
Taking Up the Discourse

Theory or Praxis

Terry Hutchinson*

Thus the distinction between theory and practice, like the distinctions between fact and value and fact and law, never actually works. It is simply a way of talking about the world, and dividing it into different levels of understanding (the general and the particular).¹

Introduction

This article responds to the invitation extended by Carney to engage in a dialogue on the topic of graduate legal research units.² In his paper, Carney stated the approach of the Sydney course as being to teach theory rather than skills, to “pursue academic goals over skill competencies ...”.³ The challenge was laid in these terms:

This paper has sketched one possible framework for such a course. The object has been two-fold: to locate the course in a “perspective”, and in so doing, to provide a basis for dialogue about the objectives and methods which might be set for such a unit ... The frame for the discourse may be contested, and the perspective outlined here may yet cause readers to “start” from our affair. But the invitation to engage in a dialogue remains.⁴

The Faculty of Law at Queensland University of Technology introduced a post-graduate legal research unit in 1993 with different perspectives and purposes to

* Lecturer, Faculty of Law, Queensland University of Technology, Brisbane.

1 M. Davies, *Asking the Law Question*, (Sydney: Law Book Co., 1994) 169.

2 T. Carney, Graduate Research Seminars: Theory or Praxis? (1993) 4 (1) *Legal Education Review* 165.

3 *Id.* 167.

4 *Id.* 176.

the Sydney course,⁵ and given this experience, the opportunity for a discussion on aspects of such units including the theoretical versus practical approach to teaching cannot be ignored.⁶

The nature of legal research and scholarship, its theoretical framework, empirical underpinnings and its interdisciplinary relationships has not been adequately discussed by Australian academics.⁷ Any commentary in this area has tended to concentrate on the mechanics and bibliography of the research process.⁸ Some consideration has been given to methodology in such texts, but until relatively recently, the quality and future directions of legal scholarship has been overlooked.⁹ However, Carney seems to assume that the theoretical dialogue is all-important and that incremental skills development should be a secondary consideration for postgraduate students. This is unrealistic in light of the burgeoning impact of research technology on both practitioners and academics alike, and in view of the fact that it is unlikely that postgraduate students will have completed training in advanced research techniques at undergraduate level. Overall academic goals must include skills competencies. After all, what is the fully skilled lawyer, whether practising solicitor, barrister, judge or academic, without such skills? Those graduates who are competent researchers will often find that research training and skills required for professional purposes and taught at undergraduate level, differ profoundly from that required by postgraduates. No doubt, all lawyers have need for basic skills such as updating legislation, but undergraduates and practising lawyers generally do not require the exhaustive coverage, nor do they have the extensive organisational problems inherent in a major postgraduate research project. Therefore, while postgraduates need to stand back and consider the 'big picture' in terms of a possible theoretical basis for their research work or be given avenues of exploration for non-doctrinal perspectives, it also seems very appropriate that they are facilitated in the development of research skills to add to their already developed 'transferable intellectual skills'.¹⁰ The QUT course attempts to combine both aspects — not downplaying the practice as against theory, but attempting to strike a balance.

5 The unit is co-taught by Professor David Gardiner.

6 See also the parallel debates raised regarding bibliographic as against process or methods training in teaching legal research in Wren, C.G. and J.R. Wren, *The Teaching of Legal Research* (1988) 80 *Law Library Journal* 7; R.C. Berring and K.V. Heuvel, *Legal Research: Should Students Learn It or Wing It* (1989) 81 *Law Library Journal* 431.

7 See in contrast the many recent articles on Legal scholarship noted in H. Edwards, 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 Oct *Michigan Law Review* 34 at 41.

8 E. Campbell, *et. al.*, *Legal Research: Materials and Methods* (3rd ed., Sydney: Law Book, 1988); M. Banks, *Using a Law Library: A Guide for Students and Lawyers in the Common Law Provinces of Canada*, (4th ed., Toronto: Carswell, 1985). R. Watt, *Concise Legal Research* (2nd ed., Sydney: The Federation Press, 1995).

9 But see J. Gava 'Scholarship and Community' (1994) 16 (4) *Sydney Law Review* 443; T. Quilty, *Definitions of Research and the Role of Consultancy*. Unpublished paper presented at the 49th Annual Conference of ALTA, Hobart, 29 Sept–2 Oct 1994.

10 W. Twining, *Preparing Lawyers for the Twenty-first Century*, (1992) 3 (1) *Legal Education Review* 1 at 15.

1. Theoretical Underpinnings of the Research Endeavour — The Debate

The Pearce Report has been criticised, though not totally condemned for its scant discussion of legal research and scholarship.¹¹ The Report is credited with making legal research more 'self-conscious' and although the effects seem difficult to specify precisely, Marginson has summed up the response as 'lasting and important'.¹² The Pearce Committee did make one incisive comment regarding the overall nature of legal research. It stated a doubt that 'the paradigm of scientific research — development of new knowledge' — was entirely apt for legal research.¹³ In the light of such comment, a major priority within legal academic circles would have to be the identification of a workable alternative legal research paradigm. Post-graduate offerings in legal research would appear to be an ideal setting for the airing of such issues, but such a debate should also exist in more diverse forums.¹⁴

1.1 Development of Legal Scholarship in Australia

To fully contextualise the present paradigm of 'legal research', it is necessary to look at the development of research and scholarship of the profession in Australia. The legal profession in early Australia initially comprised those 'admitted in Great Britain or Ireland or who had passed examinations conducted by professional training authorities and (in the case of solicitors) undertaken articles in Australia'.¹⁵ Although the University of Sydney was established in 1850, the first law faculties in Australia began operating much later and it was not until the second half of this century that the majority of those admitted to practice in New South Wales and Queensland held university degrees.¹⁶ The change to university education gradually encouraged the growth of a class of full-time legal academics who had more time and opportunity to pursue research interests. English texts

11 'Thus the report's consideration of the nature and forms of research ... was a limited one'. C. McInnis and S. Marginson, *Australian Law Schools after the 1987 Pearce Report* (Canberra: Australian Government Publishing Service, 1994) 181. D. Pearce, et. al., *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, A Summary* (Canberra: AGPS, 1987), Vol. 2; L. Martin, *Tertiary Education in Australia* Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission, Vol 11, (Canberra: AGPS, 1964).

12 *Id.* 182.

13 D. Pearce, *op. cit.*, Vol. 2, 308.

14 See, for example, the responses to Edwards' article in (1993) 91 August *Michigan Law Review*.

15 M. Chesterman and D. Weisbrot, Legal Scholarship in Australia (1987) 50 (Oct) *Modern Law Review* 709, 710.

16 *Id.* 711; and see M. Weir, 'The Dissonance Between Law School Academics and Practitioners — The Why The How The Where To Now' (1993) 9 *Queensland University of Technology Law Journal* 143 for the Queensland experience.

were used until local lawyers remedied the gap in local publishing, though as Castles points out:

By the end of the nineteenth century most legal subjects had been examined in books and pamphlets in some way ... It was only in relation to subject matters like torts and the basics of the law of contract where English law often remained largely intact in its operation in Australia that local commentaries or texts were not published.¹⁷

Even so, the Australian market was so small that often the work done was not viable for separate publication. This was even more apparent with material in non-traditional areas.¹⁸ Research of necessity tended to be largely operational or directed to student needs.

The emergence of an Australian 'legal academy' has brought additional challenges and opportunities:

The emergence of a significant and distinct class of legal academics, freed from narrow vocational concerns, creates the conditions for a systematic and comprehensive review of areas of legal doctrine and practice which incorporates theory, empirical research, comparative analysis and inter-disciplinary approaches.¹⁹

The research expectation has been prompted by more recent changes as well — university status being given to the former colleges of advanced education with a consequent increased importance being placed on research profiles of academic staff, increasing pressure from university management for researchers to obtain external funding, and new universities being established which are opening places for a younger generation of full-time academics and scholars.

Other forces at work in the wider legal spectrum have provided fertile ground for commentary. There is the increasing use of comparative law and reference to internationally accepted human rights and international conventions and treaties by the judiciary, especially the High Court, which have led to decisions that diverge widely from traditional British common law. This has led to the emergence of a distinct Australian jurisprudence. There is the move away from strict formalism in legal reasoning including the consideration of substance rather than the form or letter of the law. There is the increasing amount of legislation encroaching on areas previously covered by the common law and the increasing infusion of equitable principles such as ideas of good faith in contract.²⁰

17 A. Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788–1900*, (Sydney: Law Book, 1994) xxiii.

18 M. Chesterman and D. Weisbrot, *op. cit.*, 714.

19 D. Weisbrot, Competition, Cooperation and Legal Change (1993) 4 (1) *Legal Education Review* 1 at 15.

20 See generally M. Kirby, 'Changes Seen, Foreseen and Unforeseen' (1993) 4 (2) *Legal Education Review* 299; A. Mason, 'Changing the Law in a Changing Society' (1993) 67 (8) *Australian Law Journal* 568.

1.2 Legal Research Development in America and Canada

In America, the upsurge of interest in the quality and nature of legal scholarship had begun in 1955 and was marked by a conference on the aims and methods of legal research at the University of Michigan which culminated in many articles in legal education journals. In 1959, the Association of American Law Schools adopted a new standard imposing a responsibility on faculty members 'to advance ... ordered knowledge'.²¹ Again, in 1983, the Association of American Law Schools Annual Meeting considered the 'state of legal scholarship and its future prospects'.²² The papers tend to project a more forward looking approach for researchers in the law:

Legal scholarship must produce a blueprint for the future as well as a gloss on the past.²³

The 1950's also saw the Canadian Bar Association form a committee to look into the condition of legal research.²⁴ The conclusion the committee came to was that legal research in Canada was 'wholly inadequate in quantity and quality to enable the legal profession properly to fulfil its high social obligations'.²⁵ Nearly thirty years later, *Law and Learning*, the landmark study on the state of legal research and scholarship in Canada, still commented on the paucity of legal research in Canada.²⁶ The conclusions were very scathing:

We conclude that law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum. Without overstraining analogies to the "hard" sciences, the state of the art of all types of legal research is poorly developed. Clients are advised, litigants represented and judged, statutes enacted and implemented in important areas of community life on the basis of "knowledge" which, if it were medical, would place us as contemporaries of Pasteur, if it related to aeronautics, as contemporaries of the Wright brothers.²⁷

21 E. Jones, Some Current Trends in Legal Research (1962) 15 *Journal of Legal Education* 121, 122.

22 F. Allen, Legal Scholarship: Present Status and Future Prospects (1983) 22 *Journal of Legal Education* 403.

23 G. Hughes, The Great American Legal Scholarship Bazaar (1983) 33 *Journal of Legal Education* 424 at 431.

24 F. Scott, Report of the Committee on Legal Research (1956) 34 (9) *The Canadian Bar Review* 999.

25 *Id.* 1001.

26 *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Ottawa: Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) 5.

27 *Id.* 71.

1.3 The Continuing Debate

Various commentators have pursued the debate, including Twining who in the 1970's noted the uncertainty surrounding the parameters of legal research:

Grand theory versus pragmatic empiricism; applied versus basic research; highly structured research designs versus "plunging in"; the extent to which topics and priorities for research should be identified by the international community of scholars or by governments or other local agencies; and finally the extent to which fruitful dialogue and general consensus about research is possible between individuals holding different ideological positions.²⁸

However, with some notable exceptions, the legacy remains, and academic lawyers' research has tended to be mainly doctrinal and operational — directed either towards producing texts for teaching activities, or solutions to problems occurring in practice.²⁹ Commentators in the United States very early noted the possibility of a developing schizophrenia inherent in this situation — between the 'pure' academics who would see their role as adding to the 'understanding of the meaning of law and its role in society' and the practice-oriented 'Hessian trainer' whose role would be to simply 'prepare law students for practice at the Bar'.³⁰ Of course, these views do not give due recognition to the possibility of bridging or truly merging those two disparate levels in research, of using practical legal situations to expound theory, or explaining theory by example.³¹

So the challenge of developing an integrated connection and purpose to legal research remains. Ziegler stressed the need for the development of a legal paradigm or some steering factors to guide and control the shaping of fields of inquiry, so that research would become more connected rather than pragmatic.³² Posner

28 W. Twining, *Taylor Lectures, 1975: Academic Law and Legal Development* (Lagos: University of Lagos Faculty of Law, 1976), 5.

29 D. Gardiner, Lawyer Competence — The Role of the Law School (1990) Oct *Queensland Law Society Journal* 349, 352.

30 T. Bergin, The Law Teacher: A Man Divided Against Himself (1968) 54 *Virginia Law Review* 637 at 639.

31 Note, for example, Murumba's discussion in relation to good legal writing:

'However, in areas of controversy or uncertainty it is necessary to take a vertical approach that cuts through different levels. A legal problem in these areas will often have no answer at the operational level. Its solution will be likely to encompass higher levels just like a stubborn ethical problem will often extend one's search beyond ethics into the realm of meta-ethics. The best legal writing deals with problems of this kind'.

S. Murumba, 'Good Legal Writing: A Guide for the Perplexed' (1991) 17 (1) *Monash University Law Review* 93 at 96.

32 P. Ziegler, A General Theory of Law as a Paradigm for Legal Research (1988) 51 Sept. *Modern Law Review* 569. But see also T. Daintith, Legal Research and Legal Values (1989) 52 *Modern Law Review* 352 at 356.

suggested that the inventors of the case method of teaching law, the Langdellian method, thought they were involved in a type of scientific method:

They thought that cases were the scientific observations and that extracting the true rule from a line of cases was the equivalent of the inductive method of scientific research.³³

Thus, some writers have blamed the Langdellian method of teaching for the very narrow view of doctrinal scholarship prevalent among both academic and practising lawyers.

The notion at the root of the Langdellian program, that law is a definable and finite body of knowledge, meant that the task with which scholars were left once that body was substantially defined was to monitor the small changes in the law — chronicling, where possible, a new development in eminent domain or a new wrinkle in consideration.³⁴

So if the common law and Langdellian notions of precedent are not a sufficient paradigm, and straight operational models are also not acceptable, what is an acceptable research paradigm? Carney speaks in terms of ‘theoretical rather than simply “hornbook” skills’, an emphasis on ‘issues of legal theory’, and ‘research training with a strongly “intellectual” bent’.³⁵ But is the ideal legal research paradigm only concerned with legal theory — including, for example, the developments in critical legal studies, economic analysis of law or feminist legal perspectives? Is this ideal only to include empirical or social science methods and new or other-than-doctrinal projects?³⁶

Gava has claimed that ‘practice and scholarship are different, with disparate needs and duties’, and appears to welcome the ‘increasing separation between legal academics and practitioners which leading scholars, such as Paul Carrington and Roger Cramton, have observed as emerging from the growing academic

33 R. Posner, *The Present Situation in Legal Scholarship* (1981) 90 (5) *Yale Law Journal* 1113 at 1119.

34 J. Schlegel, *Langdell’s Legacy Or, The Case of the Empty Envelope* (1984) 36 July *Stanford Law Review* 1517 at 1530.

35 T. Carney, *op. cit.* 168, 173, 174.

36 The Pearce Committee defined legal research as:

1. Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments (doctrinal research).
2. Research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting (reform-oriented research).
3. Research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity (theoretical research).

Id., Vol. 3, Appendix 3, 17.

focus of legal scholarship'.³⁷ He goes so far as to propose that the law reviews should limit their contents to academic scholarship and thus provide a separate arena for 'conversations about law and how it operates' for the Australian 'community of legal scholars'.³⁸ Other commentators have challenged the assumption that operational doctrinal research and true scholarship are separate concepts, that theory and practice are different, and should not be confused or mixed. They argue, to the contrary, that there is a closing of the 'gap' between academic and client-based research, and point to increasing specialisation and Hilmer based reforms as hastening this change.³⁹

Perhaps the truth lies in between with a fusion of different typologies so that true scholarship, like a classic work of fiction, has many layers. It is useful to the practising lawyer because it sheds new insights into the operation of the law. It is an addition to the understanding of the jurisprude because it provides new examples of legal theory in action. It provides an insight for other disciplines and an example for the legal profession because it relates law to the rest of the world of learning instead of placing it into an unassailable box of rules. It is of practical significance for those administering the law because it provides tangible feedback and hard data on the law in action and ideas for future reform.

Given this background, the development of theoretical paradigms and future directions for legal research and the questioning of underlying assumptions, is essential, especially for lawyers on the brink of extensive research projects. The questions must be asked. Are the proposed research projects informed by prior work either in law or in other related disciplines? Are the projects forward-looking and purposive? Are the proposed projects no more than practice-oriented research with no thought being given to their operational and legal context? Has due consideration been given to 'recent developments in legal theory'?⁴⁰ Investigation of the theoretical basis of legal research is certainly a priority in the planning of any postgraduate legal research program. However, against this must be balanced the individual researchers skills requirements.

2. Postgraduate Research Students' Skills Levels

Who are our postgraduate students and what are their needs? No doubt the answer to these questions varies from state to state and university to university. To

37 J. Gava, *op. cit.* 467.

38 *Id.* 463.

39 B. Horrigan, 'Law, Legal Reasoning, Legal Research and Legal Practice — Everything in Context'. Unpublished paper reproduced in LWB434 Advanced Research and Legal Reasoning Study Guide, Faculty of Law, QUT, 1995. Referring to the comments in D. Weisbrot, 'Competition, Cooperation and Legal Change' (1993) 4 *Legal Education Review* 1 at 25.

40 W. Twining, *op. cit.* 12.

take QUT as an example, the breakdown of statistics for postgraduate students as at March 1994 looked like this:

	F/T	P/T	Total
PhD	4	1	5
SJD	–	6	6
LLM(Res)	–	3	3
LLM(CWK)	7	162	169 ⁴¹

Thus it is apparent that the large majority of QUT's postgraduate students in 1994 were part-time, and enrolled in the course-work Masters program.⁴² Fourteen were involved in research Masters or doctoral studies. Of those involved in course-work Masters, many would include either whole year or one semester research projects in their programs. Some of these will be recent graduates, but a significant proportion are more experienced practitioners gaining specialist qualifications. Experience suggests that the figures represent predominantly practising solicitors or barristers. Another smaller proportion would consist of government lawyers and academics.

The lack of confidence many lawyers feel when approaching research was underscored by the results of a study of Brisbane solicitors in 1992.⁴³ This survey applied to articled clerks and solicitors in practice in firms which is a reasonable segment of the pool of lawyers from which part-time coursework masters students are drawn.⁴⁴ Over 97% of the respondents regarded good legal research skills for a practising solicitor as either very important or fairly important.

Approximately 25% of the respondents had never received any formal research training. Nearly half had done a compulsory segment in the first year of their degree. Over 70% indicated that they wanted more training in the techniques of legal research. The surprising aspect was that the respondents were asking for training in locating and updating case law and legislation of their own jurisdiction — not more complex research tasks. So it seems likely that a small proportion of our graduate level students will have a great need for research training. A greater proportion still require honing of their skills. All the students will be interested in learning more about the new research technology.

3. Increasing Impact of Research Technology

Respondents specifically requested aid in coming to terms with modern research technology. Only 30.1% indicated that they used computers in their research, and

41 *QUT Statistics Bulletin 1994*, (QUT: Planning and Statistics Section, 1994) 13–15.

42 The Sydney postgraduate profile for Law also shows a predominance of part-time students. *Statistics 1994* (Univ. of Syd: Statistics Unit, 1994) 106.

43 T.C. Hutchinson, *Legal Research in Law Firms*, (Buffalo, N.Y.: William S. Hein and Co., 1994).

44 C. McInnes and S. Marginson, *op. cit.*, 178, 445, 446.

of these the firm's in-house database was ranked first in regard to use. As a result of the cost of on-line services in the past, together with the inevitable learning curve required to use the softwares efficiently, computer research has not been seen as a ready option in the law firms. However, the new cd-rom services have neither of these drawbacks, and when coupled with relatively low-cost subscriptions are more viable. In addition, publishers are publishing books and caselaw on floppy disk. The enhanced capabilities inherent in electronic research cannot be downplayed when dealing with postgraduate students.

The research resources are expanding so quickly that it is impossible to keep up with the changes. It is likely that even if recent graduates have developed electronic research techniques during their degree, they will appreciate an update on the many new systems that will make their work so much faster, particularly the cd-rom journal indexes such as **AGIS** and **Index to Legal Periodicals**, the Australian case citator **CASEBASE** and the full-text caselaw databases such as INFO-ONE's **LAWPAC**. On-line service providers such as **LEXIS** facilitate teaching by providing special training passwords for the courses. If postgraduate students are to be certain that they have covered the pertinent literature in their field, they should have access to these systems. To do this effectively, it is necessary to know a little about how the systems work and what is available through using them.

Electronic sources are useful for the planned literature updates throughout the complete research process. Sometimes the projects can span several years, and whereas the main literature scan might be completed at the beginning of the project, it is imperative to constantly check for new information and developments. Cd-rom indexes are useful for this but the sometimes considerable lag-time, between journal publication, indexing and index availability, must be kept in mind. A combination of regular on-line, CD-rom and hard-copy journal checks must be utilised. On-line scans of newspaper articles may lead to references to government discussion papers and reports other sources have not identified. Other basic sources should also be perused including *Dissertation Abstracts*, *Books in Print* and extensive catalogue checks completed.

Large international law libraries' catalogues can be perused via the Superhighway. The Internet, with its vast banks of information and services, also provides electronic access to specialised Discussion Lists, Bulletin Boards and electronic journals, and these are all information points for those involved in comprehensive reviews of legal knowledge in specific areas. Valuable information on recent developments can often be identified in this manner. To date much of the legal material has emanated from the United States with such sites as the Cornell Legal Information Institute and various international legal materials sources.⁴⁵ However, two new Australian public legal information sites are proving particularly useful. These are the Australasian Legal Information Institute and Uniserve-

45 <http://www.law.cornell.edu> and see also the use of the web to access appellate briefs — <http://www-Leland.Stanford.Edu/group/law/reckless>.

Law. **AustLII** has been jointly established by the University of New South Wales and the University of Technology, Sydney and commenced operations in 1995. It includes the full text of federal legislation and several decades of High Court judgments, and its list of holdings is constantly being increased.⁴⁶ **Uniserve-Law** is being developed at the Australian National University.⁴⁷ Uniserve aims to be a clearing house and information sorter and provider. No charges are levied for access to the information. At present, its material includes:

- Administrative Materials relating to Australian law faculties, research institutions and publications,
- Teaching Materials and
- Specialist Research Activities information.

In addition, the Law Foundation in October announced a project to establish a world first — a national legal information service on the internet. The project, **Foundation Law**, will aim to provide a good coverage of Australian primary materials. With such developments, the range of information and ease of use and access to the internet, may overtake the commercial legal research electronic market in the near future. The Internet is definitely developing as the leading legal information source for the late nineties.⁴⁸

4. Should Postgraduate Academic Goals Include Skills Competencies?

Much debate has emerged in the profession in regard to lawyer competence, and many definitions have been proposed.⁴⁹ The required level of legal research competence is unclear. Does competence, for example, include a positive duty in

46 G. Greenleaf, 'Information Technology and the Law' (1995) 69 (8) ALJ 581. <http://austlii.law.uts.edu.au> and note also the Australian Parliament's Hansard at <http://www.aph.gov.au>.

47 B. Moles and E. Clark, 'Uniserve-Law' (1995) 6 (1) *Journal of Law and Information Science* 84. <http://uniserve.edu.au/law/>.

48 See also *Whirlpool Financial Corp v. GN Holdings, Inc and Others* Unreported judgment in the United States Court of Appeals for the Seventh Circuit, No. 95-1292, September 28, 1995. <http://www.law.emory.edu/7circuit/sept95/95-1292.html>

See the discussion of information on the internet in relation to reasonable diligence in this case: 'In today's society, with the advent of the "information superhighway", federal and state legislation and regulations, as well as information regarding industry trends, are easily accessed. A reasonable investor is presumed to have information available in the public domain, and therefore Whirlpool is imputed with constructive knowledge of this information'.

49 G. Nash, 'How Best to Refresh our Legal Knowledge' in *Commonwealth Law Conference Proceedings and Papers*, Hong Kong, 1983, 221 at 223,224; R. Ayling and M. Constanzo, 'Toward a Model of Education for Competent Practice' (1984) 2 (1) *The Journal of Professional Legal Education* 94 at 96, 97.

regard to the use of the new electronic research sources?⁵⁰ The fundamental nature of lawyer skills has been addressed in the recent American Bar Association Report of the Task Force on Law Schools and the Profession.⁵¹ The Task Force identified ten skills and four values as being basic. Legal Research was the third of the skills:

In order to conduct legal research effectively, a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.⁵²

More recently, ideas of the ‘fully skilled lawyer’ as being one who can strike a balance between legal theory, substantive law, legal practice and legal methodology (and research) have been mooted:

So, fully skilled lawyers recognise that legal reasoning occurs in neither a practical vacuum (because the point of much legal reasoning and research is the settlement of practical legal problems for clients, by lawyers or ultimately the courts) nor a theoretical or social vacuum (because the substantive or “black letter” law has an underlying theoretical and societal basis).⁵³

Perhaps with this in mind, it is time to reflect on the ‘fully skilled’ legal academic or postgraduate researcher. Skills training is not overlooked in the overall objectives of the postgraduate study at QUT which includes:

- to provide opportunities for training designed to equip law graduates with the necessary skills, knowledge and professional attitude for practice of law.⁵⁴

In this regard, it is useless to simply **talk about** doing research. Postgraduate students must be given the opportunity to achieve the skill levels they need to complete their projects — and where else should this be done if not in a course on Advanced Legal Research?

This is not an easy task. The first difficulty lies in determining the base skills level of the group. Most groups will display some degree of disparity. Sometimes the effects of this can be relieved by including an informal peer mentor arrangement. This is best accomplished by allowing students to form pairs with less

50 S. Chester, ‘Electronic Malpractice: Does Reasonable Competence Require Computer Research’ (1991) Nov/Dec *Law Practice Management* 23.

51 American Bar Association, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum*, (Chicago: American Bar Association, 1992).

52 *Id.* 157.

53 B. Horrigan, *op. cit.*, 1.

54 QUT Faculty of Law, *Postgraduate Student Information Booklet 1995*, 2.

experienced researchers working alongside more competent classmates. Such an arrangement works especially well in the computer-based research segments.

Workshop sessions are most useful for encouraging students to learn skills.⁵⁵ The components necessitate small class numbers and tend to be time-intensive for staff involved. For electronic research, each student must be seated at a computer and this equipment ideally needs to be in a discrete electronic classroom preferably with facilities for data display of the group facilitator's screen. Class numbers can necessitate the availability of at least two facilitators at each session. For manual research, a library teaching collection providing extra copies of basic reference sources is useful so that all the students have access to the resources necessary to solve workshop problems.

Intensive planning is necessary for the workshops. Topics used as vehicles for learning must be both relevant to the group and suitable for post-graduate discussion. Hands-on research is the threshold to the whole research process and therefore every effort must be made to integrate the skill into the overall learning process. This is not simply a matter of learning how to use a particular research source, but also discovering what to use the source for, and when to integrate it into the overall research process.

With class time at a premium, required reading, group workshops and assessment can be so structured to require that all the students attain a certain level regardless of the skills level at which they started the course. This may mean that those students who do not have prior skills, for example those holding undergraduate degrees from civil law jurisdictions, will need to do more work outside class. Such segments are ideally suited to weekend intensives rather than two-hour evening timeslots, but, in any case, students realise that the training they receive is an introduction to a world that they need to investigate at their own leisure and in addition to the set class hours. So, although it is possible to assume that more recent graduates entering the postgraduate arena may have some skills, it is necessary for a postgraduate legal research subject to consolidate and update the skills.

5. Postgraduate Research Requirements — The QUT Course

The objectives of the Advanced Legal Research course reflect the overall objectives of postgraduate study of law at QUT, in particular those relating to the provision of opportunities for legal research of an advanced and original nature, the

55 For information on this type of teaching method see T. Sork, (ed), *Designing and Implementing Effective Workshops* (San Fransisco: Jossey-Bass, 1984); and also M. Le Brun and R. Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Sydney: Law Book, 1994) at 294 on Syndicate Groups; D. Jacques, *Learning in Groups* (2nd ed, London: Kogan Press, 1994).

development of 'skills required for the critical evaluation of law', and 'applied research opportunities'.⁵⁶ These objectives are further reflective of the goals set at the undergraduate level. QUT has compulsory legal research units at first and final year levels which aim to introduce law undergraduates to doctrinal research in conjunction with legal reasoning. The advanced research subject builds on the undergraduate focus and has as its objectives:

- To develop an understanding of and abilities in formulating a thesis and the development and implementation of research strategies in legal hypothesis testing and theory building;
- To develop advanced skills in locating and extracting legal and other source materials;
- To develop skills to an advanced level in the use of technology in locating and organising materials;
- To develop an understanding of interdisciplinary research relevant to legal research; and
- To develop skills and abilities to an advanced level in the presentation and defence of research.

The assessment is designed to test the achievement of the objectives. Students must complete two major assignments. The first paper involves a 1500 word presentation of a research strategy for a research project including proposals for literature and source material reviews. The strategy is presented in class and is subject to discussion and defence. The second paper involves a 3000 word critical analysis and self-reflective explanation of the development of the research project as a result of refinement engendered by the presentation. This second paper must include a Research Record and a proposed outline or structure for the proposed research project. In addition, general participation and performance in workshop exercises are taken into account.

A Research Proposal is often required for faculty acceptance of a large research project. This proposal might include a statement of the project's research objectives, methods, hypotheses and a timeline.⁵⁷ The legal research course introduces students to the suggested parameters for such a proposal, and invites students to present their proposal to the group. The presentation, defence and discussion of such proposals provides an opportunity for the student's ideas to crystallise and focus, an opportunity that may not otherwise arise until a much later stage in their endeavours.

Those facing a project that will extend over several years require direction on the management of the fruits of their research — possibly hundreds of pages of

56 *Loc. cit.*

57 See N. Moore, *How To Do Research*, (2nd ed., London: Library Association Publishing, 1987).

caselaw, journal articles, survey results and documents. One aspect of control is the noting of all research sources consulted, search profiles and results. Part of such data would later be reproduced in footnotes and form the bibliography. In the past, card file systems⁵⁸ would have been the basis for the Research Record,⁵⁹ but cards are being replaced by personal bibliographic database software such as Filemaker Pro. Control and ease of retrieval of material will become more and more important as the student's project progresses and develops.

Postgraduates have not generally been exposed to any ideas of interdisciplinary work, nor have traditional law studies covered such aspects as the effect of law on society, or social science methods. They are often not used to looking at the law from a critical perspective, having been trained in a formalist legal tradition. Many faculties in Australia are beginning to reflect a change of attitude, a broadening in the curriculum, and institutional views about what is relevant to law at the undergraduate level.⁶⁰ This change is largely driven by external factors such as the activism of the High Court and globalism as much as legal academic enthusiasm for theoretical and interdisciplinary perspectives. This subject achieves a heightening of postgraduate student awareness of legal changes. Policy aspects and research are confronted and the opportunity is taken to discuss the possible relevance of statistical data or an empirical dimension within the proposed research papers. Law reform work provides an ideal case-study. Accounts of particular consultancies are also good examples of policy research in action. A broad focus, away from the purely doctrinal approach to legal research, and towards a social science base can open vistas for those who have been trained under the Langdellian model.

The undergraduate courses cover aspects of the internationalisation of Australian law and the importance of comparative perspectives. Depending on the time-lag since completing their degrees, postgraduate students may perceive that they have a lack of knowledge and expertise in this area. Such students may also be very competent in locating and assessing the value of Australian and British law but may be at a loss with materials from the United States, Canada, or the European Union. The postgraduate research unit has endeavoured to bridge this lack of appreciation of the scope for the influence of other legal systems, international treaties and concerns on Australian law.

58 See P. Clinch, *Using a Law Library: A Student's Guide to Legal Research Skills*, (London: Blackstone Press, 1992), Chapter 6.

59 C. Bruce, *Developing Students Library Research Skills*, (Campbelltown: Higher Education Research and Development Society Australia, 1992. No 13).

60 See also L. Bollinger, 'The Mind in the Major American Law School' (1993) August *Michigan Law Review* 2167 at 2170, 2176 for the American experience.

4. Conclusion

Legal Research is slowly gaining a place in the undergraduate curriculum. In this country, Directors of Research and Directors of Research in undergraduate courses have only been appointed in the last few years and only at a few universities.⁶¹ The number of law schools offering undergraduate training in legal research has increased.⁶² However, students with this training are only slowly filtering through into the postgraduate arena. What we are experiencing therefore is a current need to ensure attainment of research skills at the postgraduate level. In the future, this need may dissipate. With the large developmental strides technology is taking, now is not the time to relegate research skills to the background. A more practical approach to research training at this level is at present fulfilling market needs because of the lack of extensive training at the undergraduate level in previous years and the recent advances in research technology. Those writing at postgraduate level need to have access to the breadth of work already accomplished in their chosen field as well as being challenged to broaden their own endeavours within the wider theoretical spectrum. Surely 'academic goals' for lawyers on the brink of the twenty-first century must include 'skills competencies'. The two are not mutually exclusive.

61 C. McInnes and S. Marginson, *op.cit.*, 187.

62 E. Barnett, 'Legal Research Skills Training in Australasian Law Faculties', Unpublished paper presented at the Australasian Law Teachers Association Conference, September 1995.