

Working on Serendipity: An Approach to Teaching Legal Research for Practice



Tony Thew

Director, Legal Workshop, Canberra

serendipity *n* the faculty of making desirable but unsought-for discoveries
[SERENDIP + IYY; coined by Horace Walpole from the Persian fairytale *The Three Princes of Serendip*, in which the heroes have this faculty]

The Macquarie Dictionary

For five years now I have been teaching Legal Research at The Australian National University, Faculty of Law, in the Graduate Diploma in Legal Practice, otherwise known as the Legal Workshop. The Legal Workshop commenced in 1972. It was the first legal practice course in Australia. The Course runs for a period of 33 weeks, February till October, and whilst the majority of students applying to undertake the Course are graduates of the ANU, very many students are graduates of other Australian university law schools.

Over a period of four sessions law graduates receive instruction and are assessed in the following areas:

Legal Profession

1. Accounts
2. Legal Ethics

Professional Skills

3. Advocacy and Persuasion
4. Interviewing
5. Legal Analysis and Research
6. Legal Drafting
7. Legal Practice (Clinical)
8. Negotiation and Dispute Resolution
9. Organisation and Management of Legal Work

Professional Practice

10. Administrative Law
11. Civil Procedure
12. Commercial Practice
13. Criminal Procedure
14. Family Law Practice
15. Insolvency Practice
16. Real Estate Transactions
17. Wills, Probate and Administration of Estates

together with one of the following elective units:

Electives

- Administrative and Government Law
- Advanced Commercial Practice
- Advanced Criminal Procedure
- Advanced Family Law Practice
- General Practice
- Litigation Strategy and Skills

When I first commenced law in the early 1970s, the body of law that I had to study at Sydney University Law School was fairly well settled. The *Trade Practices Act* and the *Family Law Act* were yet to be introduced. There was a fairly straightforward programme of study (no 'fluffy' subjects) which would equip you for practices in the city of Sydney. The firm of Dawson Waldron, formerly Dawson Waldron Edwards and Nicholls, had eight partners in all - I could name them. The firm of Freehill Hollingdale and Page had twelve partners. My firm had opened its doors prior to the outbreak of war (WWI). Accession to partnership was by invitation following a death or retirement. The New South Wales Supreme Court Practice comprised one red volume. It was contained in a fairly recent style of publication known as a looseleaf service. There were insufficient numbers of graduates for the positions available in practice. Practice implied private practice. The major text in the area of research was Campbell and MacDougall *Legal Research Materials and Methods*, 1967, Law Book Company.

In the 23 years since I first set foot in a law firm as my place of employment, the very issue of whether I still practise in a profession has been questioned. However the greatest change in that period of time has been in the volume and nature of material being generated by our Parliaments (State, Territory and Federal), by the courts and commentators. The repository for all of this change has necessarily been the law library shelves.

Parallel changes in the technology of the law library have, for practitioners, only added insult to injury with respect to their capacity to now find the law¹. Inevitably those of us responsible for the training of young practitioners have had cause to rethink our approach to the teaching of research skills and the assessment of the outcome of that teaching.

1 (As all law librarians would be aware the command structure upon entry to an online database changes all too frequently - pity the poor practitioner! I understand in the United States that many of the older practitioners find themselves unable to check research generated by younger practitioners accessing extremely sophisticated databases)

Programmes and Strategies - Where to Begin

Many students undertaking the Graduate Diploma in Legal Practice have, at best, average library skills and poor research skills. Articles I read in the journals of legal education confirm a regrettable lack of research instruction in the undergraduate years of law schools in all jurisdictions.

The reasons behind the lack of effective programmes in law schools are multi-factorial. However, there are some common threads:

- Successful research programmes have often been conducted by motivated law librarians together with similarly motivated members of law faculties. Such individuals inevitably move on and often there is a hiatus remaining in the period following their departure.
- Motivated law librarians and similarly motivated members of law faculties can soon become demotivated as a result of actions, adjustments and changes within the institutional setting that may affect their willingness to conduct programmes that are not generally given the recognition that they should be given within the faculty itself or, necessarily, within the university or institution concerned.
- Inevitably the resource of the library itself may be fiscally challenged, the collection curtailed or regulated in such a way as not to permit the burgeoning numbers of students wishing to access the facility to do so. The net result of these financial considerations on the part of universities is that they deny students access to materials vital to their legal education. Response on the part of librarians and faculties has in the main been considered 'pragmatic'. That response more probably than not has been to produce large tomes of photocopied cases and other materials which are purchased by the students. At times I am sure "note" income has been a most welcome addition to most law faculties' meagre budgets. The provision of these materials, although pragmatic, in itself operates as a disincentive to addressing the problem.
- Finally, access to the collection has become difficult as a result of demand created by increased numbers of students. As a consequence we find more and more areas of the library restricted in terms of either access or loan, the demands of the faculty, research graduates and others often taking precedence over many of the needs of the undergraduate cohort.

The policies and predicaments that I have outlined above necessarily delay the acquisition of one of the most important skills that a young lawyer can acquire - that is the skill of finding the law for oneself.

Then What of Serendipity?

The problem for the law student who has relied upon serendipity rather than soundly based research technique is that the day will come when nothing is to be found. Does the student stop with the product of his or her labours, or go on? This student may never know whether something does exist that would alter the concluded position. Ultimately this could prove to be disastrous for a student proceeding into practice.

In his foreword to *Finding The Law*², the Chief Justice of New South Wales, The Hon A.M Gleeson, writes, "Many of the techniques which lawyers have in the past used, and still use, for research are labour intensive, time consuming and regrettably, inefficient. Not infrequently such research must be undertaken with a degree of urgency. However, whether what is required is a check, during the running of a case, for the last word on a particular subject, or a thorough examination of the problem, it is of great assistance to have to hand a systematic, comprehensive and accurate means of access to the necessary information."

How do we deal with students who have progressed thus far with a less than satisfactory research technique? Obviously congratulate them on their initiative and resourcefulness to date; and then console them with the fact that many a reference has been acquired in such a way by librarians and practitioners over the years.

To be critical of a student's underdeveloped research skills serves no useful purpose. Building a student's confidence in a resource that they have come to rely on is important; expanding the range of possibilities is more important.

A Programme

Develop through exercises and discussion a methodology that encompasses at least the following elements:-

- 1 Identify physically the following research tools:
 - Indexes to Citations
 - Citators
 - Digests
 - Encyclopaedias
 - Dictionaries
 - Periodical Indexes
 - Statute Indexes
 - Research Manuals and Law Publishers' Guides

2 Fong & Ellis, Sydney: Legal Information Press, 1990

- 2 Discuss and demonstrate their use
- 3 Test understanding of the research tools and their use
- 4 Develop pathways and strategies of research
- 5 Develop exercises which cause the students to record their research pathway and the time taken for the exercise.
- 6 Integrate exercises in research in other subject areas, obliging the students to unconsciously develop the use of the knowledge and skills required.

The first step in weaning students off texts is the most difficult. By setting exercises designed to point up the dated nature of a text you obviate inappropriate reliance upon undergraduate materials. For example the law relating to share farmers has been dramatically affected in New South Wales by amendments to legislation.

Texts and commentaries on share farming agreements provide readily available information spelling out the obligations of the parties. As a result of the amendments this information is now dated and dangerous. Students who have in the past relied on dated texts are quickly converted when it is pointed out that in practice consequences flow when incorrect advice is provided to clients. The message of updating research is efficiently delivered.

Legal trivia should not be ignored in research skills training.

- What Commonwealth legislation makes provision for 'free balloons'?
- What recent case was concerned with the right of a male employee to wear a kaftan to work?
- Which judge of an Australian state died in a whaleboat?

Such matters stimulate a competitive interest in research and oblige the student to target materials that will most directly resolve the problem thus reinforcing the lessons of retaining a sound knowledge of available materials. Such specific questions decrease the reliance on serendipity.

Maps, Charts and Cartographers

In 1993 I was introducing Jacqui Elliott (the Librarian of the High Court of Australia) to yet again another fresh-faced group of graduates, eager to hear what Jacqui had to tell them about practical approaches to legal research. In the previous week I had viewed some videotapes borrowed from the New South Wales University Library titled, alarmingly, *Commando Legal Research*. Many law librarians will recognise the tapes and the work of

Professor Robert C. Berring One line delivered by Robert Berring in one of the tapes stuck with me. It was to the effect that "finding the law is like moving through a minefield, and the lawyers have the maps". In my introduction to the topic of 'Legal Research for Practice' and the speaker, I gratuitously added "and the law librarians are the cartographers", but upon reflection it is not an inappropriate analogy. Most certainly practitioners and academics do have the capacity to read and interpret the maps, but the all important component, and, I would suggest, the all important partner in the teaching of legal research skills, must be those individuals who survey the length and breadth of available legal materials and establish and chart the reference points upon which the maps are based - the law librarians

A competent programme of research training must entail the necessary partnership of law library personnel and law teacher. Every year that the undergraduate student spends at Law School is an opportunity to increase and extend the knowledge of that student and the skills with respect to research. Inevitably I have been led to the view that each and every year and each and every subject at Law School should contain a component part of research employing the skills that are necessarily going to be employed by the student in the career that will follow. Programmes that introduce students intensively over a short period of days or weeks to libraries, their component parts and personnel inevitably fall short of the mark - they are soon forgotten. Skills that are not repeated and perfected over a period of time soon fall into disuse and inevitably (with the development of other materials and technology), the desire to relearn, given the pressures of the latter years of Law School, will be passed by for more easily won information such as photocopies of case notes conveniently reproduced and distributed by the Law School. It would of course be simplistic to say this practice must stop. Reality demands that we balance the available resources against demand for them.

Legal research training at an undergraduate level has recently been assisted by the publication of the text *Concise Legal Research* by Robert Watt, published by Federation Press, 1993. This publication provides a platform for the teaching of undergraduate research and has proved to be a particularly useful 'map' to graduate students whose research skills are lacking.

Another Matter of Approach

I treasure my old books, particularly those that have stood the test of time such as Hastings & Weir *Probate Law & Practice* 2nd ed 1948. I attempt to convey my respect for books to my students.

It is always rewarding to observe a class responding so positively to the spectacle of a collection of research materials (dictionaries, encyclopaedias, digests, looseleaf services, etc.) set up on a large table in a lecture theatre.

Take the publications one item at a time, discuss the history of that publication, the strengths and weaknesses of each publication, what can be found in that publication, ask why one should look there or why one should in fact look at another source for particular information. For so many students this is a turning point - up until that moment the only dictionary had been Osborn, the only text book on torts, Fleming, and everything else could be found in the distributed notes and last year's summaries. In the lecture theatre there is a sense of a discovery in progress, they have been informed and empowered.

Many students will say "but why didn't they tell us this at Law School?" The fact is they probably were told but that was five years ago, and the information came in such a rush it was never fully absorbed; but here we are back with 'serendipity'. Six years on is not too late to start making new discoveries because a legal education is never complete and we all go home a little humbler each day.

The sphere of influence of the law librarian is growing in Law Schools and elsewhere.

What you will discover is that your experience in responding to enquiries, your knowledge of your workplace and the skills you employ daily will flow as information and instruction in a classroom setting just as easily as it does in the book stacks. Better still, make the library the classroom and through small group teaching invite students to work on a programme of planned discovery.
