scholars have already made findings to the effect that the drive to understand *pattern complexity and change* occurs also in the physical sciences (Lemercier, 2003, ch.11). The application of OCST to other fields such as social theory and science does have promise according to those scholars.

### 9.5 Policy Implications

A number of probable policy implications arise from the findings made in the research. I shall attempt to address each possible implication in the categories below:

#### 9.5.1 Regulation

Two-thirds of the research was concerned with the impact of OCST upon traditional regulation discourse. That is, it was concerned with self-steering theory and its desirability. The findings were to the general effect that OCST will predict the desirability of attempts of self-steering by the legal system or any other social subsystem. This is a consequence of autopoietic self-referential systems undertaking their daily operations.

Consequently, proceduralisation and self-regulation as opposed to direct steering will result in better outcomes in a target system. This paradox has significant applications for the government regulator in its many guises.
Furthermore, costs for the regulator would be significantly saved if the application of self-steering (Lemercier, 2003) and proceduralisation is adopted by regulators. 'Regulatory failure' is expensive and costly for both the regulator and the regulated (Parker, 2002, p.9). The design of post-regulatory models of regulation would likely lead to a form of 'meta regulation' which already shows great promise (Teubner, 1989; Parker, 2002) in Australia and Germany.

The self-referential features of OCST and systems operating autopoietically has significant implications for the long-standing relationship of the government and the legal system (courts). The case study in Chapter Seven highlighted the growing concern with the phenomena of court reorganisation in Australia in the last 15 years. The executive should take careful note of the negative impacts upon the judiciary when court reorganisation occurs.

Far more is at stake than financial restructure. Issues such as independence of the judiciary, judicial support, rule of law and jurisdictional erosion are all high on the agenda of negative impacts as a result of court reorganisation.

The research suggests that before any further jurisdictional erosion occurs in the guise of court reorganisation, the government should fund an extensive study seeking the input of the affected judiciary and the judiciary at large. Such a study would ensure that the regulator and the political system fully understands the impacts of direct steering when they occur without the input of the target system.
9.5.2 Government and legal aid industry relations

The comments made by me above in relation to political and court relations also apply to government and legal aid industry relations ipso facto. Whilst the legal aid industry resides in the periphery of the legal system, nevertheless it is self-referential as described and demonstrated in Chapters Four and Five.

9.6 Methodology

I have already noted earlier in this chapter and in Chapters One, Two and Three the methodology employed by me in this research. I have primarily used the qualitative research model as outlined by Denzin & Lincoln (1998, p.3, 27).

I have outlined earlier that my extensive experience as a participant and informal observer in the Family Court of Australia, District Court in New South Wales, Local Court of New South Wales and the Children's Court of New South Wales over the last 14 years has profoundly influenced the way in which I have designed the research problem, the proposed hypotheses and the selection of the case studies. Furthermore, my status as a participant in the above jurisdictions have led to the selection of certain case studies in my quest to demystify concerns which I had observed in the operations of the court in the above jurisdiction.

The positivist model of research includes logical deductive and scientific propositions and result in a scientific report (Denzin & Lincoln, 1998, p.27). Instead, I have adopted the qualitative research model which largely employs the interpretative case study informed by ethnographic experience in the field (Denzin
& Lincoln, 1998, p.27). That is, as a result of my participant experience in the field of court operations in New South Wales, I have designed a research model and research problem which has then informed the selection of various case studies. Those case studies were collected in my role as a ‘bricoleur’ whereby I have employed piecemeal close-knit set of practices to attempt to provide a solution to a complex problem which cannot be answered by straightforward positivist research (Denzin & Lincoln, 1998, p.3).

I have outlined earlier in this chapter limitations of each of the case studies in each of the chapters, but I have concluded that each of the case studies has significant benefits which outweigh the limitations presented by the size or type of case study employed.

Ultimately, the research is, consequently, qualitative in nature and derived upon an observation of data and interpretations of data dependant upon which case study is assessed.

I have chosen to undertake qualitative research as ‘bricoleur’ due to the poly contextual nature of the method which a qualitative researcher can employ (Denzin & Lincoln, 1998, p.7). Critics of qualitative research or of my own research would argue that the positivist scientific method is the only method worth employing. If that is not available, research is largely of little value.

I would retort that the tools of the qualitative researcher are multiple and multi-method in nature and focus (Brewer & Hunter, 1989). Most researchers would agree that objective reality can never be captured. Triangulation, therefore,
is an alternative to positivist scientific validation (Denzin & Lincoln, 1998, p.4). The combination of multiple methods and empirical materials, including documents and archival material, can add vigour and depth to my research (Flick, 1992, p.194).

If I employ qualitative research as a multiple method type of research based primarily upon interpreting case studies informed by a design resulting from my insights as a participant, then resorting to multiple techniques, including document analysis and data analysis collected in the field by researchers is valid. I can be confident then that through the process of triangulation I can validate my research findings. This ultimately is the quest of any qualitative researcher (Nelson, 1992).

9.7 Implications for Further Research

Further research could be undertaken on a number of different grounds. These grounds could be identified as follows:

(i) Further corroborative research could focus upon further similar case studies to those employed in my research. Such further corroborative research could help generalise the findings made in this research.

(ii) Removing the limitations of the Australian legal system could provide an opportunity for further research. The research problem in my research was primarily focused upon the postmodern legal system in Australia. Removal of such a limitation could provide fertile ground for further research.

(iii) The employment of positivist empirical quantitative methods could also be employed. To undertake further research, which would be difficult to design, could result in outcomes which would be most valid and useful.
Traditional regulation discourse and instrumental rationalities suggest that historical command and control models are satisfactory when the design of regulated outcomes are engaged. OCST suggests that such models are antiquated and not sophisticated enough to handle issues arising in postmodern legal systems which are evolving. Such a realisation sets the foundation for further research about this complex phenomena.
Bibliography


Children and Young Persons (Care and Protection) Act 1998 (NSW).


Bibliography


Bibliography


Bibliography


Bibliography


Bibliography


Case Authorities


Huddart, Parker & Co v Moorehead (1909) 8 CLR 330.

Appendix A

Question sheet for researchers from *Litigants in Person in the Family Court of Australia*, a report of the Family Court of Australia, 2000, presented in Chapter Five of this research.
LITIGANT IN PERSON STUDY

Schedule and script for Semi-structured interviews with LIPs

The following items should be filled out in advance:

Reference Number

Name of LIP and other parties (cross-check)

Gender of LIP

- FEMALE
- MALE

Date

Day

Month

Time

(24-hour format)

Registry

CA BR PA ML (circle one)

Name of interviewer

Barry

Cate

Both (circle one)

Was the interview held immediately after the hearing or later?

1 immediately

2 later

If later, how was it conducted? (In person or on the telephone?)

1 in person

2 phone

Were other people present?

0 NO

1 YES

If so, who? ........................................

Note whether there were any communication or language problems.
Refer to consent form, with undertaking of confidentiality, as necessary.

Thank you for agreeing to be interviewed. The Family Court has more and more people coming to it now who do not have a lawyer at all stages of their case. Sometimes this can lead to difficulties both for them and the Court. These interviews are part of an important research project, which we hope will provide information about who the unrepresented people are, why they don't have lawyers, what their special needs are, and how the Court may be able to help them in the future.

Let me assure you at the beginning that all the answers you give are strictly confidential. No names will be used in any of our reports, and all the records of the interviews will be destroyed after the research project has been completed.

1. Would you mind telling us something about yourself?

What is your highest educational qualification?

☐ 0 Year 10 or less  ☐ 1 Year 12  ☐ 2 Trade Qual.  ☐ 3 Diploma  ☐ 4 Degree

Do you have paid work?  

☐ YES  ☐ NO

If so, what do you do?  .................................................................

ABS ASCO Code [to be added later]

Where in [Canberra or the southern region/Sydney/Brisbane/Melbourne] do you live?  

.................................

(suburb or town name)

What is the postcode?  


Were you born in Australia?  

☐ YES  ☐ NO

If not, where were you born?  .....................................................

(country)

ABS Code [to be added later]

Do you speak English at home?  

☐ YES  ☐ NO

If not, what language do you speak?  ..............................................

(language)

ABS Code [to be added later]
2. Obtain a brief history of the matter: What are/were the issues?

Have any of them been resolved?

What attempts have there been (and at what stages) to reach settlement through conciliation counselling, mediation, settlement discussions between lawyers, etc.?

How long has the matter been running?

Were child representatives ordered, and if so was legal aid provided?

If there were no attempts to settle, why was this?

3. Why don’t you have a lawyer for your present matter in the Family Court?

☐ 1  ☐ 2  Go to Q5
Didn’t need/want one, etc  Couldn’t afford one (including denied legal aid)

4. Why not? [e.g., matter is a simple one; I am a lawyer; previous bad experiences with lawyers, etc.].

5. Have you used lawyers before in any other legal cases that you have had, or for other purposes, such as buying or selling a house or preparing a will?

☐ 1  ☐ 0
YES  NO

6. The Court has recently tried to simplify its procedures, redesign its forms to be more user-friendly, and provide information packs for people making applications to it. Have these influenced you to act on your own without a lawyer?

☐ 1  ☐ 0
YES  NO
7. Now that you have represented yourself do you still think that you do not need a lawyer?

☐ 1  ☐ 0

YES  NO

8. Have you applied for legal aid to assist you with the application before the Court today? [If yes, go to Q.10]

☐ 1  ☐ 0

YES  NO

9. [If no to Q.8] Why didn’t you apply for legal aid? [If necessary, prompt:] Was it that you:

(a) were told that you were not eligible;  ☐ 1

(b) did not think you were eligible;  ☐ 2

(c) prefer to represent yourself; or  ☐ 3

(d) some other reason? [If so, what?]  ☐ 4

[Go to Q.17 on next page; no more legal aid questions]

10. [If yes to Q.8] Have you been informed of the result of your legal aid application? [If yes to Q.10, go to Q.12]

☐ 1  ☐ 0

YES  NO

11. [If no to Q.10] How long have you been waiting for a decision

How has this affected you? [Go to Q.16 on next page]

12. [If yes to Q.10] Was your application to Legal Aid successful? [If no, go to Q.15 on next page]

☐ 1  ☐ 0

YES  NO
13. [If yes to Q.12] Did Legal Aid pay for all or only part of the case?

- ALL 1
- PART 2

14. Did your lawyer work in a Legal Aid office or was he/she in a private firm? [Go to Q.16]

- L/Aid 1
- Private 2
- Don’t Know 9

15. [If not successful: i.e. no to Q.12] Why did Legal Aid refuse your application? [If necessary, prompt:] Did they say that:

(a) you could afford to pay for your own solicitor;

- 1

(b) you have exceeded the limit of aid granted to you; or

- 2

(c) some other reason (If so, what?)

- 3

16. [If relevant] What was your experience with legal aid bodies? Do you have any comments?

..............................................................................................................

..............................................................................................................

17. At what stage are you in your case?
Did you get advice from a lawyer at an early stage?

Have you been unrepresented at all stages?

(If he/she has had legal representation, at what stages? – before contact with the Court, during early and/or later pre-hearing appearances, etc.)

(If he/she has had legal representation at earlier stages, but is not now represented, why did representation stop? e.g., legal aid funding stopped, legal aid cap reached, could not afford to pay any more, not happy with lawyer, no lawyer would represent him/her, etc.)
18. Did you know where to get information or advice about family law [for your matter]?

[ ] YES  [ ] NO

What sources of assistance did you use? Who else has helped you? [community legal centres, women’s or Aboriginal law centres, LIAC, a counsellor or mediator, a duty solicitor, friends or family, women’s or men’s support groups, pamphlets, videos, books, Do-It-Yourself information kits, the Internet, etc.]

[If any assistance was obtained] What was this assistance or advice about? [e.g. your rights, understanding and drafting documents, what to do in Court, trying to settle, the evidence needed, etc.]

Did you consult any experts to help you in your case? (e.g., psychologist, doctor, social worker, property valuer, accountant)

19. What was your experience of being unrepresented?
How strong or weak did you consider your case to be when it began?

How confident were you about conducting your own case?

How have you been coping?

Did you experience any difficulties representing yourself? [Prompt as necessary, e.g. preparing documents, knowing what to do in Court, cross-examining, presenting arguments, etc.; and refer to observation of the hearing if relevant.]

Were there any advantages to being a litigant in person?
What were your costs in preparing the case? (roughly) $ 

How much time did you spend in preparing the case and attending Court? Approx. (hours) 

20. Do you have any other comments about your experience in Court today [or with legal aid]? [Do not prompt. Possible responses include: anti-male bias, anti-female bias, racism, the presence of domestic violence as an issue, allegations of perjury, dissatisfaction with lawyers, judges or Court staff, continuing tit-for-tat litigation, vexatious litigation, lack of continuity in the judge or registrar hearing the case, etc.; and suggestions for changes in the system.]

Did you get any help from the Court? 

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
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<tr>
<td>1</td>
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Was it useful? 

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
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<td>1</td>
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Why? (what was it about?) 

Do you have any other comments? 

What (if any) additional information would you have liked?

21. Would you mind telling us roughly what income you have? [Show prompt card with a broad set of income ranges, both annual and weekly] After tax, which of these ranges would you say that your take-home income is in? 

Range 

Do you own any property, like a house, a block of land, shares or a car? Roughly, what would you say that these assets are worth? $ 

What is your age range? [Show prompt card with a broad set of age ranges] 

Actual age if stated ..........

Range
Thank you very much. It will be a great help to have your answers. As I said, all the answers are strictly confidential. No names will be used in any of our reports, and all the records of the interviews will be destroyed after the research project has been completed.

Here is your free movie pass. Thanks again for your help.

Comments by interviewer

For example, was the LIP stressed or emotional? Co-operative, etc.?

General Observations
Appendix B

Interview sheet used in the research for *Springvale Legal Service report into the impact of funding limits in legally aided family law matters which came into effect on 1 July 1997, presented in Chapter Five of this research.*
Family Law Issues Group
A Community Development Group at Springvale Legal Service Inc.

Practitioner Questionnaire
Family Law Ceilings

The purpose of this questionnaire is to gather information regarding the impact of ceilings in grants of aid for Family Law matters on:

- clients
- legal service delivery
- the courts

Completed questionnaires should be returned in the enclosed self-addressed envelope to:

ATTENTION: Catherine Caruana
Springvale Legal Service Inc.
PO Box 312
SPRINGVALE VIC 3171

Information sought is of an anonymous nature and all findings shall only be presented in aggregate form.

Date: ________________
Practitioners name (optional): ______________________________________

1. Location of your practice: Postcode __________

2. What proportion of your caseload is legally aided?
   a) 1-5% □    b) 5-10% □    c) 10-20% □    d) 20-30% □
   e) other (specify) __________________________

3. What impact (if any) has the imposition of Legal Aid ceilings in Family Law matters had on your practice?
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________
   ____________________________________________________________

SLS - Legal Aid Survey - February 1998
4. Have you had any legally aided cases which have reached the aid ceiling prior to the resolution of the matter?
   Yes □ No □ No. of Cases ______

5. What action did you take?
   Please tick No. of cases
   Withdrawn from the case □ □
   Continue to represent the client at no charge □ □
   Assist client to represent themselves □ □
   Advise client to accept previously unacceptable offer □ □
   Refer client elsewhere □ □
   Other ______________________________________

6. How would you assess your legally aided client/s ability as a group to represent themselves?
   not an option □ good □
   poor □ excellent □
   fair □
   Comments: ______________________________________
   ______________________________________

7. What percentage of your legally aided clients would be impeded in their ability to represent themselves by one or more of the following factors: (Please indicate a percentage).
   Non-English speaking □ Lack of confidence □
   Poor literacy □ Distressed emotional state □
   Intellectual capacity □ Lack of knowledge of the law □
   Disability □

8. Do you see any value/benefit in providing self-help measures for unrepresented parties:
   ______________________________________
   ______________________________________
   ______________________________________
If so, in what format?
Kit ☐ Workshop ☐ Other ____________________________

9. What do you estimate is the average cost of contested family matters to each party?

- $10,000 or less ☐ $15,000-$20,000 ☐
- $10,000-$15,000 ☐ $20,000-$30,000 ☐
- Other: ____________________________

10. Do you believe the $10,000 ceiling imposed in Family Law matters is adequate on average?

- Yes ☐ No ☐

11. If not, what would you consider a realistic cap? ____________________________

12. Are the ceilings affecting the way you run legally aided cases, ie.

- would you consider not briefing counsel and representing the client yourself? ☐ ☐
- would you consider representing the client free of charge once funding ceases? ☐ ☐
- would you consider seeking interim, rather than final orders? ☐ ☐
- would you call less witnesses and cut down on expert evidence? ☐ ☐
- do you anticipate there would be greater pressure on the client to try mediation or counselling, or to accept a previously unacceptable offer? ☐ ☐
- Comments ____________________________

13. Have you noticed an increase of unrepresented parties in the Family Court?

- Yes ☐ No ☐
14. Do you believe that the imposition of ceilings in Family Law matters is having a negative impact on
   a) the court list
      Yes □   No □
      Comments

   b) outcomes for unrepresented parties
      Yes □   No □
      Comments

   c) the experience of proceedings for clients
      Yes □   No □
      Comments

15. What are your views on the limits placed on the legal aid funding of separate representatives?

16. Have you been involved in a matter where you believe the party who is represented prolongs proceedings until the other party’s legal aid runs out?
   Yes □   No □

17. Have you encountered any increase in unrepresented parties pursuing unmeritorious applications?
   Yes □   No □
   Comments

18. Any other Comments/Anecdotes:

Thank you for taking the time to respond to an issue of such importance to the General Community.