

76090 Research Methodology Notes 2018

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Topic 1: The Nature of Legal Research and the Research Topic

Set readings: Hutchinson Ch1 pp 5-11, 21-23 (Choosing a methodology) and Ch 6.

What is Research?

The OECD definition of 'research and experimental development' highlights the importance of creativity, originality, and systematic activity that increases the world's 'stock of knowledge'

The Australian Standard Research Classification (ASRC) has attempted to classify research undertaken in Australia. The types of activity include:

- Pure basic research
- Strategic basic research
- Applied research
- Experimental development

Pure basic research

Experimental or **theoretical** work undertaken primarily to **acquire new knowledge** without a specific application in view.

It is carried out without looking for long term economic or social benefits other than the **advancement of knowledge** and includes most humanities research.

Strategic basic research

Also an **experimental** or **theoretical** work undertaken primarily to **acquire new knowledge** without a specific application in view. **However**, it is directed into **specific broad areas** in the expectation of useful discoveries.

Provides the broad base of knowledge necessary for the **solution of recognised practical issues**.

Applied research

Original work undertaken to acquire new knowledge with a specific practical application in view.

Its aim is to determine possible uses for the findings of basic research or to determine new methods or ways of achieving some specific and predetermined objective.

Experimental development

Systematic work using existing knowledge gained from research and/or practical experience, for creating new or improved materials, products, devices, processes or services.

In terms of social science, experimental development is defined as 'the process of transferring knowledge gained through research into operational programs'.

This type of activity aims to provide a national and international measure for the research being undertaken in all discipline areas, and also in government, universities, and business within Australia and globally.

What is Different About Legal Research?

The Pearce Committee, which reviews Australian law schools and the legal research and publications emanating from the schools has categorised research as encompassing:

- **Doctrinal research**: research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and predicts future developments.
- **Reform-oriented research**: research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting.
- **Theoretical research**: 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.

These categories reflect a **conservative** but **realistic** view of the limits within which legal writing had developed to this point.

Many doctrinal researchers tend to take a **reformist approach** but, traditionally, **law reform-oriented research** has been undertaken within law reform commissions. The reform process has become more open, with reform agendas being undertaken within individual government departments.

The 1982 landmark study on the state of legal research and scholarship in Canada, the *Arthurs Report*, includes a **4th category** covering **non-doctrinal methodologies**:

Fundamental research: research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.

Changing Research Paradigms

Is doctrinal methodology part of the accepted legal research paradigm?

One of the main difficulties facing legal scholars is the lack of a legal research paradigm. Without a paradigm, Peter Ziegler, academic, warns that all factors may seem equally relevant. All research, including every exploitation of case law or legislation, may be equally random and valid.

Ziegler suggests that in the scientific world paradigms involve 2 criteria:

1. Theories that are sufficiently unprecedented to attract an enduring group of adherents away from the existing/competing concepts
2. Theories that are sufficiently open-ended to leave reconciliation of the rest of the discipline's domain to be resolved

Ziegler warns that without a 'steering factor' or paradigm, there is no direction and guidance for research efforts, and no basis for selection of the right questions and data sources.

What is a paradigm?

Paradigms form a model or pattern 'based on a set of rules that defines boundaries and specifies how to be successful within those boundaries.'

Kuhn viewed paradigms as a shared frame of reference among researchers that could be upset by new revelations leading to a generational struggles between young and old researchers.

Paradigms are shared worldviews, which determine what topics are 'suitable' to study, what methodologies are acceptable, and what criteria may be used to judge success.

There are other definitions of paradigms available as well. John Jones describes paradigms as 'take for granted mind sets'. According to this view, socialisation into the discipline is instrumental in ensuring that the practitioners and academics take on these 'ways of knowledge'.

What facets form the current research paradigm for law?

In law, research success has tended to be measured within a doctrinal framework that is based on the tracing of common law precedent and legislative interpretation and change. This has been a vital aspect in what is known as '**dominant paradigm**'.

The dominant legal paradigm is a **more outward-looking focus** encompassing **interdisciplinary approaches** to methodology.

The traditional model of legal research has tended to embrace **practice-oriented research**. Increasingly, the extension of this paradigm includes reflection on knowledge in-practice. This is a way of translating textbook knowledge combined with the old fashioned 'know-how' and the immediate reflecting-in-action which takes place when a practitioner is presented with a problem.

Choosing a Methodology

Methodology is the **means used to gather information and data, and achieve a valid outcome**.

The methodology of any science 'involves its rules of interpretation and criteria for admissible explanation, as well as the research designs, data-collecting techniques and data processing routines that have developed from these rules and criteria.

Therefore, the methodology includes a valid and correct use of the discipline's 'preferred instrumentation and data-processing techniques.

Legal research is an intellectual process and requires conceptualisation, planning and communication. It also requires a broad focus in keeping with the modern worldview.

There have been overwhelming criticisms made of the doctrinal methodology e.g.

- It is too theoretical
- Too technical
- Uncritical
- Conservative
- Narrow and trivial
- Lack of social and economic significance of the legal process

Law has been viewed as a conservative and staid discipline. The law today is at a volatile and fluid stage and thus legal research skills are of paramount to lawyers.

Non-doctrinal research is characterised by a lesser emphasis on the primary and secondary sources of law. Not based exclusively on analysing the written sources of law - law reports, appeal cases, legislation and parliamentary notes.

Doctrinal research hypotheses tend to originate in subjective ideas and arguments ('hunches') but non-doctrinal research methodologies move beyond an analytical treatment of existing legal sources to actually test hypotheses.

The research methodology chosen needs to be directly tailored to the purpose of your research. Your choice of methodology is instrumental. Methodology is subsidiary to objectives and hypothesis.

Formulating a Research Topic

Planning is an ever changing and crucial aspect of academic writing. Planning is the stage before writing and researching. There are 2 levels of planning:

- Idea plan - consists of the topic you are writing about, the aspects of the main subject you intend to develop, your hypothesis and your arguments.
- Research plan - continues off idea plan - how to map your relevant info (basically the research methodology).

How do you choose a topic and formulate a plan?

- A basic search should be sufficient to identify whether there is recently published information available about the particular topic
 - Then can move on from there to formulate your own project
- If you choose a topic that you are not familiar with:
 - Need to broadly read the area to have a knowledge base of what you are dealing with
 - Best to consider issues very broadly before trying to focus on a specific point or problem

There are several methods that can be useful for defining a topic and for formulating a plan:

- Brainstorming
- Heuristics
- De Bono's thinking hats
- Mind mapping your project
- Visual demonstration of ideas
- Horrigan's project analysis matrix

Brainstorming

Most basic method to kick start the process. Write down everything that seems to relate to a possible topic without being judgmental or trying to divide or censor your ideas.

After you have collated the materials, you can begin to assess what might 'work' or be worth pursuing.

When brainstorming, the list of issues that you have drafted represent your views on the topic. Also need to engage with the views of other people involved in the problem:

- Stakeholders
- Clients
- Students
- Victims
- Police

Heuristics

More commonly known as '**idea generators**' are used in problem solving situations and can be useful in a research setting where the real problem is trying to 'crystallise' ideas in order to research and write effectively in an area.

They are brainstorming tricks which include:

- Question formulas
- Attitudinal heuristics (attitude changes)
- Map models (creating maps)

One way of building on ideas is to ask 'who, what, where, when, why and how' type questions. Ernest Stringer has worked out a series of questions geared to change-based action research, tailored to a problem or work situation. These questions look like [see below]:

- Who?
 - Who are the stakeholders?
 - Who are the influential people?
 - Who has resources
- What?
 - What is involved in the process?
 - Can the issues be more closely defined?
 - What major activities/events are relevant to the issue?

- How?
 - How do conflicts arise?
 - How do events happen?
 - How are decisions made?
- Where?
 - Where do events normally take place?
 - Where are the resources located?
- When?
 - When is it possible to intervene?
 - When does conflict occur?
- Why?
 - Why is this particular matter important to me personally?
 - Why is it necessary to research and write about this issue?
 - Why might people want to read about it?

Aristotle held that if you answer the following 5 questions about any topic, then you will understand it better and be able to write clearly. Aristotle's 'Topoi' encompasses 5 main issues:

- Definition (what is it?)
- Comparison (what is it like?)
- Relationship (what caused it?)
- Testimony (what has been said about it?)
- Circumstance (what can come of it?)

De Bono's 'thinking hats'

Aim of this method is to encourage the examination of an issue from a variety of angles. It is effective for broad social issues such as euthanasia. Each coloured hat corresponds to the way of thinking:

- White hat:
 - Thinking without bias
 - Expunge any bias or value judgments from your view
 - Become a computer and take a literal view of the world
 - Take a neutral position
- Red hat:
 - Thinking with emotion
 - You lay your emotions on the table
 - No need to justify your likes and dislikes
 - Lay bare your hunches, gut feelings and guesses
- Black hat:
 - Negative pessimistic view
 - Plays a 'devil's advocate' approach
 - De Bono cites that 'destruction is always much easier than construction'
- Yellow hat:
 - Optimistic and positive view
 - Allows an opportunity for positive thoughts and constructive views
- Green hat:

- Creativity and new ideas
- Forces lateral thinking or thinking outside the box
- Blue hat:
 - Thinking about the big picture.
 - Conductor who attempts to orchestrate, record, observe and provide an overview of everything.

Topic 5: Developing a Research Proposal

Developing and Refining the Topic

1. Map out a topic area that excites your interest
2. Explore the boundaries of the issues involved
3. Isolate a specific part of the whole
 - a. Can identify an issue through experience in the field

To improve in developing and refining the topic, the best thing is to teach in the area, attend conferences, and write conference presentations, join writing groups and make contacts with people in the area.

What about Originality?

- Don't worry too much about originality - there is nothing new under the sun in the law
- Scholarship thrives on the use of what other scholars have done
- New researchers (and esp when writing your thesis) can write about the law at the edges, or how it may develop in the future.

What should you include in the Research Proposal?

1. Propose a literature review of your selected sources
2. Verbalize your objectives and hypothesis
3. Contextualise what you are attempting (acknowledging the extent of your existing involvement in the research area + how this affects your methodology)

Writing a Summary or Abstract

An abstract is a separate writing genre and must be crafted with care. It is a summary of your main points. It is a condensed or abridged version of the whole.

An abstract is required if you propose to present a paper at a research conference, when you submit an article to a refereed journal and in a thesis.