A Guide to Writing in Law School

A Guide to Writing in Law School

Steven Tudor and Stephanie Falconer

LA TROBE EBUREAU
MELBOURNE

This book was published via the Council of Australian University Librarians Open Educational Resources Collective. The online version is available at https://oercollective.caul.edu.au/guide-writing-law-school.

Disclaimer

Copyright

Recommended citation: Tudor, S. & Falconer, S. (2024). *A Guide to Writing in Law School* . La Trobe University. https://oercollective.caul.edu.au/guide-writing-law-school.

Cover image: Image generated by DALL-E 2. Licence to distribute granted by Open AI.

Contents

Acknowledgement of Country

La Trobe eBureau acknowledges that our publications are produced on the lands of many traditional custodians in Victoria. We recognise their ongoing connection to the land, their centuries of diverse knowledge systems, and value their unique contribution to the University and wider Australian society.

La Trobe University has campuses and undertakes teaching, learning and research activities in the traditional lands of the following people:

- Wurundjeri (Bundoora)
- Wurundjeri / Boonerwrung (City)
- Dja Dja Wurrung (Bendigo)
- Latji Latji / Barkindji (Mildura)
- Dhudhuroa / WayWurru (Wodonga)
- Yorta Yorta / Bangerang (Shepparton)
- Gadigal (Sydney)

Publisher Information

LA TROBE EBUREAU

La Trobe University, Melbourne, VIC 3086, Australia

https://library.latrobe.edu.au/ebureau/

Published in Australia by La Trobe eBureau

First published 2024

The La Trobe eBureau is one of Australia's leading open access publishers. Our mission is to create high-quality resources for online and blended subjects, at zero cost to the student. Our published titles have been adopted by academic institutions around the world, granting our authors international recognition.

All our publications are peer reviewed to ensure a high standard of published content.

If you are an instructor using this book we would love to hear from you, particularly if you have suggestions for improvement, interesting ideas on how you're using the resource, or any other general enquiries about the text. Contact us via ebureau@latrobe.edu.au.

Copyright Information

A Guide to Writing in Law School
Steven Tudor and Stephanie Falconer
ISBN: 978-0-6458388-0-0
DOI: https://doi.org/10.26826/1018

Other information

Formatting by La Trobe eBureau
Copyediting by Adam Finlay

Cover design by La Trobe eBureau
Cover image: Image generated by DALL-E 2. Licence to distribute granted by Open AI
This book has been peer reviewed

Accessibility Information

We believe that education must be available to everyone which means supporting the creation of free, open, and accessible educational resources. We are actively committed to increasing the accessibility and usability of the textbooks we produce.

Accessibility features of the web version of this resource

The web version of this resource has been designed with accessibility in mind by incorporating the following features:

- It has been optimised for people who use screen-reader technology.
    - all content can be navigated using a keyboard
    - links, headings, and tables are formatted to work with screen readers
    - images have alt tags
- Information is not conveyed by colour alone.

Other file formats available

In addition to the web version, this book is available in a number of file formats including PDF, EPUB (for eReaders), and various editable files. Choose from the selection of available file types from the 'Download this book' drop-down menu. This option appears below the book cover image on the book's landing page.

Third-Party Content

In some cases, our open text includes third-party content. In these cases, it is often not possible to ensure accessibility of this content.

Accessibility Improvements

While we strive to ensure that this resource is as accessible and usable as possible, we might not always get it right. We are always looking for ways to make our resources more accessible. If you have problems accessing this resource, please contact eBureau@latrobe.edu.au to let us know so we can fix the issue.

About the Authors

Steven Tudor is a senior lecturer in the Law School at La Trobe University, Australia. He has also worked as a barrister, judge's associate, legal researcher for the Victorian Court of Appeal, and as a public servant for the Victorian state government, specialising in criminal law policy and reform issues. His PhD was in philosophy and his research interests mostly concern the philosophical aspects of criminal law, especially issues relating to emotions and conscience. His publications include *Compassion and Remorse: Acknowledging the Suffering Other* (2001), *Remorse: Psychological and Jurisprudential Perspectives* (2010) (co-authored with Michael Proeve), *Remorse and Criminal Justice: Multidisciplinary Perspectives* (Routledge: London, 2021) (co-edited with Richard Weisman, Michael Proeve and Kate Rossmanith), *Criminal Investigation and Procedure: The Law in Victoria*, 1st ed.(Sydney: Thomson Reuters, 2009) (co-authored with Christopher Corns), and *Waller and Williams Criminal Law Text and Cases* 14th ed (LexisNexis: Sydney, 2020) (co-authored with Penny Crofts, Thomas Crofts, Stephen Gray, Tyrone Kirchengast and Bronwyn Naylor), as well as various articles in academic journals.

Stephanie Falconer is a part-time associate lecturer at La Trobe University Law School. She has taught across a variety of subjects within the law school since 2016. As a result of Stephanie's extensive experience teaching, she has developed a sound understanding what students find most stressful about legal writing, and a keen desire to help students develop this essential skill as they progress through their degree. This understanding informs Stephanie's approach to teaching, which adopts a predominantly skills-focused pedagogy.

Beyond the classroom, Stephanie has also practiced briefly as a duty solicitor in both Victoria and the Northern Territory in the summary jurisdiction and was co-author on two international human rights complaints submitted to the United Nations Human Rights Committee. This combined experience has enabled Stephanie to hone her research and writing skills, as well as her communication and general advocacy skills.

From a qualification perspective, Stephanie is an Associate Fellow of the Higher Education Academy, holds a Bachelor of Laws and a Bachelor of Arts, a Graduate Diploma of Legal Practice, a Master of Laws, and a Graduate Certificate in Higher Education Curriculum, Teaching and Learning. In 2021, Stephanie commenced a PhD (part time) which focuses on the importance of practical legal skills as part of the core legal curriculum.

Acknowledgements

This book has been written by Dr Steven Tudor and Stephanie Falconer, senior lecturer and associate lecturer, respectively, in the La Trobe Law School. Very valuable contributions were also made by Dr Laura Griffin, Dr Pascale Chifflet, Dr Anita Mackay, Dr Savitri Taylor, Dr Emma Henderson, Heidi Butters-Stabb and Melissa Spain. We would also like to thank Dr Bruce Beswick, Assessment Research Centre, University of Melbourne, for his advice and input. The authors remain responsible for the content of this book.

This book also incorporates material from earlier guides written for La Trobe Law School students. Steven Tudor was the lead author of those earlier guides, with many contributions from numerous La Trobe Law School staff.

Introduction

This book is intended to help law students to develop their writing skills. Writing clearly and effectively is a vital legal skill. Lawyers use this skill daily. Law graduates need, therefore, to have a solid competency in clear and effective writing. Even if you do not become a lawyer or do not want to become a lawyer, the skill of writing is still a valuable asset in many professions and types of work.

Unfortunately, many students enter law school with notable weaknesses in this area. Indeed, for many students, poor writing is the main problem holding them back from attaining higher grades. The good news is that, with effort and practice, virtually everyone can improve their writing. If you invest time in working on improving your writing, it will repay you.

There are certainly other skills that law students need to develop, but writing well remains at the core. Law students who develop good writing skills early in their law studies – and continue to hone them throughout their course – will be laying a valuable foundation for their legal careers.

This book aims to help students improve their writing by presenting various pieces of advice, tips, warnings and encouragement. Once you master the basic ideas behind clear writing, you will know when and how to adapt them and even diverge from them when appropriate. Of course, this guide is not only for students experiencing difficulty in communicating effectively. Those who already write well will find ideas here that will help them become even better writers.

Legal writing is infamous for its frequently complex sentence structure and obscure vocabulary. Unfortunately, many students seem to feel that they must emulate this if they are to 'sound like a lawyer'. This is not true. Good legal writing is clear and effective, rather than ostentatious or rhetorical. Since the 1970s, the legal profession has made a concerted effort to promote the use of plain English in legal writing.

In 1987, the Law Reform Commission of Victoria (as it was then called) published its report *Plain English and the Law*. The Commission gave this succinct overview of 'Plain English':

> 'Plain English' involves the use of plain, straightforward language which … conveys its meaning as clearly and simply as possible, without unnecessary pretension or embellishment. It is to be contrasted with convoluted, repetitive and prolix language. The adoption of a plain English style demands simply that a document be written in a style which readily conveys its message to its audience. However, plain English is not concerned simply with the forms of language. Because its theme is communication, it calls for improvements in the organisation of the material and the method by which it is presented. It requires that material is presented in a sequence which the audience would expect and which helps the audience absorb the information.[1]

It would be a mistake, however, to think that plain English writing will solve all problems. As Justice Tadgell, of the Supreme Court of Victoria, once observed, 'Plain English alone achieves nothing. To be useful it must run in tandem with clear thought.'[2] Good legal writing, then, aims to be clear in

1. Law Reform Commission of Victoria, *Plain English and the Law* (Report No. 9, 1987, reprinted by the Victorian Law Reform Commission, 2017) [57].
2. *R v Roach* [1988] VR 665 at 670.

both expression and thought. This not only helps the legal writer to meet the needs of their audience; it also helps the legal writer to achieve their own purpose in writing to that audience.

The first four chapters of this book give general advice on writing in law school, and then chapters 5 through to 8 provide advice on specific kinds of writing tasks that you will be asked to perform in law school.

Chapter 1 gives some general advice on what you need to know before you start writing: who you are, who your audience is, what your subject matter is, and what your task is. It is vital to understand these four things to deliver what your writing task requires.

Chapter 2 discusses the importance of planning your document. Many students produce weak documents, or cause themselves unnecessary delays, because of a failure to plan.

Chapter 3 provides practical advice about the task of writing itself. Sentences are the building blocks of all written documents, and this chapter gives advice on how to construct clear and connected sentences. It also stresses the importance of reviewing and revising your document as part of the writing process.

Chapter 4 provides guidance on how to reference your work properly and avoid plagiarism. This is an essential part of maintaining academic integrity in your work.

Chapter 5 provides a guide to writing case briefs. Case briefs are a kind of expository or informative writing. Such writing seeks primarily to inform its audience about something, neutrally and objectively. In case briefs, the task is to summarise the key elements of a legal case so that the audience can understand its basic legal significance.

Chapter 6 focuses on legal problem-solving, which is where you are asked to apply the law to a given set of facts to work out the legal position of one or more of the people appearing in the scenario. This is perhaps the most common type of written task you will perform in law school. It usually constitutes the major part of the assessment in ‘black-letter law’ subjects, such as criminal law, torts and contracts.

Chapter 7 provides advice on writing essays, another very common form of assessment in law school. Essays usually require you to present a persuasive argument in favour of a position, not simply inform your audience about some facts.

Chapter 8 looks briefly at law reform submissions. You may sometimes be asked in law school to write a law reform submission. This is a submission to an inquiry or law reform body in which you present recommendations for how and why the law should change or indeed remain unchanged. This writing task is very similar to writing an essay, but it has a more specific focus and is more readily aligned with what you will encounter in the real world outside the academy.

assessment. This book contains general advice intended to supplement those specific instructions, but the instructions for your specific subject must take precedence in any given case. You need, therefore, to use this book with due caution.

Also, this book is not intended to contain any reliable expositions of the law. All examples of laws provided in this book are purely for illustrative purposes and do not purport to be accurate statements of the law.

Chapter 1: What you need to know before you start writing

1.1 Introduction

In law school you will be asked to write various kinds of documents, including legal advice, academic essays, legislative provisions, law reform submissions, ministerial briefings, legal documents (such as contracts and wills), and so on. Each will require a different approach and you may find yourself overwhelmed by the different tasks, but if you follow the advice in this guide, you will soon get the hang of what you need to do. In any event, and regardless of what you have been asked to write, if you ask yourself these four very important foundational questions about your writing task before you start, your task will be much more manageable:

1. Who am I, as the author of this document?
2. Who is my audience?
3. What is my purpose in writing this document?
4. What am I writing about?

The more clearly you understand your role, audience, purpose and subject matter, and how they interrelate, the better you will understand your task. This will in turn help you choose the most appropriate forms of language. Note that there is not just one form of legal writing. Different tasks can involve different styles of writing. In all tasks, however, it is crucial to write clearly and effectively.

This chapter will cover:

- knowing your role and audience
- knowing your purpose
- knowing your subject matter
- the importance of drafts.

1.2 Know your role and audience

Among the roles you might play as a writer in law school are solicitor, barrister, judge, public servant, law reform commissioner, representative of a professional organisation or a lobby group, or academic researcher. Sometimes you will also just be asked to write as yourself, a private citizen. In each of these roles you will have a different perspective, reflecting the function you are fulfilling in that role. This can shape how you write your document.

Knowing your audience is equally important. You might be writing for lawyers, clients, judges, government ministers, law reform commissioners or the general public. The identity and nature of your audience can have a very significant effect on how you should write your document and will help you decide when to use clear, simple language or more technical language to make your work most effective.

1.3 Know your purpose in writing

When you write a document addressed to a particular audience, you will have a particular purpose. For example, when studying criminal law, you may be asked to play the role of a newly qualified solicitor writing a memorandum to one of the partners of your firm, informing them of the strength of the prosecution case against your client who has been charged with the criminal offence of use of a drug of dependence. How you write this memorandum will be different from how you, as a representative of a lobby group, would write a submission to the government urging the creation of supervised drug-injecting centres.

While there are various specific purposes in writing documents, there are, generally speaking, two basic kinds of purpose you might have when writing a document: *informing* your audience about something or *persuading* your audience to do something. It is possible, and indeed quite common, for a document to do both, but they are still distinct purposes.

1.3.1 Informative writing

The goal of informative writing is to give the reader information about some particular subject matter. The task is simply to provide that information so that the reader can gain an understanding of the subject matter. Neutrality and objectivity are usually important features of such writing; it is not designed to convince the reader of a particular view, just to inform.

Very often in law school (and in legal contexts more broadly), you will be asked to inform your audience about a particular text or document, such as a judge's decision in a legal case, a statutory provision, a law reform inquiry report, or an academic journal article or book. Informing your audience about what was said in the 'target' document can be described as an expository or interpretive task.

Expository writing

Expository writing is a particular kind of informative writing which *expounds* – or lays out – another piece of writing. It must be accurate and fair to that other writer or document and enable the audience to have an accurate and reliable understanding of that other document without having to read it themselves.

Key generic questions to address when planning your expository writing include:

- What is the purpose of the writer I am to expound?
- What question or issue is their document addressing?
- Who is the intended audience of the writer?
- What is the structure of the document, and how does that structure fit its purpose?
- What positions does the writer take on the relevant issues?
- What arguments does the writer put forward for their position?
- What is central or essential in the document and what is peripheral or inessential?

Importantly, in expository writing, you do not critique, judge or evaluate what the author wrote or give your own views on the topic. It is similar to a ‘comprehension’ exercise, but with an important difference. You are not just showing how much *you* know. Instead, you are creating a document that *enables someone else* to understand the text you are expounding. This is an essential legal skill that sounds simple but can be quite challenging.

For example, imagine you are a first-year solicitor in a large law firm and one of the partners has asked you to write for her a two-page memorandum summarising yesterday’s 86-page High Court decision on insider trading. She does not want a document that shows her that *you* understand the case. She wants a short document that will enable *her* to understand the essence of the case in three minutes.

TIP: READ THREE TIMES

Read or skim the document you are expounding at least three times. The first time, just read it to get an idea of what you are working with. On the second reading, highlight key words or passages and make some notes as you go. It is not until the third reading that you should really start to think about how you can expound the contents.

Once you have read the document three times, you will be in a better position to ask yourself the key question your exposition will need to answer: what exactly does my reader need to know from the original document?

When reading the original document, do not just look for key words to restate in your piece. Quoting a text is not expounding it. You need to *explain* what the document means, not *reproduce* the best bits of it. Sometimes selective quotation of small passages may be appropriate, but do not overdo it. The best expository writing will have minimal quotations. Some may have none at all. Ultimately, if you capture the essence of the original document and put it in your own words in a way that helps your reader to understand it, you will have drafted a good exposition.

1.3.2 Persuasive writing

In contrast, persuasive writing, as the name suggests, seeks to persuade or convince the reader to agree with what the writer is saying. The writer wants to convince the audience of something and is, therefore, not taking a neutral stance in relation to the subject matter. There is often some issue to be decided or a problem to be solved, and the writer is seeking to persuade the audience that the best or preferred way of deciding the issue or solving the problem is what the writer is putting forward as the answer. This means that the writer must take a clear position, rather than neutrally describing positions that may be put forward by others.

As you can see, this is different to informative/expository writing and is sometimes described as *critical* or *argumentative* writing. ‘Critical’ in this context does not mean that the writing simply seeks to say negative things about something. Rather, it is more a matter of a careful, reasoned analysis of the strengths and weaknesses of some position in order to reach a *decision* about it. What the writer seeks to do is persuade the reader that the analysis and argument put forward justify the decision or judgment expressed.

Similarly, ‘argumentative’ here does not mean quarrelsome, belligerent or rude. It means that the writing puts forward logical arguments, or reasons, for its conclusions. In this context, an argument is a set of statements that are logically related such that the earlier statements (the premises) provide logical support for the concluding statement. The support may make the conclusion certain (in the case of *deductive* arguments) or make the conclusion more likely to be true (in the case of *inductive* arguments). (See Chapter 7 for more on arguments.)

TIP: USE ARGUMENT AND EVIDENCE, NOT EMOTIONS

In law, the means of persuasion should be reasoned argument and evidence, and not appeals to prejudice or emotional manipulation. Plenty of other kinds of persuasive writing (such as advertising or political election speeches) can adopt emotional rhetoric, but persuasive writing in law should only ever be reasoned and supported with evidence.

While it is true that to persuade one must also inform, there is a clear distinction between the goals of informative writing versus persuasive writing. If you identify the type of writing you need to do at the outset and apply the principles discussed in this section, your task will be much easier.

1.4 Know your subject matter

1.4.1 Knowing your subject and writing clearly about it are connected

Whenever you write in a particular role, to a particular person and for a particular purpose, you will also be writing *about* something. That is your subject matter. When you have a solid grasp of your subject matter, your next task is to write about that subject clearly and effectively. If you do not know what you are talking about, then clear writing will not help you, and bad writing will only exacerbate your problem.

There is, of course, a direct connection between understanding some subject matter and being able to write clearly about it: it is easier to write clearly about a topic if you are able to think clearly about it, and vice versa. So, the process of writing (and revising your writing) about a topic will very often help you develop your understanding of the subject matter, and, in turn, as your understanding deepens, your writing on that topic should also improve.

1.4.2 The importance of research

When you receive any writing task in law school, ask yourself:

> What do I need to know about this subject matter in order to do the job?

Then ask:

> What do I already know about it, and what do I need to find out?

The first question is about getting your bearings. The second question is all about research, which is an essential component of most writing tasks. Often you will find that, as you do the research, you do not know as much as you thought, or your focus needs to be on different things than what you originally thought. So, research is an ongoing, dynamic and evolving activity.

For some writing tasks, such research will be extensive. For other writing tasks, not much more may be needed than what you already know or what you have already covered in class. It will depend on the task. Exactly what research steps are needed in any particular case will vary. (This book is not a guide to how to conduct research in law school, but a few pointers are given in Chapter 2 and Chapter 3.)

1.5 The importance of drafts

The writing quality in your first draft will never be the best you can deliver. This is partially because you may still be working out your thoughts when you first start writing, and your priority is getting words on the page. But if you have a firm grasp of the subject matter you are writing on, it will be significantly easier to write a good first draft.

TIP: NEVER SUBMIT YOUR FIRST DRAFT

The way to improve the quality of your writing is by generating several drafts of your work. In other words, never submit your first draft. Always review and rewrite your work a few times before submission. You will be glad you did.

Chapter 2: Planning your document

2.1 Introduction

Once you know your role, audience, purpose and subject matter, you need to *plan* your document. Planning involves identifying the key *tasks* your document will perform in order to achieve its overall purpose and working out a suitable *structure* for your document. These are really two sides of the same coin: the different parts of the document should be identifiable mainly through the distinct tasks they perform. This means that when you plan your document, you should first work out your document's purpose, and then work out what are the most appropriate steps to take to achieve the purpose. Those steps can then form the main sections or parts of your document.

TIP: PLAN TO PLAN

Always start with a plan.

A plan helps you to ensure that all important topics are covered and that they are covered in a logical order. It can also help you to avoid repetition and to avoid writing too many words or too few. Good planning also shortens the time you will need later to revise and edit your document.

This chapter will cover:

- the importance of structure
- using distinct sections
- using distinct paragraphs
- using headings and signposting
- creating effective introductions
- the value of distinct conclusions.

2.2 The importance of structure

Good structure can make a document significantly more readable. Structure is all about making the different parts of the document work together to enable the document to achieve its goal. Each sentence in the document should be clearly constructed and the ways in which you connect your sentences should be clear. There should also be a clear overall structure to your document.

A clear structure is one that is easily understood by the reader. Of course, it is possible that a structure could be clear but not very logical. But most of the time a clear structure is clear because it is logical – it makes sense for your document to proceed the way it does.

The first draft of a document's structure is figured out as part of the initial planning stage. But be aware that your structure may change during the writing and editing processes. That is okay! This does not mean that planning the structure at the beginning is pointless. The plan provides you with a starting point and an important guide for the writing process because it tells you where you are and where you are going at any point. It will help you with task management as well because you will be able to focus on one section at a time, and, if necessary, out of order without getting confused. If, after you have created a first draft, you decide to alter the original planned structure, that is usually a sign that you are improving the document.

2.3 Using distinct sections

If your document is more than a couple of pages long, it will be very important to give it structure by organising it into distinct sections or parts. Almost every legal document can and should be divided into sections. These are the basic parts of your document and should correspond to the main basic tasks your document is to perform. Again, this is something that helps both you and your reader: you develop a clearer idea of what you are trying to do, and your reader gets a clearer idea of what they are reading.

TIP: TABLE OF CONTENTS USUALLY NOT NECESSARY

Unless instructed to do so, you should not feel the need to include a table of contents. Using headings and dividing your paper into sections will be enough to enhance the clarity of your document.

As already noted, your original structure can evolve or be amended, but you should start writing your document with a planned sequence of sections, and your completed document should comprise a sequence of clearly identified sections.

Sections can be further subdivided into subsections and even sub-subsections. But be careful not to go overboard. It is possible for a document to be divided into too many sections and subsections, in the sense that the text and ideas become disjointed and underdeveloped.

There is no simple, or set, formula for how a document should be structured, as there are many different kinds of documents. The old formula of ‘have an introduction, a main body and a conclusion’ is not wrong, but it leaves open just how that main body is itself to be structured, and that will depend on the document you are writing.

An example of how to structure a document might help here.

Example 2.1

Imagine you are writing an essay in which your purpose is to persuade your reader that jury trials should be abolished. A possible structure could be:

1. Introduction

2. History and rationale of jury trials
3. Current problems with jury trials
4. Why abolition of jury trials would solve those problems
5. Possible objections to abolition
6. Responses to those objections
7. Conclusion.

The main body consists of sections 2 to 6.

You can see the logic behind these sections. First, you provide relevant background information. Then you set up the problem to be solved and provide your solution to that problem. You show balance by considering objections to your position, but you are then able to rebut those objections and defend your position.

This is not a universal structure to apply indiscriminately. Moreover, this possible structure could well be varied in the final version. For example, you might find that it is more effective to combine sections 3 and 4 and propose the solution to the problem while explaining what the problem is. You might also find that it is more effective, and avoids repetition, to combine sections 5 and 6, so that you respond to each objection as you present it.

The key thing is that your reader should be able quickly to see, without having to look very hard, that this is indeed what you are doing.

2.4 Using distinct paragraphs

Within each section, you should also organise your ideas into distinct paragraphs. A paragraph is a group of sentences that deal with a particular topic or point. Moreover, those sentences work together to deal with that common topic or point in an integrated way. As you plan your document (and when you are writing and revising it), work out what the distinct ideas and issues are that you want to address and dedicate a distinct paragraph to each one. This will help present your ideas logically and clearly. Exactly how you decide what particular topics or points need distinct treatment in a separate paragraph is something to be worked out in each case; there is no fixed rule for this. You will need to think through what points you want to make and decide how best to present those points.

If your document needs to be short, then it may be that distinct sections with headings are not needed. In such cases, distinct paragraphs will be the sole key to providing your document with structure.

If your document has long passages of text without paragraph breaks, this is usually a sign that the ideas and themes are jumbled together, rather than an indication that the idea or theme you are dealing with is large and complicated. Even large and complicated ideas and themes can be broken down into smaller ideas and themes with distinct paragraphs. At the very least, it is a courtesy to your reader to break up large slabs of unbroken text into paragraphs.

To make your paragraphs clear on the page, you should start a new paragraph on a new line *and* either indent the first line of the new paragraph, or insert a whole line break between the previous paragraph and the new one (so that there is a whole line of white space between them). It is not enough simply to start a new line.

TIP: PARAGRAPHS SHOULD BE ABLE TO STAND ON THEIR OWN

A paragraph should be substantive enough to stand on its own. Avoid single sentence paragraphs. As a rule of thumb, aim for at least three to five sentences in a paragraph. But be flexible if the content demands a different number of sentences. Try to avoid dividing up an idea across two paragraphs when that idea should be discussed in just one paragraph.

The opening sentence of your paragraph (often called a ‘topic sentence’) should usually introduce the topic to be explored or articulate the main point to be made. It does not have to do so explicitly:

> The topic of this paragraph is whether barristers’ wigs should be abolished.

Indeed, that would be rather odd. But your paragraph’s opening sentence should serve to introduce your reader to what is to come:

> The debate about whether barristers’ wigs are an anachronism or a valuable link to tradition seems to recur every few years.

It can also let your reader know the position being taken:

> Barristers' wigs have become an embarrassing anachronism in our contemporary justice system.

The paragraph's following sentences should then go further into the substance of your topic or point, perhaps explaining your position or noting the various views on the issue. Your paragraph's concluding sentence should usually round things off but does not need to contain the substantive conclusion to the paragraph's argument. Indeed, it will often be best to have your main point at the start of your paragraph. (See the 'point first' approach in section 3.3.8 in Chapter 3.)

To connect your paragraphs it is often useful to include a bridging sentence or two, either at the end of the current paragraph or at the start of the next one. A bridging sentence explains the connection between one paragraph and the next, or, indeed, explains the contrast between the paragraphs:

> Not only barristers' wigs, but also some barristers' tendency to use anachronistic jargon when plain speaking is best has been the subject of much complaint. Such jargon … [*and the paragraph then goes on to discuss jargon*]

2.5 Using headings and signposts

The final version of your document should have a clear and logical structure that is easily discernible to the reader. It should not only be clear what the document's structure is, it should also be clear how each part contributes to achieving the document's overall purpose. At any point while reading your document, your reader should be able to discern without much effort exactly how the current sentence, paragraph and section of the document fits into the document's overall structure.

Headings are the most direct and useful way to identify where different sections begin and end. Do not be shy about using headings that expressly mark out distinct sections of your document. Headings and subheadings will often help you when planning your document *and* help your reader to follow your structure.

The wording of your headings can provide useful information about what is to be found in the sections to follow but they should be brief. Even so, avoid using generic headings like 'Background' or 'Main discussion' because that does not tell your reader much about what that section is about. The heading usually works better if it describes the key content of the relevant section or communicates the section's main idea. This allows you to make the flow of your document's points or argument explicit even in the headings, which can be a great help to your reader.

You can make your structure even clearer by telling the reader, directly and explicitly, what you are doing at key points in your document. For example, you might write:

> This section examines the main arguments for why the concept of law should be viewed as inescapably value-laden and not neutral.

This sort of *signposting* helps the reader to follow your text. It can also be very helpful to *you*, the writer, in working out just what it is that you are doing at any given point in your document.

If you are using more than one level of heading, be clear about which heading belongs to which level. That is, you should clearly identify what is a main heading, what is a subheading, what is a sub-subheading, and so on. You can do this by numbering or lettering the headings, or using different fonts, bold text, italics and so on, or both. (The *Australian Guide to Legal Citation*, 4th edition, rule 1.12.2 provides one model for heading levels and styles.)

2.6 Introductions are almost always essential

Introductions are necessary in most, if not all, the writing tasks you will perform in law school. The particular purpose and detail of your introduction will depend on the purpose of your document, but in most kinds of legal writing, a good introduction seeks to introduce the reader not just to the subject of the document but also to the document itself. It will orient the reader by letting them know what the document is about and what the document is doing in relation to the subject matter. An introduction is somewhat like the on-ramp of a motorway: it enables your reader to get up to speed so that they can make headway into the rest of the document.

TIP: LEAVE MYSTERY TO MYSTERY NOVELS

The main purpose of the introduction is to introduce your reader to your document and to prepare them for what follows. Your document is not a mystery novel where you need to keep crucial things hidden for the surprise ending. Outline your purpose and the structure as clearly as you can, with sufficient specificity to enable the reader to know where your document is going and to correctly anticipate how your document will end.

In a professional context, such as writing legal advice, it is common to put your conclusion in the introduction. This is because you are providing information as a service, and making the most important information easily accessible to your client is good service. On other occasions, the role of the introduction may be more about drawing the reader into the document and making them want to read the rest of what you wrote. For example, if you were writing to persuade someone that a law should be reformed, your introduction should start by pointing this out clearly and could set the scene with a vivid illustration of problems with the current law and a suggestion, if not an outright statement, of what the solutions (if any) may be. In all cases, the introduction needs to be useful to the reader.

Depending on the length and complexity of your document, it may be appropriate for your introduction to provide a short roadmap of the rest of the document, by briefly identifying the sections that are to come and what they do. This makes the most important information easy to access by letting the reader know what is in store. You should, of course, make sure that your document does go on to deliver what you have promised.

The length of a good introduction will vary. Most often it will be a matter of proportionality: the shorter the document, the shorter the introduction. If you are only writing a paragraph, then the topic sentence of that paragraph will serve as an introduction. If you are writing a page, then you might only need a few sentences of introduction. If you are writing a 3,000-word piece, then a few paragraphs is usually enough.

2.7 The value of a distinct conclusion section

It is important to know when to draw things to an end. It is also important to let your reader know that things have come to an end and remind them what it is you want them to take away from the document. This applies when you are ending particular discussions *within* your document as well as ending the document as a whole.

If you are delivering the conclusion to an argument or just ending your discussion of some issue, it will usually help your reader if you use words that clearly indicate this. Conclusions can be signposted in various ways.

> *From the preceding arguments*, it can be seen that Kwong's position on the issue is the most plausible one.
>
> *In conclusion,* it is clear that the most plausible position is that of Kwong.

TIP: BE EXPLICIT ABOUT YOUR CONCLUSION

Whether you are concluding a section or the whole document, make sure you bring things to a finish before moving on. Do not just leave thoughts or points hanging. Do not assume that your reader will do the work of inferring your conclusion from your discussion – state it explicitly to avoid any confusion about what you mean. This helps your reader move through the different sections of your document and glean the meaning you are trying to communicate.

Chapter 3: Writing your document

3.1 Introduction

This is where the fun really starts! Once you have worked out who you are, who your audience is, what you are writing about, what your purpose is and what your planned document will look like, it is time to start writing. What you will write will be *sentences*. Clear, well-written sentences are the foundation of good writing. Good writing also involves *connecting* your sentences clearly and effectively so that your document is a well-integrated whole. You also need to review and revise your writing. Good writing is *polished* writing.

This chapter will cover advice on:

- how to write clear sentences
- ways to make your writing clearer
- reviewing and revising your work before submission.

3.2 Writing clear sentences

Clear writing starts with constructing clear sentences. A sentence is a basic unit of language that expresses a complete or self-contained thought. A clear sentence is one whose meaning is readily understood by its audience. This section briefly explains what a sentence is, before going on to provide some advice on how to write a clear sentence.

3.2.1 Constructing a sentence

To construct a good sentence, you need to know what sentences do and how they are built. In English there are four basic types of sentences: declarative, imperative, interrogative and exclamative.

TYPES OF SENTENCES

A **declarative** sentence makes a statement:

The lawyer was rude to the judge.

An **imperative** sentence commands that something be done:

Stop smirking!

An **interrogative** sentence asks a question:

Did that lawyer just smirk at the judge?

An **exclamative** sentence expresses a sudden emotion or attitude:

What a fool!

In this chapter we focus on declarative sentences, which do most of the work in legal writing. The key grammatical point to note here is that a declarative sentence consists of a *subject* and a *predicate*. In every declarative sentence, something is said to perform some action or to have some feature or attribute. The *subject* of the sentence is the thing that performs that action or has that feature. The *predicate* of the sentence is the action or feature that is attributed to the subject.

In the sentence ‘The barrister smirked at the judge’, the **subject** is the barrister, and the **predicate** tells us what the barrister did, namely that they smirked at the judge.

In the sentence ‘The barrister is a rude buffoon’, the barrister is again the **subject**, but the **predicate** now tells us what the barrister *is* or what feature they *have*, rather than what they *did*.

In the sentence ‘The judge was smirked at by the barrister’, the judge is the **subject** (even though the judge does not perform the action of smirking) and the **predicate** tells us that the judge has the feature of having been smirked at. It is also written in the passive voice, which is generally better to avoid in legal writing. See 3.2.1(d) for more about the active versus passive voices.

This brief grammar lesson leads us to the first piece of practical advice about writing clear sentences.

(a) Make your subject and predicate clear

A clearly written declarative sentence will enable the reader to know straight away what the subject of the sentence is and what is said about that subject. A good way to help you make these things clear is to formulate your sentence as an answer to two questions:

1. What or who is the subject of your sentence?
2. What is the key action or feature of that subject that you want to convey?

If your answers are ‘the barrister’ and ‘he smirked at the judge’, you could write your sentence as ‘The barrister smirked at the judge’. If your answers are ‘the judge’ and ‘she was annoyed’, you could write your sentence as ‘The judge was annoyed’.

In this way, you can build your sentence from the basic building blocks of subject and predicate. Keep your main focus on the nouns, verbs and adjectives you will need to identify the subject and predicate.

Once you have made that core information clear, you may sometimes want to add further information to the sentence. For example, you might want to also tell the reader that the barrister had arrived late to court. So you might add:

> The barrister, *who had arrived late to court,* smirked at the judge.

Or you might want to add that the judge had already chastised the barrister and add some explanatory information:

> The judge had already chastised the barrister for his lateness and *so was annoyed by his further rudeness*.

You might then want to put all of this information into one sentence:

> The barrister, who had arrived late to court and had already been chastised by the judge for his tardiness, smirked at her, so she was annoyed by his further rudeness.

However, as you can see, the longer and more complex your sentence becomes, the harder it is for your reader to follow. Be careful not to overload your sentence with extra words and clauses. This brings us to the next piece of practical advice.

(b) Express just one main idea in each sentence

Your sentence will usually be much clearer if it expresses one main idea. This will often be a matter of the sentence having just one main subject and one main predicate. When you have made these clear, stop and think whether your sentence will be improved by adding more ideas to it. Very often, it will not. So, add more information to your sentence only if the new information is integral to the main idea. If you have another, distinct idea to convey, then put it in a new sentence. Avoid piling

up multiple ideas in one sentence and then leaving it to your reader to sort out what you are trying to say.

TIP: PRESENT ONE IDEA AT A TIME

Simpler sentences that deal with one idea at a time are easier to read (and understand) than longer, complicated sentences with lots of components.

Recall the example from above:

> The barrister, who had arrived late to court and had already been chastised by the judge for his tardiness, smirked at her, so she was annoyed by his further rudeness.

This sentence is probably too complex. It could be better to write it as two sentences:

> The barrister, who had arrived late to court, smirked at the judge. The judge had already chastised the barrister for his tardiness and so was annoyed by this further rudeness.

There is usually no limit on how many sentences you can use to build a document so there is no advantage in using long, complicated sentences over short, clear sentences.

(c) Use short sentences

Short sentences are usually much clearer than long ones. Keep your sentences short if you can do so without compromising the meaning of what you want to say. To help you write short sentences, be direct. Have a point and get to it. Add extra information only when necessary. This practice is closely connected to the value of expressing one main idea per sentence. If you express just one main idea in each sentence, then it will be easier to keep your sentences short.

Avoid trying to appear smart or more ‘lawyerly’ by using roundabout, longwinded ways of getting to your point. Unfortunately, there are many real-world examples of legal writing that use long and complex sentences. Law students do need to be able to *read* such writing, but this is not what is expected or desired of students in their *own* writing. Resist the temptation to mimic this verbose style.

TIP: IF THE CAT SAT ON THE MAT, JUST SAY SO

If the basic idea that you want to convey to your reader is that the cat sat on the mat, then just write:

> The cat sat on the mat.

It is not more ‘lawyerly’ to write something like:

> With regard to the domesticated feline mammal, it can be asserted that, inter alia,

> the postural relationship of the said creature vis-à-vis the woven floor covering was one involving the placing of the lower part of its body upon the latter in a resting configuration.

Of course, if every sentence in your document is no more than 10 words long, your prose may risk appearing abrupt and disconnected. As a matter of style, it is usually desirable to have a mix of shorter, medium and longer sentences so that your text flows more smoothly. A good test is to read your text aloud to hear how it flows. (This does not mean that written text should read as a transcript of spoken words. If you write merely as you speak, your text will be very hard to read.) As you develop your writing skills and gain experience and confidence in constructing sentences, you will be better able to judge what sort of mix works best in the document you are writing.

(d) Consider whether the active voice is better than the passive voice

Writing in the *active voice* is often clearer than writing in the *passive voice*. In the active voice, the **subject** of the sentence is the agent or performer of the main action.

In the sentence ‘The barrister smirked at the judge’, the barrister is the **subject**, smirking is the action and it is the barrister who is doing the smirking. This is the active voice.

In contrast, in the passive voice, the **subject** of the sentence is the recipient of the action, or the person or thing affected by the action.

In the sentence ‘The judge was smirked at by the barrister’, the judge is the **subject** of the sentence and is the one who ‘receives’ the action of smirking. This is the passive voice.

The active voice is often (but not always) better to use than the passive voice. For example, ‘The junior solicitor lost the summons’ is clearer and more direct than ‘The summons was lost by the junior solicitor’ or, even more vaguely, ‘The summons was lost’. A feature of the passive voice that can create problems is that the agent of the action is not always stated (as in the last example here), so the reader gets only half of the picture.

Sometimes your purpose may be best served by using the passive voice because it might be appropriate to focus the sentence on the thing that is affected by the action.

For example, in the sentence ‘The junior solicitor was sacked’ the **subject** is ‘the junior solicitor’ and they were on the receiving end of the action of sacking, but we are not told who did the sacking. But that may be what writer wanted, in order to focus on the junior solicitor and leave it to the context to identify the agent (e.g. ‘the senior partner’), who is not central to the story the writer wants to tell. For this reason, the passive voice is sometimes used by speakers or writers who want to avoid identifying the agent of the action, or where the agent is unknown.

(e) Make sure each sentence is grammatically correct and properly punctuated

Always reviews each sentence to, makes sure that it are grammatical correct and properly; punctuated. (Yes, that sentence contains examples of what not to do.)

Grammar is not a matter of linguistic snobbery or pedantry. It is a matter of the basic rules that

enable words to be used together in ways that make sense. Having a good grasp of how to write a grammatical sentence is an essential foundation for clear writing. Of course, some rules of grammar are more fundamental than others, some rules change over time, and there are some purported rules (such as the rule against splitting infinitives or ending a sentence with a preposition) whose value can be disputed. But there are some basic agreed points of grammar that it helps to know if you are to improve your writing.

The punctuation of your sentence should work hand in hand with its grammatical structure. Punctuation helps to show the internal structure of the sentence. Incorrect placement of punctuation marks can make a sentence very hard to read. Learn what the different punctuation marks are for and how to use them.

Common problem areas in punctuation include semicolons and apostrophes. Semicolons (;) are not colons (:). Colons introduce what is to follow. Semicolons have two main functions: they can be used to join independent clauses (i.e. sentences) to form one sentence; they can also be used to separate longer items in a list, especially one that has been introduced by a colon. Apostrophes indicate ownership (e.g. the writer's pen, the writers' pens) or the missing letters in a contraction (e.g. the contraction *it's* expands to *it is* and the contraction *can't* expands to *cannot*). Apostrophes have nothing to do with plurals (e.g. *one ATM* and *two ATMs*, not *two ATM's*).

Full stop

A full stop ends a sentence.

- **The judge was clearly irritated by the barrister.**

Comma

A comma can have many uses. Some examples include separating items in a list, connecting two related ideas in a sentence or distinguishing qualifying information within a sentence.

- **The lawyer was late, dishevelled and cranky.**
- **If the accused doesn't show, she will be sent to prison.**
- **The lawyer, who was originally from Canada, had to retrain in Australia.**

Semicolon

A semicolon is used to join independent clauses or separate longer items in a list.

- **The courtroom was deserted; everyone was on holiday.**
- **The judge was angry; the barrister was embarrassed.**
- **There are four things a good criminal defence barrister needs to know before going into court: the law; the expected evidence against their client; how to apply the law to that evidence; and, most importantly, how to put all that together and explain to the jury, clearly and persuasively, that the evidence does not prove their client's guilt beyond reasonable doubt.**

Colon

A colon introduces what is to follow. It is often used at the start of a list.

- **I will tell you what makes me angry: rude people!**
- **In your first year, you will study three subjects: introduction to law, contracts and torts.**

Quotation marks

Quotation marks are used to show what someone else has said or words that you have taken from other sources. They are also used when you want to draw attention to the words themselves.

- **The judge said, 'If you interrupt me one more time, you'll be facing a contempt of court charge.'**
- **According to Aristotle, 'the law is reason unaffected by desire'.**
- **What exactly do we mean by 'the rule of law'?**
- **'Legal positivism' is the name given to a range of views that are opposed to natural law theory.**

Hyphen **Hyphens join words.**

- **The lawyer was quick-witted.**

Apostrophe **Apostrophes are used for showing ownership of something or an action and for contractions. They are not used for plurals.**

- **The judge's wig slipped off.**
- **I didn't see that.**

3.2.2 Choosing words to make your meaning clear

Sentences are made up of words. The words you choose will profoundly affect the clarity of your sentence. Even if your sentence is short, contains one main idea and is perfectly grammatically correct, a poor choice of words can render it incomprehensible.

(a) When simpler, shorter words and phrases will do the job, use them

> With respect to the issue of the optimum verbal form for effective communication, it is submitted that an overly extensive and conspicuously polysyllabic vocabulary whose contribution to the attempted communicative act would appear to be principally an increase in the likelihood of obscurantism is best decommissioned and substituted with terminology of a less complicated nature in those contexts where there is practicability attending upon such a strategy.

Or:

> Long and complex words and phrases that obscure your meaning should be replaced with simpler and shorter words and phrases where possible.

As noted above, legal writing unfortunately contains many examples of needlessly complex and obscure vocabulary. Some students mistakenly believe they must emulate this style if they are to 'sound like a lawyer'. What often makes this worse is that students who do this often do a poor job of it, so that what emerges is clumsy and unclear. It is much safer, especially for the beginning legal writer, to choose simpler, shorter words and phrases when they will do the job just as well. It is best to avoid decorating your writing with supposedly lawyerly words and phrases such as 'hereunto', 'in the event that' or 'inter alia'.

Sometimes it is necessary to use certain technical words and phrases, such as 'prima facie evidence', 'involuntary manslaughter', 'autrefois acquit' or 'testamentary trust', which you should not replace with more familiar English words. In fact, when referring to cases or legislation, it is important to use the same language. But, apart from such instances, it is usually best to use simple and familiar words and phrases, particularly if your task is to explain complex legal concepts to a client who may not be familiar with technical language. As you learn more about the law, you will learn to recognise when a technical legal term needs to be used and when it does not. You can also use a legal dictionary to help you identify technical terms to make sure you are using them in the correct context.

TIP: BE CHEAP — USE THE FIFTY-CENT WORD

Mark Twain once said: ‘Don’t use a five-dollar word when a fifty-cent word will do.’

What this means is that, outside of those circumstances where you need to use the technical legal term, often, a simpler word will be clearer than a more sophisticated word. For example, the word ‘car’ is simpler than the term ‘motor vehicle’ but they could both be used to refer to the same object. Here, ‘motor vehicle’ is the five-dollar word, while ‘car’ is the fifty-cent word. Of course, you need to use your discretion and consider the context of your words and whether ‘car’ adequately covers what you need to communicate.

(b) Cut unnecessary words

If a word is unnecessary, ~~redundant or superfluous~~, it will probably ~~extraneously~~ get in the way of the ~~essential and~~ important words ~~that are actually necessary~~. Delete such ~~unnecessary~~ words ~~from your sentence~~.

(c) Use words consistently

Clarity needs consistency. The clear expression of fundamental principles requires consistent language. Also, some technical words need to be used consistently. While having a wide vocabulary can be useful, it will often be more helpful to your argument (and your reader) to be consistent where you are referring to the same thing. Writing with style does not always mean having to think up different ways of saying the same thing.

TIP: SYNONYMS CAN BE A TRAP

A thesaurus is not always your friend. Not every synonym is interchangeable, and law is very context-specific. Be careful when using synonyms in legal writing.

(d) Use appropriate words of qualification

A common writing problem is the failure to properly qualify claims that are being made. For example, consider the sentence ‘Lawyers are greedy’. This sentence is telling us, or at least implying, that *all* lawyers are greedy, but can this be true? Or is it more accurate to say that only *some* lawyers are greedy? Most? Many? By failing to qualify the claim, the sentence is unclear, even though grammatically it is very simple.

Another example: ‘Greed causes ulcers’. Can we tell from this whether greed *always* causes ulcers or just *sometimes* causes ulcers? Is it saying that greed is the *only* cause of ulcers or just *a* cause?

Often the broader context will provide the missing information, but you should always check the context to see whether it really does provide the necessary clarification. If you are leaving too much to context and requiring your reader to do most of the work in sorting out your sentence’s meaning, then you will probably need to make the qualification explicit. Try to avoid being verbose when you

do so, but very often the right extra word of qualification saves your reader from having to work it out for themselves.

(e) Use the first-person pronoun when it is appropriate

Should you ever use the first-person pronoun (i.e. ‘I’, ‘me’, ‘mine’) in legal writing? It all depends on what you are writing. Recall the importance of knowing your role, audience and purpose.

When you are writing as a lawyer, you are not writing as yourself. You are playing a professional role in which you will, ideally, write what any competent lawyer would write. So, your identity should be in the background. However, this need not always mean that the first-person singular pronoun must be banished. Read judges’ reasons for their decisions and you will often see them writing ‘I have’ or ‘in my view’. Still, when writing as a lawyer, it is generally best to keep the focus away from you and use ‘I’ and ‘my’ sparingly.

TIP: BE CLEAR ABOUT WHO IS DOING WHAT

It will often be better to write things like ‘this essay argues that’ rather than ‘I argue that’, or ‘the third section of this paper concerns’ rather than ‘my third section concerns’, or ‘it was found earlier that’ rather than ‘I found earlier that’.

But at all times, ensure that your reader can tell straight away who is doing the arguing or making the findings. Clarity remains the main goal.

The indirect, passive phrase ‘it is submitted that’ or ‘it is argued that’ is often used by barristers when presenting arguments in court on behalf of clients. This is because the arguments are not necessarily what the lawyer personally believes (indeed it could be the complete opposite). Rather, it is the best argument that can be put on behalf of the client. However, when this formulation appears in other legal contexts or in academic writing, it can sometimes sound stilted and confusing. Some might think it is the badge of a true lawyer to say ‘it is submitted that’ wherever possible, but if your reader has to stop and try to work out who is doing the submitting, then you are losing clarity.

In contrast, if you are writing a standard academic essay, you usually *are* writing as yourself and presenting your ideas and arguments with the purpose of informing or persuading your audience. It is true that you are, in a sense, playing the role of ‘an academic writer’, but even in that role you are still presenting your views and arguments. In this context, most law teachers view it as acceptable (and usually clearest) for you to use the first person singular (‘I’, ‘my’ etc.). (If you are in any doubt about what your teacher prefers, ask them.)

Using the first-person pronoun need not make your essay subjective. A subjective essay is one that *merely* expresses the writer’s opinions and preferences, without substantiating their claims with supporting evidence or reasoned arguments. An academic essay aims to be objective in the sense that it seeks to persuade its audience by appealing to some common ground in the form of evidence and argument. It does not seek to persuade merely by the sincerity or passion with which it maintains its position. The presence of ‘I’, ‘my’ and so on does not prevent you from substantiating your claims, and the absence of ‘I’ or ‘my’ does not itself supply any substantiating evidence or argument. That is, merely avoiding the word ‘I’ does not make your essay objective and merely using the word ‘I’ does

not make your essay subjective. Nonetheless, in making your case, stick more closely to ‘I argue’, ‘I suggest’, ‘my definition’ and so on than to ‘I wish’, ‘I hate’ or ‘my feeling’. Your goal is still to persuade your audience, not just to express your feelings or to display your personality.

3.3 Ways to make your writing clearer

Clear writing needs clear sentences, but your document needs to be more than a collection of clear sentences. There need to be relationships between your sentences if your writing is to make sense. You need to choose your words carefully to show these relationships. There are many ways in which sentences can be related to each other. We identify some of them below. The key theme is the importance of using the right words to signal to the reader how a sentence relates to other sentences. Remember that a sentence needs to be able to stand on its own, but it is just as important that it fits in with the sentences around it.

3.3.1 Signposting

It will most often help your reader if you provide some 'signposts' to help them keep track of where they are going while reading your document. Signposts are words and phrases at particular points that tell the reader what the document is doing or where it is going. Be clear about changes in topic, so that your reader knows a change is being made. If you have finished discussing a topic or issue and are moving on to a new one, it will usually help if you flag this to your reader.

EXAMPLE 3.1

- *This paper will consider* the importance of signposting, *before moving on to examine* the most effective ways to signpost in legal writing.
- *Turning now to consider* the question of whether supervised injecting centres should be established in Victoria, I will argue that …
- *The next aspect* of the liberal account of religious freedom *to be analysed* is …
- *Having examined* the background to the presumption of innocence, *we now turn to* survey …
- *It has now been established that* to be defamation, an imputation must damage a person's reputation. *Next, we will explore* what damage to a person's reputation means.

3.3.2 Numbering your points

If you have, say, three arguments for your position that animals should be given legal rights, then it will probably be helpful to your reader to say so.

In this section I will present three arguments in favour of giving animals legal rights. First,

> animals' sentience means that … Second, animal rights follow from human duties toward animals … Third, recognition of animal rights will increase the overall welfare of animals …

Here you are telling your reader to expect three arguments, and then you flag each argument as you get to it. This way you clearly deliver what was promised. Sometimes the flow of the arguments will make this flagging unnecessary, but do not be afraid that this sort of thing is prosaic or stating the obvious. Usually, it is very helpful to your reader.

3.3.3 Elaborating meaning

When one sentence elaborates the preceding sentence, it expands, elucidates or explains the meaning of that sentence. That is, it restates the meaning or part of the meaning of the preceding sentence in a different way and builds on it. In other words, an elaborative sentence seeks to draw out and clarify the meaning of the sentence being elaborated. This can be helpful when you are discussing a difficult or dense subject that might need several descriptions for it to become clear. This kind of elaborative sentence can often be flagged by using introductory words such as 'that is' or 'in other words'. (See the second and third sentences of this paragraph for examples.) Such words can help the reader to appreciate what is going on, but they can be overdone, so use them judiciously.

3.3.4 Providing examples

Examples often help to make your meaning clear. If you are presenting an example, say so. Imagine you are writing an essay on whether a compassionate motive should be a defence to murder. You might write:

> If a person intentionally kills another person, it is no defence in law that they did so on merciful grounds. *For example*, if a man is dying painfully from a disease and asks his wife to kill him to put him out of his misery, and she does so out of compassion for her husband, then she will still be guilty of murder.

Other phrases that flag examples include 'a case in point is', 'for instance' and 'this is illustrated by'.

3.3.5 Accumulating information

Often in a series of declarative sentences, each sentence will be adding a further, independent statement. The effect of the series is an accumulation of distinct statements. This can be flagged using words and phrases such as 'moreover', 'furthermore' or 'in addition'.

> Capital punishment is a cruel and barbaric practice that no civilised nation should allow. *Furthermore*, capital punishment, rather than deterring potential criminals, merely vents the community's anger. *Moreover*, it can lead to grave injustice where a person is put to death but later found to be innocent.

However, such linguistic flags are not always necessary, and they can be overdone. Only use them if it is not clear that your sentences are accumulating discrete statements or items of information.

Even though the accumulative sentences are providing distinct items of information, it will usually still be possible and desirable to present them in a meaningful or logical order, rather than just randomly. For example, if you were describing the High Court building in Canberra, you would not just list its features randomly:

> The High Court building is asymmetrical. It is in Canberra. It has a café. It stands near a lake. It has three courtrooms. Its interior design is a bit dated now.

Instead, you might start with one aspect, such as the building's location, and provide all the desired information about that aspect before moving on to another aspect, such as its structure.

> The High Court building, standing on the shore of Lake Burley Griffin in Canberra, was built between 1976 and 1980 and was opened by Her Majesty Queen Elizabeth II on 26 May 1980. *Though* the building is quite dated now, it still has the necessary facilities any courthouse needs. *In particular*, it has three courtrooms, each with viewing galleries so the public can view the course of justice. *Moreover*, it provides barristers with rooms in which to prepare for court. *In addition* to the practical facilities, it also has couches in the lobby and a café for visitors to relax in.

3.3.6 Making a contrast

It can often help to clarify the meaning of a sentence by making a contrast. That is, you can explain or highlight the meaning of one thing by pointing out something different.

EXAMPLE 3.2

- It is a mistake to think each human right is perfectly compatible with every other human right. *Nonetheless,* many different human rights are mutually supportive of each other.
- Justice Donner supported a liberal interpretation of section 80 of the Constitution. Justice Blitzen, *however*, argued for a conservative interpretation. *In contrast*, Justice Rudolph held that section 80 was not relevant to the issue in the case.
- It is difficult to determine whether compulsory voting has improved Australian democracy. *On the one hand*, it seems very undemocratic to force people to vote. *On the other hand*, voting can be seen as a citizen's civic duty and not merely their civil right.

Contrasts like these can be seen as a particular kind of accumulation (see section 3.3.5). Extra information is being provided with each sentence, but the contrastive nature of the new information is being noted by use of words like 'in contrast', 'however' or 'nonetheless'.

3.3.7 Drawing an inference

There is a very important relationship between sentences where one sentence follows logically from some of the preceding sentences. That is, one sentence might be the logical *conclusion* to be drawn from other sentences which form the *premises* to that conclusion. (The premises and conclusion together constitute a logical *argument*.) Where one sentence follows logically from the preceding

sentences, we can flag that *as* a conclusion by using words such as ‘therefore’, ‘thus’ or ‘it follows that’.

Some conclusions follow from their premises with certainty, while other conclusions are simply well-supported by their premises.

> All Victorian barristers are bound by the Victorian Bar’s rules of professional conduct. Anika is a Victorian barrister. Therefore, Anika is bound by the Victorian Bar’s rules of professional conduct.

In this argument, the conclusion that Anika is bound by the Victorian Bar’s rules of professional conduct follows with logical certainty from the premises.

In contrast:

> Only about 10 per cent of Victorian barristers are King’s Counsel. Anika is a Victorian barrister. It follows that she is probably not a King’s Counsel.

In this argument, the conclusion is well supported by the premises, but it is not certain and may yet prove to be false.

When you draw an inference, be careful to note, at least to yourself, how strong the degree of logical support is. Sometimes, if it is important, you should also indicate to the reader what that level of support is. Other times, if it is not central to your discussion or is reasonably obvious, you can leave it to the reader to note.

TIP: KNOW YOUR (LOGICAL) STRENGTH

Be careful not to overstate your case by claiming your conclusion follows with certainty when it does not or is logically well supported when it is not. If you try to present matters as certain when they are merely well supported, it can undermine the persuasiveness of your argument. A persuasive argument presents a realistic assessment of the strength of its conclusions.

Also, avoid adding words like ‘thus’, ‘therefore’ or ‘so’ to your writing for rhetorical effect or to make it seem more logically integrated than it is. Therefore, simply using such words will not create logical connections that are not actually there. (Yes, the ‘therefore’ at the start of that last sentence is an example of this sort of phantom logical connection.)

3.3.8 Justifying a statement

When an inference is drawn, the conclusion is supported by the preceding premises. It is also possible (and often desirable) to present things the other way around: present your conclusion first and then justify it by laying out the premises that support it.

For example, we could present the earlier argument about Anika’s professional obligations the other way around:

> Anika is bound by the Victorian Bar's rules of professional conduct. This is because all Victorian barristers are bound by the Victorian Bar's rules of professional conduct and Anika is a Victorian barrister.

Here we make the statement and then, by using the word 'because', flag that the words to follow will justify that statement.

'Because' is perhaps the most common term to use in these situations. Other appropriate terms include 'as' and 'since'.

> Anika is bound by the Victorian Bar's rules of professional conduct, as all Victorian barristers are bound by those rules and Anika is a Victorian barrister.

> Anika is probably not a KC since only about 10 per cent of Victorian barristers are KCs and all we know about Anika is that she is a Victorian barrister.

The 'point first' approach

It is often a good idea to present your conclusion or main point first and then lay out your justification for it. Presenting all the premises first and drawing the conclusion at the end sometimes risks losing your reader's attention, especially if the argument is a long one. If you let your reader know right at the start where you are heading, that can help them follow your argument. This is called the **'point first' approach** to presenting arguments. You tell your reader up-front what your key point is and then provide the detail that explains or justifies that point. This does not 'spoil the story' because in legal writing you are not writing a mystery novel in which 'whodunnit' is to be revealed only at the very end.

The point first approach is often used by advocates in drafting submissions to courts. Here your audience (the judge) is busy, is professionally required not to sympathise with you and wants to know quickly what your basic position is, so that they can start orienting themselves in the debate between the advocates appearing before them. If at any point the judge is not sure where you are headed, you are losing them. If you lose the judge's attention and then their understanding, you run a grave risk of losing your case as well.

It can also be useful when drafting legal advice to state your conclusion at the start and then tell the reader why that conclusion is justified, using key words such as 'because', 'since' and 'as'.

If you do use the point first approach, you must make sure that you do go on, after stating your point first, to justify or explain that point. Do not just state your point and then move on to the next one. Many students, when writing legal advice, simply state the relevant legal test in general terms and then baldly state that the client satisfies (or does not satisfy) that test, with little or no reference to the material facts that support that conclusion.

EXAMPLE 3.3

> Intentional murder is defined as intentionally killing a human being by way of a conscious, voluntary and deliberate act, without lawful justification or excuse. Therefore, Jintana is guilty of murder.

Here the writer is implying that the elements of the crime of murder are met, but there is no reference to the particular facts which satisfy those elements. Writing in a point first style and using terms such as 'because' can help you to connect the law to the material facts of the case.

In this case, we could write:

> Jintana is guilty of murder. This is because (i) she caused Kevin's death (by stabbing him in the heart with a kitchen knife), (ii) her actions were conscious, voluntary and deliberate, (iii) she intended to kill Kevin, and (iv) she acted without lawful justification or excuse. These four facts satisfy the four elements for intentional murder.

3.3.9 Flagging a preliminary discussion

Sometimes the point first approach will not work if there are certain preliminary ideas that need to be stated in order to make sense of your ultimate conclusion. Where this is the case, make *that* clear so that the reader knows you are not yet making your main point, but you are on your way to doing so.

> *Before presenting the main arguments* in favour of abolishing the right to the presumption of bail, *it is first necessary to* note briefly the origins of the presumption. The presumption was first identified in …

This is a way of flagging for your reader that your main point can only be fully understood with reference to certain preliminary information, without causing your reader to feel like they are being led down the garden path before you get to your main point.

3.3.10 Referring to points already made

Sometimes in a document you will want to refer to something you have already said. It usually helps to be explicit about this. If you are repeating a point you have already made but do not convey to your reader that you know you are doing so, it can weaken your document's sense of structure.

EXAMPLE 3.4

- The office of Solicitor-General is independent of the government. However, *as argued in section 2 above*, the actions of the Attorney-General were seen as putting unreasonable fetters on the Solicitor-General.
- The new Victorian provisions create an objective standard. However, *as we saw earlier*, the creation of an objective form of fault element in the New South Wales version of the offence led to difficulties.

3.3.11 Summarising what you have said

A particular kind of referring involves summarising earlier discussions. In longer documents it can sometimes help the reader if you provide brief summaries of where the discussion has got to at certain points.

EXAMPLE 3.5

> We have now completed a brief history of the jury trial. *We saw that* the jurors were first used in the 12th century as witnesses at trials rather than fact-finders. *We also noted that* it was only in later centuries that jurors came to be independent assessors of the evidence. *We now move on to* …

A variation:

> We have now surveyed the history of the jury trial. *The main points noted were*, first, that jurors initially served as witnesses and, second, that juries only slowly became fact-finders.

This sort of recapping can help reinforce your main points and keep your reader oriented as you move on to your next topic of discussion. This can also act as a sort of signposting to help your reader keep up.

3.3.12 Indicating who is saying what

When discussing or referring to other people's ideas, be clear which ideas are theirs and which are yours. A very common problem in student writing is lack of clarity about who is saying what. It is

often not clear if the student, when presenting an idea, is presenting their *own* idea or expounding *someone else's* idea. This can be a major impediment to comprehension of the document.

If you refer to a particular author's ideas and then go on to say something else, your reader needs to know whether that something else is still the author's point or whether you have moved on and are saying something of your own, or even from another author. Careful use of signposting words can make all the difference here.

EXAMPLE 3.6

Consider this short passage:

> Danowski presents a detailed account of the nature of the legal profession. She argues that as the law is a profession, it is governed by ethical principles and that it is self-regulating and independent of government. The law is also a lucrative profession for some.

Who is saying that the law is also a lucrative profession for some? Is it Danowski or is it the author of the passage? If the author is still expounding Danowski, that third sentence could have been rewritten as:

> *She further contends that* the law is also a lucrative profession for some.

However, if the author is intending to introduce their own idea with that third sentence, then it could be rewritten as:

> *It can also be argued* that the law is also a lucrative profession for some.

Or, even more clearly:

> *In addition, though Danowski does not say so,* the law is also a lucrative profession for some.

This is not (yet) the same problem as plagiarism (which we will look at in Chapter 4), because it does not appear that the student is trying to pass off someone else's words or ideas as their own. But it can still lose you marks because it is unclear. You might also miss out on marks because you are failing to show that you have original ideas.

Note also that merely providing a footnote does not say who says what. You still need a few well-chosen words in your main text to indicate who is saying what. Your footnote should then simply provide the source of the information.

3.4 Reviewing and revising

Once you have written your document, take the time to review and revise what you have written. This will not be just a matter of ‘polishing things up a bit’. It involves stepping back and critically and rigorously reviewing and, where necessary, rewriting your text.

TIP: GOOD WRITING IS GOOD RE-WRITING

Virtually all good writing involves rewriting. It is very rare for any writer to get things perfectly right (or even good enough) on the first attempt. A clear document should *appear* to have been effortlessly written. But to create such prose usually requires several stages of drafting.

A lot of student work suffers because of a failure to review and revise. For many students this will be due to problems with time management. So, you should plan to include time for reviewing and revising your work. Some students also do not seem to be in the habit of reviewing and revising their work. If this applies to you, you should cultivate the habit. It will repay you.

3.4.1 What does reviewing and revising your work involve?

Reviewing and revising is more than just re-reading and editing your document, though those are both essential parts of the reviewing and revising process. It involves reading your document to see if it achieves what you want it to achieve and making any changes necessary to enable it to do so.

Always bear your reader in mind when you review your work. That is, think about how your reader will approach your text. Will they understand what you have written? Will they be persuaded by it? Try to avoid being content with having expressed yourself just how you want to express yourself. That will be important, but it is only half the story, because it may yet be that your reader will not understand or be sympathetic to how you see things. You need to aim at helping the reader to understand, and even to be persuaded by, what you say.

3.4.2 Give yourself some distance

It can be hard to step back and detach yourself from your work. This can be because you have become emotionally attached to your creation. But it can also be because you have simply become too used to your text and your eyes ‘skate over’ things. If you can give yourself that critical distance, and reapproach your text with an objective and critical eye, it will help you. If possible, it is best to give yourself a clear break between finishing a draft and then critically reviewing it, so that you can approach things with ‘fresh eyes’.

TIP: READING ALOUD IS ALLOWED (AND RECOMMENDED)

Reading your draft document aloud to yourself can be a useful way of forcing yourself to read every single word. It is also a handy way to pick up grammatical errors or inconsistencies (like changes in tense) and long sentences (which leave you breathless when read aloud). Most word processors now have a ‘read aloud’ function that can help with the editing stage.

3.4.3 Edit with depth

In reviewing your work, pay attention to both the big picture and the details. That is, make sure the structure works and is clear, and everything hangs together well. But also go through each sentence and make sure each one is grammatically correct and as clear as it can be.

Of course, you will never cash every typo, but the moor of these you can correct before submitting your document, the beta.

Yes, that sentence contains examples of what to avoid. The words ‘cash’, ‘moor’ and ‘beta’ are correctly spelt but they are the wrong words in that sentence – and a spell check will not pick that up.

3.4.4 Your work may need several reviews

The revising process may need to be repeated, especially for longer documents. Be prepared to go through a number of distinct drafts. Of course, there must be a point at which you let go of your document. It is possible to keep on tinkering with a document with diminishing returns for your efforts. But too many students let their work go too early. Err on the side of doing one too many revisions rather than one too few.

TIP: GIVE YOURSELF TIME TO EDIT AND REVISE

Never submit your first draft. Always build in time for editing and revision in your work plan to give yourself enough time to improve your work before submission.

3.4.5 Stage your revisions

When reviewing and revising your document there are various things to look for. For long documents, it can often help to have different stages of revision. In the different stages you are looking for different things.

STAGED REVISION

Here is one approach to this sort of staged revision process:

- Finalise the basic content of the conclusion and the introduction.
- Check that your overall structure makes sense. Are the sections in a logical order? Do any sections need combining or splitting?
- Revise the draft to make sure your arguments do in fact establish the points you intend them to establish. Fill in logical gaps and remove repetition. Make sure your text addresses the audience it is intended to address.
- Revise your draft to ensure continuity. This is where you can provide appropriate flags and signposts.
- Revise your draft to make sure the individual paragraphs are clearly separated, and address distinct points.
- Revise your individual sentences to ensure your grammar and punctuation are correct and your expression is clear and engaging.
- Revise your draft to make sure the referencing is correct, the bibliography provided (if required) and the document is in the required or appropriate format.

Chapter 4: Acknowledging your sources

4.1 Introduction

This chapter lays down some general rules and gives you some practical advice on how to acknowledge your sources. This will also help you to avoid plagiarism and inadequate referencing. This is not just to help you to avoid the penalties applicable to plagiarism and inadequate referencing, but also to help you gain a better understanding of the methods and purposes of good academic writing.

It is perfectly legitimate (and sometimes essential) to quote or paraphrase other writers' words or to use facts, information or ideas obtained from other sources – but only if proper acknowledgment of your sources is given. But what *is* 'proper acknowledgment' and, more importantly, how *do* you properly acknowledge your sources?

In brief, proper acknowledgment means that when you reproduce or paraphrase another's words, or when you use facts, information or ideas obtained from other sources, you:

- indicate that this is what you are doing
- provide sufficient information about your sources to allow your readers to consult those sources for themselves.

This chapter will give you some practical advice on:

- the nature and importance of referencing
- when to reference
- the nature of plagiarism and inadequate referencing
- citation styles
- direct copying or quoting
- paraphrasing
- using facts, information or ideas from other sources
- acknowledging your actual source
- note taking to avoid inadequate referencing.

4.2 What is referencing and why is it important?

It is very important first to appreciate what referencing is in general and why it is important. There are at least four main functions served by referencing:

- acknowledgment of one's sources
- supporting one's claims
- contextualising one's writing
- aiding the reader.[1]

It is worth briefly explaining each of these four functions.

4.2.1 Acknowledging your sources

Whenever you assert some fact or make a claim about the truth of some matter, you are relying either on your own direct knowledge or on information supplied by someone else. If you have relied on someone else's information, then you need to tell the reader this by referring to that source. Failure to acknowledge your use of another's work will often mean that you are, in effect, claiming that you are the original source. This can mislead the reader and, in some cases, lead to charges of *plagiarism*. The consequences of a finding of plagiarism – in both academic and professional contexts – can be severe, for lawyers in particular. Proper referencing will show the reader your sources and protect you from allegations of plagiarism.

TIP: DIVULGE YOUR SOURCES

If you make an assertion, claim or statement with no citation, you are implying that you yourself are the source of that information. If you are not the source, you run the risk of plagiarism. Where you assert or imply some fact or information that is common knowledge ('notorious facts', 'what everyone knows', e.g. that Canberra is the capital of Australia), then you do not need to cite a source. It can be a blurred line between what is and what is not common knowledge. If in doubt, err on the side of providing a citation.

4.2.2 Supporting your claims

In legal writing, whenever you make a claim or assert some fact or policy position, your reader may well think 'But why should I accept that? What evidence is there for that claim? What authority is there for that assertion?'

1. Maurice Nevile, 'Literacy Culture Shock: Developing Academic Literacy at University' (1996) 19 *The Australian Journal of Language and Literacy* 38, 47. See also Jeffrey Barnes, 'Cite Seeing: Citation in Legal Writing' (Review Essay) (1998) 16(2) *Law In Context* 144, 150.

If your purpose is to persuade your reader to accept what you say, then you should provide good reasons for why your reader should agree with you. The logic of your own argument will play a key role in persuading your reader, but you can support your claims by referring to other works and materials that provide the evidence or the sources of authority that you need.

TIP: REFERENCES SAY WHO YOUR (REPUTABLE) FRIENDS ARE

It is not enough to say, 'This is my opinion and, trust me, it's right'.

When you are giving references to support your claims, what you are effectively saying is 'This is not just my opinion. Look at all these other very reputable people and organisations who back up this point!'

In legal writing in particular it is especially important to provide the legal authority for any proposition of law (i.e. a statement of what the law is) that you put forward. Such legal authority will ultimately be a particular decided case or legislative provision. If you say, for example, that it is against the law in Victoria to disturb religious worship, but do not tell your reader the legal source or authority for that claim, then your argument will be notably weakened. Indeed, in practice, a judge would not accept assertions of the law that are not supported by legal authority. (The authority for that claim is the *Summary Offences Act 1966* (Vic) s 21(1).)

4.2.3 Contextualising your writing

Few of us write in isolation. It is almost always the case in academic and legal writing that the issues and topics one writes about have already been written about by others, even if not directly. Often it will be important that you be aware of the current discussions in the areas in which you are writing and that you try to connect with them in your own contribution. Appropriate references in your work to authors who have preceded you can therefore show that you are aware of the existing issues, positions and arguments and that you are situating yourself in relation to them. This contextualising also clarifies the strengths of your claims and allows you, sometimes, to cut out lengthy introductory concepts and move on to the real substance of your discussion.

4.2.4 Helping your readers find things for themselves

Good referencing enables your readers to find the materials you have used in your work if they want to. In professional and academic writing this is not merely generosity to the reader. Rather, it is an essential part of the cooperative enterprise that is legal and academic work, in which it is to be expected that your readers (who may include judges, other professionals or fellow researchers) will not just read your words and accept them but will themselves look up the materials you refer to as part of their own pursuit of the subject matter. This is particularly so in relation to primary legal sources such as cases and legislation.

Inadequate referencing that prevents your reader from retrieving the relevant information efficiently – or perhaps at all – is a professional and academic vice. If it happens in professional contexts such

as submissions to a court or negotiations with other lawyers, you can expect the judges and your colleagues to view your contribution as lacking professionalism.

4.3 When to reference

Subject to instructions from your lecturer, you should assume that proper acknowledgment of your sources is required for all forms of assessment, including examinations (both open and closed book), essays and problem-solving assignments.

It is important to know when proper acknowledgment of sources is required. As a rule of thumb, there are four basic occasions in legal writing when you should provide a citation:

- when you make a statement of law
- when you report another's word or ideas
- when you refer to other sources
- when you adopt information or opinions.

4.3.1 Statements of law

When you state what the law is on some topic, you must cite where that law is found, that is, in which case and/or in which statutory provision. The case or statutory provision is the legal authority for the statement of law that you have made. It is a mere assertion on your part if you do not back it up with a reference to the relevant legal authority.

EXAMPLE 4.1

In Victoria it is an offence to disrupt religious worship.[1]

_____

[1] *Summary Offences Act 1966* (Vic) s 21(1).

Without the footnote providing the source of the law that makes disrupting religious worship an offence, your statement has no force.

4.3.2 Reports of another's words or ideas

When you say that someone said something (i.e. you attribute some particular words to someone), you must cite who said it and where. This applies whether you are directly quoting someone (i.e. reproducing their exact words) or paraphrasing them (changing their words but expressing the same basic idea).

EXAMPLE 4.2

Henderson states that 'law school is the appropriate forum to inculcate professional norms and a vision of law as a noble public profession'.[8]

_____

[8] Bethany Rubin Henderson, 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53(1) *Journal of Legal Education* 48, 49.

Or:

According to Henderson, it is appropriate for law schools to teach future lawyers professional norms and ideals.[8]

_____

[8] Bethany Rubin Henderson, 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53(1) *Journal of Legal Education* 48, 49.

4.3.3 Reporting an idea expressed by more than one source

Where you have seen the same idea expressed in a number of different sources and you want to make a point of that, then you should make that clear.

EXAMPLE 4.3

Many scholars have argued that the decriminalisation of cannabis will have a positive benefit on society.[5]

_____

[5] See, for example, E Single, P Christie and R Ali, 'The Impact of Cannabis Decriminalisation in Australia and the United States' (2000) 21(2) *Journal of Public Health Policy* 157. See also, N Donnelly, W Hall and P Christie, 'The Effects of Partial Decriminalisation on Cannabis Use in South Australia, 1985–1993' (1995) 19(3) *Australian Journal of Public Health* 281.

4.3.4 References to further sources

When you want to refer your reader to a *further* source (i.e. beyond what you are conveying in your text), you should cite that source. Your reference may tell the reader to see that further source for

more information, as a source for a supporting view, as a source for a contrasting view, or because it is not covered specifically by your work and so on.

EXAMPLE 4.4

This paper focuses on the legality of certain artificially intelligent technology in war as it exists and will not review the ethical implications of the use of such technology in certain circumstances.[13]

_____

[13] For a comprehensive discussion on the ethics of AI technology in war see Robert Sparrow, 'Killer Robots' (2007) 24(1) *Journal of Applied Philosophy* 62; ICRC Cross, *Ethics and Autonomous Weapon Systems: An Ethical Basis for Human Control?* (Report, 3 April 2018) <https://www.icrc.org/en/document/ethics-and-autonomous-weapon-systems-ethical-basis-human-control>; Ronald Sandler (ed), *Ethics and Emerging Technologies* (Palgrave Macmillan, 2013).

4.3.5 Adopted information or opinions

When you make or imply a statement, assertion or claim which contains *information* that you have taken from someone else (whether wholly or in part), then you must cite that source. This still applies if you are adding your own words or ideas into the mix.

If you are adopting an *opinion* or *interpretation* that you have taken from someone else (i.e. you are not simply *reporting* another's view but are *adopting* it as your view as well), then you must cite that source.

When you refer to another's information or view, be clear about whether you are just reporting it or also *adopting* it as something you endorse. This is an important difference. Much student writing is unclear on this important distinction. It is a common weakness that undermines otherwise good work.

EXAMPLE 4.5

There is clear evidence that recidivism rates remain unacceptably high in Victoria. For example, among males aged between 25 to 40 years who leave a Victorian prison after a term of 24 months or more, the recidivism rate (for indictable offences committed within 12 months of release) is 43%.[5]

_____

[5] Juno Nakagawa, 'Recidivism Rates Among Ex-Prisoners in Victoria, 2010–2020' (2022) 23(1) *Australasian Journal of Comparative Criminological Studies* 45, 47.

This style of citation implies that you have *adopted* the information or opinion provided by someone else. That is, you have accepted Nakagawa's claim and are repeating it as a claim you yourself are making. In contrast, if you simply wanted to *report* that Nakagawa says that 43 per cent of inmates reoffend within 12 months of release, then you should cite Nakagawa as described in section 4.3.2. That style of reporting does not imply that you adopt Nakagawa's claim as your own or one that you endorse.

4.4 What are plagiarism and inadequate referencing?

4.4.1 Plagiarism

The *Encyclopaedic Australian Legal Dictionary* defines 'plagiarism' as 'the act of using in one's own work the written expression of another person's ideas and knowledge without acknowledging the authorship and source of the material used.'[1]

Clearly, there can be different degrees of seriousness when it comes to plagiarism. Directly copying one sentence without acknowledgment is at the lower end of the spectrum compared with downloading an entire article from the internet, removing the author's name and presenting it as your own work. But be aware that all degrees of plagiarism are treated seriously. There can be various academic penalties (e.g. loss of marks, failing an assessment, failing a subject). For law students, a finding of plagiarism can have added negative consequences when you apply for admission to practice as a lawyer.[2]

4.4.2 Unintentional inadequate referencing

Inadequate referencing can be problematic, even where a student has not engaged in plagiarism. While you are still studying, it is highly unlikely that you will be an authority on whatever you are being asked to write about, so you will rely heavily on other people's ideas. When you do your research, take detailed notes – including the referencing data such as author, publication and specific page number – so that you can make sure that you correctly attribute your idea to the original source. Always ensure that you are aware of the requirements concerning referencing and check your work for any instances of inadequate referencing.

TIP: INADEQUATE REFERENCING CAN RESULT IN FAILURE

Plagiarism is not merely inadequate citation. Nonetheless, many students cite poorly or inadequately even when they are not (or it appears that they are not) trying to pass off another's work as their own. Such students lose marks for their sloppiness. It is possible to fail because of inadequate citation of sources, even where there is no allegation or finding of plagiarism. Make sure you reference every time you use someone else's ideas, conclusions or work.

1. *Encyclopaedic Australian Legal Dictionary* (LexisNexis online, La Trobe University Library subscription service, accessed 2 June 2022).
2. See the case of *Re Liveri* [2006] QCA 152 (Unreported, de Jersey CJ, McMurdo P and Williams JA, 12 May 2006).

4.5 Citation styles

A citation style is a particular method or style of providing references. There are numerous different citation styles. Whichever citation style is used in any particular work, you should be consistent in following it.

The *Australian Guide to Legal Citation: Fourth edition* (AGLC4) is the style most commonly adopted in Australian law schools and Australian legal academic journals. It is the default citation style for the La Trobe Law School. You should get to know it well. It can be freely downloaded in full. The La Trobe Library website has useful summaries of the AGLC4. The examples in this book follow the AGLC4 but are not intended to be a comprehensive guide. Please refer to the AGLC for the specific rules.

4.6 Direct copying or quoting

Direct copying is where you *reproduce exactly* another person's (or other persons'[1]) words. It is also known as *quoting* another person.

To acknowledge properly that you are directly copying, you must:

- indicate in your text (using single quotation marks) exactly *which* words you have taken from another person, and
- provide information about the source of those quoted words (in a footnote).

4.6.1 Quotation marks for short quotations

Where the quoted words amount to only three lines or less, then the words should be kept within the current paragraph of your text and enclosed within single quotation marks.

An example follows. (The examples in this chapter are all made up. Imagine they are extracts from student assignments.)

SHORT QUOTE

… to maintain and promote individuals' freedom. As the American legal scholar Lon Fuller put it, '[t]he desideratum of clarity represents one of the most essential ingredients of legality.'[8] Indeed, it is almost impossible to …

_____

8 Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

Note how Fuller's words are reproduced exactly as they appear in the original source and are clearly indicated by using single quotation marks (' '), which set them apart from your own words. (If you have a 'quotation within a quotation', use double quotation marks (" ") for the inner quote.)

The relevant information about the source of the quotation is contained in the footnote (here it is the eighth footnote in your assignment). The footnote tells the reader that the quoted words are from page 63 of the revised edition of Lon Fuller's book *The Morality of Law*, published in 1969 by Yale University Press.

Note also how a few introductory words ('As the American legal scholar Lon Fuller put it') preface the actual quotation. This is preferable to going straight into reproducing Fuller's words without

1. For the rest of this chapter, read the singular as including the plural in this sort of context.

saying anything to alert the reader that Fuller is about to be quoted. It is generally better to let the reader know you are about to quote someone (or that you have done so, after the quotation). It also helps to integrate their words into yours.

Finally, note also that the first letter of the quoted words from Fuller has been put into lower case and placed in square brackets. This indicates that you have altered it from upper case (in the original) in order to make the quoted words fit into the grammatical structure of your own sentence.

As a law student, you will often need to quote from cases and statutes. The method for doing so is the same as above.

QUOTE FROM A CASE

… in criminal justice. This principle is perhaps most famously articulated in *R v Williscroft*, in which Adam and Crockett JJ said that 'every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.'[8] Whether this is still seen …

_____

8 *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

QUOTE FROM A STATUTE

… dishonesty as an element. This is made clear in the definition of theft provided for in the *Crimes Act 1958* (Vic), which states that '[a] person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.'[8] It is, however, left to case law …

_____

8 *Crimes Act 1958* (Vic) s 72.

4.6.2 Indented paragraphs for long quotations

Where the words to be quoted are longer than three lines (in your text), identify them by putting them in a distinct indented paragraph within your own paragraph. 'Indented' here just means the first word of each line is moved in from the left margin.

INDENTED QUOTE

… significant cases in Australian constitutional history, with continuing relevance today. Winterton concludes by arguing that

> [t]he *Communist Party* case demonstrated that our freedom depends on impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny.[6]

No doubt, national security is one of the areas in which the rule of law is …

---

[6] George Winterton, 'The Communist Party Case' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 135.

Note that here the indented paragraph appears in a smaller font size and no quotation marks are used. The same sort of information about the source of the quoted words appears in a footnote.

Alternatively, quotes can be introduced in a way that splits the quoted words into a first part which appears in quotation marks in the text and a second part which appears in an indented paragraph.

SPLIT QUOTE

… significant cases in Australian constitutional history, with continuing relevance today. 'The *Communist Party* case,' Winterton concludes,

> demonstrated that our freedom depends on impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny.[6]

No doubt, national security is one of the areas in which the rule of law is …

---

[6] George Winterton, 'The Communist Party Case' in H. P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 135.

LONG INDENTED QUOTE

… in criminal justice. This principle is perhaps most famously articulated in *R v Williscroft*, in which Adam and Crockett JJ said that

> ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless (as it was thought to be in *Kane's Case*) to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.[8]

Whether this is still seen as the best way to conceive of the sentencing …

---

[8] *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

LONG QUOTE FROM A STATUTE

… forms of fraud. Section 83A of the *Crimes Act 1958* (Vic) clarifies this. Subsection (1) provides as follows:

> A person must not make a false document with the intention that he or she, or another person, shall use it to induce another person to accept it as genuine, and by reason of so accepting it to do or not to do some act to that other person's, or to another person's prejudice.[8]

It is, therefore, clear from the terms of the statute that prejudice to a third party …

---

[8] *Crimes Act 1958* (Vic) s 83A(1).

4.6.3 A common error: quotations without either quotation marks or an indented paragraph

If you reproduce another person's words exactly but do not use quotation marks or an indented paragraph, then you are effectively claiming that the words are yours – and that is fundamentally misleading. An example of what *not* to do follows.

EXAMPLE OF BAD PRACTICE

… to maintain and promote individuals' freedom. The desideratum of clarity represents one of the most essential ingredients of legality.[8] Indeed, it is almost impossible to conceive of a legal system where such a criterion was …

---

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

Here it is not possible to tell which are your words and which are Fuller's. It is not sufficient to put the footnote reference after the quoted words and leave out the quotation marks or indentations, because that does not indicate that the words are not yours. By merely putting in the footnote reference to Fuller, you are effectively only indicating, at best, that you are paraphrasing Fuller's text or that

Fuller’s text was the source of the ideas. As Fuller’s text was the source of the very words themselves, you are therefore misleading the reader. This is a common error and a good way to lose marks.

4.7 Paraphrasing

Paraphrasing is rewriting another person's words in your own words, while still presenting them as expressing that other person's ideas. Just how you might phrase your paraphrase will depend on a great variety of things; there is no fixed set of rules governing this art. Explaining or interpreting someone else's text in your own words can sometimes be difficult, but being able to paraphrase well is a very important skill and worth working hard at developing.

It is often better to paraphrase instead of quoting because paraphrasing requires you to understand the original idea in order to communicate it adequately to your reader. It demonstrates your understanding more clearly if the text is in your own words, rather than a direct recitation of someone else's words.

TIP: PARAPHRASING IS RE-PHRASING

Good paraphrasing helps you to convey to your reader that you have not just located some relevant passage from another person's work but have also actually understood it. Note, however, that paraphrasing is not just changing some key words but leaving the rest intact. It involves a full restatement – or *re–phrasing* – of the ideas underpinning the original quote.

It is still necessary, when paraphrasing, to indicate that this is what you are doing and to provide proper information about the source of the paraphrased content both in the text and in the footnote. However, indicating that you are paraphrasing cannot be done by way of quotation marks or indented paragraphs. It is a more subtle matter of using your own words to indicate that you are paraphrasing another. This can be done in many ways.

4.7.1 How to paraphrase

Because paraphrasing is a much more creative art than simple quotation, it is probably best to provide several examples of how a short passage may be paraphrased. The paraphrased passage in the examples below is from the Fuller text used above. Remember that the original quote is: 'The desideratum of clarity represents one of the most essential ingredients of legality.'

EXAMPLE 4.6

… to maintain and promote individuals' freedom. Fuller maintains that this desired clarity is a necessary element for something to count as law.[8] Indeed, it is almost impossible to conceive of a legal system where such a criterion …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

EXAMPLE 4.7

… to maintain and promote individuals' freedom. It is a requirement for any legal system, in Fuller's view, that its laws are reasonably clearly ascertainable.[8] Indeed, it is almost impossible to conceive of a legal system …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

In these first two examples, you are making it explicit in your text that you are paraphrasing Fuller's words, and your footnote gives the reader the source of the original text.

EXAMPLE 4.8

… to maintain and promote individuals' freedom. Indeed, clarity is so important that, in the view of some, laws that lack sufficient clarity may not qualify as laws at all.[8] Indeed, it is almost impossible to conceive of a …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

In this third example, you have not referred to Fuller explicitly in your text, but you have more obliquely indicated that you are expounding someone else's idea. It is only in the footnote that you expressly mention Fuller. This is acceptable as this still indicates the ideas come from Fuller.

EXAMPLE 4.9

… to maintain and promote individuals' freedom. It might even be argued that clarity is so important that laws that lack sufficient clarity may not qualify as laws at all.[8] Indeed, it is almost impossible to conceive of a legal …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

In this fourth example, the reference to Fuller is even more oblique but still acceptable.

EXAMPLE 4.10

… to maintain and promote individuals' freedom. Indeed, clarity is so important that laws that lack sufficient clarity may not qualify as laws at all.[8] Indeed, it is almost impossible to conceive of a legal system where …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

This last example is acceptable but close to the borderline (and very common among early law students). The text gives no indication that you are paraphrasing another; only the provision of the footnote indicates this. This style is acceptable, so long as it is clear from the context that this is what you are doing. It is usually safer to include some textual indication as well, as in the first two examples in this section.

4.7.2 A common weakness: overly thin paraphrases

Because it can sometimes be hard to think of your own way of expressing someone else's words (especially when the other person says it so well already), there is a temptation to 'rewrite' the original passage by substituting only one or two words. This sort of 'thin' paraphrase is really more like a quotation than a proper paraphrase – and if you have thereby effectively quoted the original but not used quotation marks or an indented paragraph, then you will be courting trouble. This is because it will look like an inadequately referenced, and indeed inaccurate, quotation.

A bad example of a paraphrase (using Fuller's text again) follows.

EXAMPLE OF BAD PRACTICE

… to maintain and promote individuals' freedom. The desirable clarity is one of the most essential ingredients of legality.[8] Indeed, it is almost impossible to conceive of a legal system where such a criterion was not made central to …

_____

[8] Lon L. Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 63.

The above example looks like a paraphrase when it is in fact such a thin paraphrase that it is almost a direct quotation.

TIP: EITHER PARAPHRASE PROPERLY OR JUST QUOTE

If you are paraphrasing, make a proper job of it and recast the whole passage being paraphrased, making your words sufficiently different from the original passage.

If you really are unable to put an idea into different words, just quote it.

A good essay, or other piece of work, will have a combination of quotes and paraphrasing but the balance should be in favour of paraphrasing. Again, putting information into your own words is the best way to show you have understood it.

It can sometimes be difficult to judge whether your rewritten version of the original is a proper paraphrase. Moreover, what counts as 'too thin' can vary according to whether you are paraphrasing an original work by an author, a judgment or a statute. Again, there are no fixed rules for determining this.

TIP: PARAPHRASE ACCURATELY

When trying to avoid an overly thin paraphrase, be careful not to be too creative and make your words so different from the original text that you end up misrepresenting it. A paraphrase should still aim to present an accurate picture of the paraphrased text.

You should also put down the thesaurus: do not simply look for synonyms to replace words in the original phrase. Often in the law, not all synonyms are created equal.

4.7.3 Paraphrasing legal authorities

It will sometimes be appropriate to paraphrase legal authorities such as cases and statutes. Paraphrasing such texts is usually more constrained than paraphrasing original works by private authors, because you must be even more careful not to misrepresent what the terms of the law are. This is especially so for legislation, which, unlike the common law, is in fixed written form.

TIP: BE WARY OF PARAPHRASING TECHNICAL TERMS

Law can be technical and a word in law can have a different meaning to the same word in a non-law context. A good rule of thumb is that when dealing with law from cases or statutes, you should adopt the language of the original source rather than change it to something that means essentially the same thing.

It will often be safer to quote directly the specific words of a statutory provision or a judicial decision rather than risk a misleading paraphrase by straying too far from the actual text. Sometimes, though, the demands of space or the nature of the task you are engaged in make paraphrasing the law appropriate instead. As always, one needs to exercise good judgment in particular cases about whether it is best to paraphrase or to quote directly.

Here is an example of an acceptable paraphrase of the passage from *R v Williscroft* quoted earlier. (To get a sense of what makes it acceptable, you will need to know the context of the original. This point goes for virtually all paraphrasing.)

PARAPHRASE FROM A CASE

… in criminal justice. This principle is perhaps most famously articulated in *R v Williscroft*. In this case, Adam and Crockett JJ held that all sentences involve the judge intuitively bringing together the different purposes of punishment in order to settle upon a particular sentence.[8] Whether this is …

_____

8 R v Williscroft [1975] VR 292, 300 (Adam and Crockett JJ).

When paraphrasing legislation, it is usually best to stick even more closely to the text than when paraphrasing academic authors or even legal judgments.

The following acceptable paraphrase is of the statutory provision quoted earlier.

PARAPHRASE FROM A STATUTE

… forms of fraud. The *Crimes Act 1958* (Vic) clarifies this by making it an offence to make a false document intending that another person will accept it as genuine and do something to their or a third party's detriment.[8] It is, therefore, clear from the terms of the statute that prejudice to a third party …

_____

[8] *Crimes Act 1958* (Vic) s 83A(1).

4.8 Using facts or information from another

When you make factual claims or present any sort of information, it is essential that you indicate the source(s) of your information. This is primarily to allow your readers to go to the original source to confirm the facts or information for themselves. In turn, this helps to bolster the credibility of your own assertion of these facts.

Here is part of an original passage from Aitken and Orr to allow you to see how it was presented in the original.

ORIGINAL

From Guy Aitken and Robert Orr, *Sawer's The Australian Constitution* (Australian Government Solicitor, 3rd ed, 2002) 155–6:

> The history of constitutional reform in Australia is littered with failed attempts. Of the 44 proposals put, only the following eight proposals were carried:
>
> - Section 13 was amended in 1907 …
> - Section 105 was amended in 1910 …
>
> …
>
> The 44 proposals were put at 19 separate referendums. Referendums can be held at the same time as general elections, and on nine of the 19 occasions this has occurred.

The next example shows how that information could be paraphrased.

PARAPHRASE

… efforts at constitutional reform. There have been 44 proposals to amend the Australian Constitution, presented at a total of 19 referendums, and nine of those coincided with general elections.[8] Australians have mostly been …

_____

[8] Guy Aitken and Robert Orr, *Sawer's The Australian Constitution* (Australian Government Solicitor, 3rd ed, 2002) 155–6.

Remember, if you fail to indicate the source(s) of your information, you are effectively claiming to be the source of that information *yourself*. If this is not the case, then you are misleading the reader.

Making factual claims with no reference to your sources is, then, another good way to lose marks. Of course, there will sometimes be things that are commonly known or easily confirmed and so do not usually need to be referenced, like the name of the current Chief Justice of Australia or the fact that Australia is a federation. But there may be occasions when it is wise to provide references even for such matters as these. As always, much depends on the context and nature of your writing task.

TIP: CREDIT WHERE CREDIT IS DUE

Whenever you give information to your reader which you have found from some place other than your own experience, always provide a source.

4.9 Using ideas directly from another

If you take an idea from someone else but you are neither quoting them nor paraphrasing any particular text of theirs, you must still indicate where you got the idea from. If you do not, you will appear to be claiming that the idea is your own, and if that is not so, then you will run the risk of plagiarism. Ideas can be plagiarised just as easily as words.

CITING AN IDEA FROM ANOTHER PERSON

> … different societies. In analysing the very notion of what constitutes a legal system it is necessary, according to Hart, to distinguish between primary and secondary rules.[8] Virtually all societies have an assortment of primary rules that govern conduct, but if a society is to be recognised as having a legal system as such, then it must also have secondary rules. Such rules relate to …
>
> _____
>
> [8] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 91–99.

It is sometimes permissible to drop the reference to the other person in your text, and simply indicate with a footnote that you are taking the idea from someone else.

CITING USING A FOOTNOTE ONLY

> … different societies. In analysing the very notion of what constitutes a legal system it is necessary to distinguish between primary and secondary rules.[8] Virtually all societies have an assortment of primary rules that govern conduct, but if a society is to be recognised as having a legal system as such, then it must also have secondary rules. Such rules relate to three different ways in …
>
> _____
>
> [8] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 91–99.

In both examples, the idea about primary and secondary rules has been taken from the English legal

philosopher H. L. A. Hart, but there is no specific passage of his that is being quoted or paraphrased. Rather, the text in the examples is a summary statement of Hart's much longer and more complex discussion in his book *The Concept of Law*.

If you fail to indicate that this is so (whether explicitly in the text with accompanying footnote or by footnote only), then you run the risk of committing plagiarism. Again, this is because you will be presenting these ideas about primary and secondary rules as *your* ideas when they are in fact Hart's.

What if you think of an idea yourself but later find that someone else, say Bloggs, has already written about it? As Bloggs is not in fact your source for the idea, then it is not appropriate to cite Bloggs as if they *were* your source. However, it can be good scholarship to make reference to Bloggs as a *further* source for the idea. But where Bloggs *is* in fact your source, do not be tempted to pretend that your thought was merely congruent with, rather than derived from, Bloggs. That is plagiarism. The best way to avoid the risk of failing to cite an authority you did not even know about is to make sure you conduct thorough research at the outset.

4.10 Advice on note taking to avoid inadequate referencing

It is important that your study methods help you to maintain good referencing practices and avoid plagiarism and inadequate referencing.

One well-known trap is to make poor notes from your reading which you later use when writing up your essay or writing in an examination. For example, if you copy a text verbatim when you are studying but do not indicate this in your notes, then there is a real risk that you may later go to those notes when writing an assignment or sitting an exam and write out 'your' notes – without adequate or even any acknowledgement of the original source. That will lead to allegations of plagiarism or, at best, inadequate referencing.

If you are making notes when studying a text (whether a legal authority, a commentary or any other material), give yourself sufficient information to enable you to use those notes later without fear of transgressing the rules on referencing. Whether you are copying material verbatim or paraphrasing a text or noting information gathered from some sources, always note to yourself what you are doing and take down the relevant information you will need later. If you make the right notes at the right time, you will save yourself time and effort later trying to find the original sources and references.

TIP: KEEP TRACK OF PAGE NUMBERS

Always record the page number in your notes so that you can include it in your footnote. This helps you and your reader trace the original inspiration for your work to the exact source. It also helps you to avoid later confusion or allegations of plagiarism.

Chapter 5: Case briefs

5.1 Introduction

The previous four chapters have provided general advice about writing in law school. This and the next three chapters turn to advice on specific kinds of documents you will be asked to write in law school. In this chapter we focus on case briefs, a common task for law students and one which helps to provide a firm foundation for other legal writing skills.

This chapter is intended to help students understand what is involved in writing case briefs. In particular, this chapter explores:

- what a case brief is
- when a case brief can and/or should be used
- what a case brief must contain.

An annotated sample case brief is also included at the end of the chapter.

5.2 What is a case brief?

A case brief is a concise summary of a judge's reasons for a decision in a particular case. It is a *lawyer's* summary; that is, it is a summary intended to help a lawyer understand the case. This means that the case brief picks out the key things that a lawyer needs to know about the case. It also means that a case brief is likely to be different to how an historian or a psychologist might summarise a case.

To non-lawyers, judges' reasons for their decisions will often appear to be arcane pieces of writing that are difficult to understand. As a lawyer, you must be able to understand, analyse and use these technical documents. Preparing a case brief is a useful way to unlock the value in a legal judgment.

Generally, a case brief is a neutral or objective summary of the case. It does not provide criticism of the case or an opinion about the merits or demerits of the decision or reasoning. The goal is simply to understand the case in its own, legal terms. There may be occasions where you are asked to provide a critique of a case, or find a way to distinguish it (i.e. not follow it as a precedent), or suggest ways to reform and improve the law as stated in that case. But a case brief as such does not have that purpose. You should assume that if you are asked to write a case brief, it is to be objective and neutral and just focused on the case itself.

Note that terminology can vary, but generally 'case brief' and 'case summary' are used to refer to this kind of descriptive, informative writing about a legal case. In contrast 'case note' is often used to refer to writing about a case that covers much of what a case brief covers but also goes on to provide some analysis. That analysis may involve going deeper into the background, significance or implications of the case and may involve a critical assessment or evaluation of the case. In this way, a case note involves persuasive as well as descriptive writing. In this chapter we are concerned with the more descriptive task. If you are in doubt about which you are being asked to write, always seek confirmation before beginning.

5.3 What is a case brief for?

There are various contexts in which you will want or need to prepare a case brief. First, writing case briefs will help you with your own study of the law. We recommend that you prepare case briefs for all the prescribed reading cases in your law subjects. This will help you to understand the law much better than just reading the cases and will come in handy when it is time to revise for exams.

Second, you may find that when you enter the legal profession you will be asked to provide a case brief (or case summary or case note). This could happen in various professional contexts. You may be asked to provide a case brief as part of assisting a more senior lawyer in relation to a particular case. Or your supervisor might ask for a case brief to help them keep up to date with recent developments in the law. You may also be asked to provide case summaries for educational material for clients in your law firm's client newsletter. (Note that the different audiences would entail different approaches to style and content, since you would not want to present a lawyer's summary to a lay client.)

5.4 What must a case brief contain?

Case briefs can vary in form and length, depending on the context. The following table shows one commonly used template for case briefs.

1	**Name of case**	**Give the correct name of the case, which is usually the parties' names.**
2	**Citation**	**Give the correct citation(s) for the case.**
3	**Court**	**Identify the name of the court and the names of the particular judge(s) giving the judgment.**
4	**Material facts**	**Outline very briefly the factual circumstances which give rise to the issues ultimately adjudicated on and material to the court's holdings.**
5	**Procedural history**	**Outline very briefly how the dispute got to the court, including, where relevant, the nature of the action, the remedy sought, the process by which the case was commenced (e.g. writ, application, police charges) and (if the matter is on appeal) any lower court decisions already made in the matter.**
6	**Issues**	**Identify clearly and precisely the legal or factual issue(s) addressed by the court in the judgment.**
7	**Holdings**	**Identify the decision of the court on each of those issues. Those decisions are known as 'holdings' or 'held points'. They are what the court decided or held on those issues. These will usually form the key legal principles for which the case will stand as authority.** **The holdings of *the court* will necessarily be those of the majority judges. Sometimes there is no clear majority holding on a particular issue, even though a majority of the court agreed on the practical outcome of the case. In such cases, identify the holdings of each of the majority judges.** **Where a court makes a decision about a factual issue (i.e. it decides what actually happened), that decision is called a 'finding' of fact. In most case briefs, you will be concerned primarily with the court's decision on legal issues; i.e. its holdings on the legal issues.**
8	**Reasons**	**Expound concisely the court's reasons for reaching those decisions or held points. This is the ratio decidendi: any 'indispensable factor' in the court's reasoning to its conclusion. These should be taken directly from the judgment with care. Some degree of paraphrase may be needed, but be accurate. Where there is more than one judge, be clear as to who stated the reasons and whether other judges concurred with those reasons.**
9	**Additional comments**	**Identify and expound comments or observations made by the court that are not essential to the final decision, but which are worth noting. These are 'obiter dicta' (remarks made in passing). The holdings and reasoning of dissenting or minority judges should be included here if they are of interest or are important.**
10	**Order(s)**	**Identify what the court's final order(s) were; i.e. what it ordered to be done, or not done, to dispose of the matter.**

This template may need to be adapted to the particular case you are reading, especially where you are asked to read only particular judges' reasons or selected passages rather than the whole case. Nonetheless, the basic format can be followed in such cases.

Identifying these various aspects of a case is not always easy. Not every judgment is written clearly or in a way that makes it straightforward to identify the main issues, or the *ratio*, or the held points. In such cases, you will need to work harder at *interpreting* the case. This can involve making explicit what is reasonably implicit in the text. That can sometimes involve some degree of reconstruction of the judgment as you try to make clear what is implicit or inherent in the judgment. Interpretations should, however, still be objective and neutral. Be careful not to state things as implied just because you think they *ought* to have been considered.

It is acceptable to quote short passages from the judgment, especially when it comes to the key legal principles being articulated. But keep it simple and keep it short. The task is not to find the 'juicy bits' of a judgment and just repeat them at length. Nor is the task simply to replicate the judgment in miniature. Instead, the task is to understand, and communicate the essence of, the judgment in concise terms. If you are quoting several sentences at a time, you are probably quoting too much.

The length of a case brief will depend on the task that you have been set and the detail of the judgment you are dealing with. Some case briefs will be longer than others.

TIP: BE CLEAR, CONCISE AND DIRECT

Aim first for clarity and simplicity – the language used in a case brief should be clear, concise and direct. Write in a plain, direct manner. Do not think that because it is a legal document it must be written in 'legalese', with complex sentence structure and lots of pretentious words and phrases.

There will often be a need to use specific technical legal terminology. Use the relevant terms clearly and precisely, but try to keep them to a minimum where possible.

5.5 A sample case brief

The last part of this chapter is an example of a case brief. The footnotes are commentary on the case brief for educational purposes only. They are not part of the brief.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://oercollective.caul.edu.au/guide-writing-law-school/?p=248#h5p-1

Chapter 6: Legal problem-solving

6.1 Introduction

One of the most common forms of assessment in law school is legal problem-solving. In very general terms, this task usually involves giving students a hypothetical factual scenario to which they must apply the law and reach a conclusion about the legal position of a person described in the scenario. This application of the law to a factual scenario is a core part of legal work, whether it takes the form of advising clients of their legal liabilities and rights, making submissions to a court or writing judgments as a judge. The 'problem to be solved' in these situations is the question 'How does the law apply to this particular situation?'

This chapter is intended to help students understand what is involved in legal problem-solving. In particular, this chapter will:

- explain what legal problems are, both in legal practice and in law school, to give you a clearer sense of what the task of 'solving' them can involve
- give you an overview of the main tasks most commonly performed in solving legal problems in law school
- provide various tips and warnings to help you develop your skills in legal problem-solving.

This chapter will not be enough on its own to give you those skills. Practice and experience in tackling legal problems in your specific law subjects will be more useful. Studying examples of good answers to legal problems will also help. (Your teacher should be able to provide or direct you to such examples.)

TIP: PUT THIS ADVICE IN CONTEXT

As you read this chapter you may also want to have before you some legal problems from your current law subjects so that you can see the advice in context.

It is important to note that this chapter does not provide a rule book for legal problem-solving; it does not lay down fixed rules to govern every answer to all legal problems. But, hopefully, it will give you a starting point.

6.2 What are legal problems?

Studying in law school is meant, among other things, to help prepare you for legal practice. This means that it is important to see how some of the tasks you perform in law school relate to what lawyers do in real-life legal practice. In this section, we will briefly consider legal problems in legal practice before looking at legal problems in law school.

6.2.1 Legal problems in legal practice

(a) Clients and their legal positions

A legal problem usually involves a question about a person's legal position. Accordingly, answering or solving a legal problem usually involves identifying and making clear what that person's legal position is. 'Legal position' refers to how a person in a particular factual situation 'stands in the eyes of the law' and thus which legal rights, liabilities, obligations and so on apply to them.

Note that this is a technical conception of what a legal problem is. Some people might think they have a legal problem when their problem has something to do with the law, such as having a tax bill for which they had not budgeted. To a lawyer there may not be much of a legal problem here if the law is clear that the person is obliged to pay the tax. This lay person's sense of 'legal problem' is perfectly legitimate, but it is important to note that lawyers usually mean something more specific by this term.

In legal practice, legal problems are usually provided by lawyers' clients. Clients commonly see a lawyer when they find themselves in situations in which their legal rights, liabilities or obligations are unclear or somehow problematic. One of the lawyer's tasks is to work out the client's legal position, given the facts of the client's situation.

(b) Facts

It is not always simple or easy to determine just what a client's factual situation is. Initially, the lawyer will need to rely on what the client tells them about their situation, usually prompted by questions from the lawyer. Sometimes what a client says about their factual situation may not be enough or is inaccurate and further information and investigation is needed on the part of the lawyer, such as examining relevant documents or speaking to other people with relevant knowledge.

Different people will often perceive situations and events differently. This means that 'the facts' concerning the client are rarely a complete and uncontested narrative that falls ready-made out of the sky but will often need to be constructed from a number of sources. This is one reason why lawyers usually make clear that their advice to clients is based on the information they have been given or had confirmed by the client.

(c) Applying the law

Having ascertained the relevant facts, the lawyer then needs to apply the law to the client's situation and work out what legal rights, liabilities, obligations and so on the client has. This process is meant to be objective; the lawyer is here trying to work out what the law would most likely say about the

client. It is something like predicting how a fair and reasonable judge would apply the law to the client. What the lawyer is doing is more or less putting themselves in the shoes of a judge faced with deciding the case. Thus, at this stage, the task is not one of advocating for a favourable outcome for one's client, but is, rather, an impartial way of seeing how the law is likely to apply to those relevant facts in the first instance. It will not be until later that an advocate may try to persuade a court that the correct application of the law to the client is one that is favourable to the client. Such advocacy does, however, build on the prior, predictive task of objectively applying the law.

(d) Advice

Sometimes a lawyer will ask another lawyer to work out the client's legal position. Thus, solicitors sometimes ask ('brief') barristers to prepare a document ('an advice' or 'an opinion') which will explain the client's legal position. Barristers are often briefed to prepare an advice where the problem is complex, or requires more specialist knowledge, or involves litigation. On other occasions, a senior solicitor may ask a more junior solicitor within their firm to prepare an advice, for example, when the senior solicitor needs to spend time on some other matter or the matter is not too complex or specialised. Advice from lawyer to lawyer usually looks very different to advice from lawyer to client, but the basic principles will be the same.

SOME ADVICE ON 'ADVICE'

The word 'advice' is a little ambiguous in law. In ordinary English, it perhaps most often means a recommendation of some course of action to another person. However, in the legal context it also has an older sense of 'information'. So 'to advise' someone in this sense is more a matter of giving them information, rather than a recommendation.

If a lawyer does recommend a course of action to a client, then it will normally be in a conditional form:

> If you are not prepared to risk the costs of losing the case, then I'd recommend trying to settle it outside court.

Alternatively, it may simply involve explaining what the client's various lawful options are, and what their consequences may be, and leaving it to the client to decide what to do.

Having worked out the client's legal position, the lawyer then needs to explain this to the client. This explanation is also called 'legal advice', and it can be quite a difficult task where the client has trouble understanding the details of the law. The lawyer must take great care to not misrepresent the law in order to please their client.

Of course, advising on legal problems is not the only thing that lawyers can do for clients. But it is one of the most important ones, and it often provides the basis for many other services that lawyers perform for clients.

6.2.2 Legal problems in law school

Given the importance of giving advice on legal problems in legal practice, learning how to do it is a core skill to be learned in law school. This is why so much of your 'black-letter law' subjects have problem-based assessment – to get you to think like a lawyer.

In legal practice, real clients' factual situations provide the legal problems, but in law school the factual situations are usually fictional. That is, we pretend that some factual situation has arisen and that a make-believe client needs legal advice. Sometimes law school problems are based on real situations (or variations of them), but the point is that students are not normally asked to give real legal advice (indeed they are not allowed to do so). In any case, whether the facts are real or hypothetical, given by a client or by a law teacher, the basic task is essentially much the same: to apply the law to the given factual situation to determine a person's legal position.

(a) In what contexts do law students answer legal problems?

There are three main contexts in which students are asked to answer legal problems as part of their assessment:

- legal problems in exams
- legal problems in assignments
- legal problems in moots.

Legal problems in written examinations

This is perhaps the most commonly encountered context for answering legal problems in law school – the traditional written examination where students are given a limited time to answer legal problems they have not seen beforehand. Such examinations are usually open book (i.e. you may consult notes and textbooks) and do not involve conducting legal research (in the library or via the internet), as the relevant law should normally have already been covered in the subject materials. Much of the advice in this chapter will have this traditional style of time-restricted examination in view.

It is sometimes suggested that examinations are artificial environments that are not good simulations of real-life legal practice. There are, for example, the stresses of working under strict time limits and coping with material not seen before, the inability to speak to the client to get further information and perhaps the need for further legal research to fully answer the question. However, many lawyers will tell you that this just as accurately describes much of their experience of legal practice. The academic context differs from legal practice in many ways, but learning to handle exams is a genuine skill that will stand you in good stead in legal practice and, indeed, elsewhere.

Legal problems in assignments

Here students are given one or more legal problems to take away and answer in their own time. This gives you more time to plan, draft and polish your answer. This sort of assessment may sometimes also involve conducting legal research to find the relevant law before you apply it.

TIP: DOES THE TASK REQUIRE LEGAL RESEARCH?

If legal research is set as part of your legal problem-solving assignment, you should start with the subject materials (prescribed cases, statutory provisions, reading guide, provided case notes/ judgments, lectures) and only do further research outside the subject materials if instructed to do so. It is extremely rare that a lecturer will set a problem-solving assignment where 'the answer' is hidden somewhere out there in other cases and statutes, and your task is to go and find it by searching through those cases and statutes.

Instead, in most legal problem-solving assignments, you are being assessed on your ability to problem-solve, not to research, and the lecturer will often be looking for an analysis using the materials they have provided for the subject. When in doubt, always seek clarification.

Legal problems in moots

In some subjects in law school, assessment can be by moot. This involves an oral presentation of argument as an advocate on behalf of a pretend client before an imaginary court. As mentioned above, advocacy is a special type of response to a legal problem, where one tries to persuade the court that the correct application of the law is one that is favourable to one's client. In requiring advocacy, mooting is different to the more usual type of legal problem, which calls for a more impartial application of the law. To perform advocacy well you need to have first gone through the more impartial task of predicting how the law will probably apply to the case. Only then can you develop good arguments for one side or the other.

(b) What particular questions are posed by legal problems?

So far it may sound as if legal problems (whether in law school or in legal practice) all have the same form. While it is true that most legal problems are variations on the generic question of 'how does the law apply to these facts?', there are, in reality, many variations on this general theme. This means that the specific questions posed by particular legal problems can be very different in form and content. It is essential to be alert to the differences, since answering any question well requires knowing just what the question is. For example:

> Would it be appropriate for the police to charge Deshi with murder?
>
> Is Wei's hearsay evidence admissible on behalf of the prosecution case against Deshi?
>
> Could Deshi successfully raise the defence of self-defence?

All these questions concern the 'legal position' of Deshi, understood widely. But it is essential to appreciate that they are asking very different, specific questions.

Some law school legal problems give you guidance as to the particular issues in question, as in the Deshi questions above. At other times the problem may simply give you a factual scenario about some person, for example, Dinusha, and then tell you to 'advise Dinusha', with no hint as to the issues other than what is in the facts. Here you need to work out the particular issues yourself. This takes a bit longer and you need to make sure you have identified each relevant issue before starting to solve any legal problems.

Other problems might tell you, for example, to 'discuss Vin's rights against the police'. Here the

'discussion' is not usually meant to be a general discussion about Vin's rights from, say, a political science or philosophical perspective; the focus should still be on applying the law to Vin's situation to elucidate Vin's legal position.

(c) Communicative context

Learning a new kind of writing can be harder when you are unsure of what style or tone to adopt. You can 'find the right voice' in writing answers to legal problems if you can get clear on the 'communicative context' that is often assumed in legal problems in law school.

As noted in Chapter 1, there are at least four basic aspects to the context for any communication:

- the identity or role of the speaker or writer
- the identity or role of the audience or reader
- the subject matter of the communication
- the purpose of the speaker or writer.

Successful communication requires the speaker or writer to have a good understanding of each of these four aspects of the communicative context.

At one level the communicative context in law school is quite clear: you are a student, writing for a marker, about the law, with the (probable) purpose of getting the best mark possible. At another level, in setting and answering legal problems in law school, we usually also adopt a fictional communicative context. In this context, the student writes as a lawyer, for another lawyer, about a person's situation, with the purpose of giving a reasoned and objective account of the person's legal position.

In terms of a legal practice analogy, it may be helpful to imagine that the facts have been given to you as a barrister in a 'brief to advise' from a solicitor or as a junior solicitor in a memorandum from a senior solicitor within your firm. At this stage, you have not spoken to the client and are not in a position to ask the client or the solicitor for further information before submitting your advice. But you can note in your advice where you think further information is needed, why, and what the possibilities may be, depending on what those further facts are.

You should regard the reader of your advice as a generic lawyer. Lawyers' professional writing for other lawyers should generally be the same no matter who the lawyer is. Further, because you are writing to another lawyer, you should use correct legal terminology and a relatively formal or professional style. That does not mean that you should write in a verbose, convoluted, 'legalese' style. Clarity and concision remain essential features of good legal writing. But it does mean that you should avoid the informality and simplification that may sometimes be appropriate when directly speaking to a client with a limited understanding of legal matters.

Finally, a couple of points should be made on the communicative style usually required by the 'advise David' kind of question. First, as noted earlier, here you are really being asked to *inform* the audience of David's legal position, not primarily to make practical recommendations regarding possible courses of action. Sometimes it can be appropriate to conclude an answer with a short, conditional sort of recommendation (e.g. 'therefore David is highly likely to be found liable in negligence. If he wishes to minimise his financial losses, he should consider settling at the earliest opportunity'). A conditional form of recommendation is usually best, as we cannot always say what a client's real preferences would be (e.g. David may care more about what he sees as a

matter of principle than about his money). Moreover, unless the task asks you to present options, any recommendations should be delivered as briefly as possible so that you can use most of your discussion for the substantive analysis.

Second, despite the apparent grammar of the phrase ‘advise David’, you are not normally being asked to speak directly *to* the client, David, which could well require a quite different communicative style in real life. Instead, you are usually being asked to inform an imaginary legal audience *about* David’s legal position. So, you should use the third person (‘He is likely to be found liable to pay damages’) rather than the second person (‘You are likely to be found liable to pay damages’).

(d) ‘Answering’ or ‘solving’ legal problems?

Is an answer to a legal problem a ‘solution’ to the problem? It is very common to speak of ‘solving’ legal problems rather than ‘answering’ them. However, it does run a couple of risks. First, talk of ‘solving’ legal problems can encourage the limiting idea that there must always be one correct solution to a legal problem. Second, what for the lawyer is a ‘solution’ to a problem may be a disaster for the client. For example, your advice about a client may be that they are likely to be found guilty of blackmail and face the prospect of up to 15 years in jail. That may be the best answer to the question posed by the client, but the client is not likely to see it as a ‘solution’ to *their* problem. Nonetheless, the terms ‘solving’ and ‘solution’ are very commonly used in this context and so we will use them, as well as using ‘answering’ and ‘answer’.

6.3 How do I answer a legal problem?

This section gives a brief overview of the different basic tasks that are most commonly required when preparing an answer to a legal problem in law school. These tasks or functions are described only very generically here. Various aspects of these tasks will be elaborated on in section 6.4.

It cannot be over-emphasised that *there is no fixed formula for answering legal problems*. For one thing, problems differ, so even if there were a formula for one kind of problem, that may well not apply to other kinds of problems. In any case, even if there were just one kind of problem, there is no fixed rule book applying to that one kind. So do not take the following as providing a fixed set of steps that must be rigidly followed in all cases.

Moreover, as you consider each of these tasks in relation to particular problems, you should bear in mind all the other steps as you go. That is to say, working out the answer to a legal problem is not a linear process whereby one step can be completed in isolation from the other steps. Instead, each stage is influenced by the other stages. You need to be aware of the whole as you attend to particular steps, while also being aware that the whole is ultimately made up of particular steps.

This also means that, though your preparations might follow the same structure, the way you actually go about writing your answer may not follow the same structure. In any event, the steps below will assist significantly in your preparations, even if they do not exactly match the structure of your final written answer.

Below we explore the process of answering a legal problem following a basic six-step structure (more or less extracted from the IRAC method, which is summarised at the end):

- Step 1: Read the facts
- Step 2: Read the task you have been set
- Step 3: Identify the legal issues
- Step 4: Identify the relevant legal rules
- Step 5: Apply the rules to the facts
- Step 6: Reach a conclusion

Step 1: Read the facts

First you need to know the facts of the situation, as given to you. Read them carefully and thoroughly, a couple of times if necessary. Identify the main people or entities in the scenario and their relationships to each other. (It can sometimes help to do a rough sketch map of these.) Think about what these people and entities are likely to want (e.g. compensation, the return of their property, an acquittal). Note any gaps and areas where more information is needed to give a fuller answer.

As you read the facts, also consider whether they remind you of any of the factual scenarios in the relevant cases (precedents) you have studied. As you study the precedents in various areas (e.g. medical negligence, confessions), you will often see similar types of factual scenarios. When some new set of facts sufficiently resembles the fact patterns of precedents, the relevant rules found in those precedents will normally apply to the new facts.

Whether some new set of facts really does fit the pattern or whether the new facts are ‘distinguishable’ (i.e. the new facts do not fit the pattern) is often one of the key threshold issues to be worked out. Grappling with whether the facts of an apparent precedent case are properly analogous to those of a current case or whether the precedent can in fact be distinguished from the new case is a key part of the case-law reasoning that is central to the common law.

TIP: DO THE NEW FACTS SOUND FAMILIAR?

With this sort of thing in mind, lecturers will often draw from established cases that you have been studying to create new factual scenarios. They will change key facts that create a novel twist, which will then usually raise the question of whether the new facts fit any patterns found in the precedents and so bring the case under the scope of those precedents.

In short, do not just read the facts as if you were reading a short story. Read them with a lawyer’s eyes to see what resemblances and what differences can be discerned in relation to existing precedents. This also means that the more familiar you are with existing precedents, the better will be your legal reading of the new facts.

Step 2: Read the task you have been set

What is your specific task? Regardless of what you think the question *might* be about or *should* be about, what are you *actually* being asked to do? The question may not always be asking how a client can get what they ultimately want. *Read the question very carefully*. For example, have you been asked simply to ‘advise Dorothy’ or have you been asked to ‘advise on the admissibility of Dorothy’s recorded confession to the police at 7 am on 3 April 2021’?

As already stressed, while the generic task is often similar across legal problems, the particular question asked is vitally important. It does not matter how amazing your legal analysis is if it does not answer the specific question posed.

Step 3: Identify the legal issues raised

What legal issues are raised by the facts as given? What questions or potentially disputed legal points could be raised? For example, in relation to the admissibility of Dorothy’s confession, is the issue whether Dorothy’s confession to the police was voluntary, or whether the police have satisfied the statutory recording requirements, or indeed are both (and even other) issues raised?

(a) Sub-issues

Within each main issue, what sub-issues, if any, are raised? To put it another way, what smaller questions do you need to answer to be able to answer the bigger, overarching question raised by the scenario. The sub-issues raised will often correspond to the elements of a particular cause of action or criminal offence. For example, if the question asks whether Vivian has a claim in the tort of negligence, then you will often have a clear set of sub-issues to be addressed, matching the elements of negligence: was there a duty of care, was the duty breached and was material damage caused by the breach?

In other problems there may be alternative ways in which a main issue could be settled. For example, if the main issue regarding Dorothy's confession is whether it was voluntary, is the sub-issue whether Dorothy was subject to oppressive conduct or whether she was induced by a person in authority? Do not assume that a particular issue is raised in a problem simply because your notes include that issue under the relevant general heading. Look at the facts to see whether they do in fact raise that issue.

(b) Spotting the issue

'Spotting the issue' is a key skill, but there is no simple, generic formula for how to do this. Often you will be better able to identify the relevant issues if you are familiar with the relevant precedents and the relevant rules of law (statutory or case law). Through recognising resemblances and having a sense of how the reasoning of precedents would be extended to the new case, you will find spotting the issues in the new case easier. In this way, it can be really helpful to draw up checklists, tables or flowcharts from the facts and materials you have been given to aid issue spotting.

Also, where you are asked a specific question about the facts (as in law school problems, but not always in legal practice), that question may provide a guide to what the relevant issues are.

In identifying issues, bear in mind all the other aspects of answering legal problems: the facts, the question posed, the relevant rules of law and how those rules might apply to the facts. This reinforces the point made earlier: the process of preparing answers to legal problems is non-linear, as each part of the process influences the other.

How is it best to phrase issues? It will often depend on the context, but usually it will help to pose issues by putting 'whether' in front of the relevant proposition (e.g. '*whether* Dorothy's confession was voluntary' or '*whether* the police satisfied the recording requirements') or by phrasing the issue in terms of a question (e.g. 'Was Dorothy's confession voluntary?' or 'Did the police satisfy the recording requirements?'). You can also use these questions, or a phrase indicating the issue, as headings to make the document even clearer.

TIP: LEAVE EMOTION AT THE DOOR

You should avoid emotive language when identifying the issues. There will often be important value questions raised by the facts, and it can be tempting to bring out those aspects. But you need to focus on the *legal* issues and identify them *as* legal issues, clearly, precisely and neutrally.

Step 4: Identify the relevant legal rules

What are the relevant rules of law that apply to the identified issues? What, for example, are the legal requirements for recording a confession, and what exceptions, if any, are there to these requirements? What cases (with what *ratio decidendi*) are the applicable precedents? What statutory laws are applicable? Note that you will draw on your knowledge of the law in identifying the issues in the first place.

Identifying the relevant rule is not always a simple or straightforward task. It can sometimes involve a significant degree of interpretation and argument. Thus, sometimes one of the issues to be decided in your answer is the very question of *just what the law is* that is applicable to the facts. For example,

the current authority in Victoria of a 40-year-old English case on police searches may be in doubt, or the correct verbal formulation of a legal rule may be unsettled.

TIP: USE THE LAW TO IDENTIFY ISSUES

Sometimes the issues will not be clear from a hypothetical scenario alone and you will need to refer to the relevant law to identify all of the issues raised.

For example, if you are dealing with a provision from legislation, you can often tease out the words of the provision and create a checklist of elements that need to be established/satisfied. The same can be said for the *ratio decidendi* (reasons for decision) from precedents. Sometimes your lecture notes or readings will give you an idea of the elements you need to look for.

Wherever possible, use the existing law to help identify the issues or, at least, where to look for the issues.

Step 5: Apply the rules to the facts

How exactly should the relevant legal rules be applied to the facts of the case? Which bits of which rules apply to which bits of which facts? For example, do the facts given satisfy each of the requirements for an admissible recorded confession? If not, are the exceptions satisfied by the facts?

This is usually the hardest and trickiest part in answering legal problems, for, among other difficulties, it may not be clear-cut how a general and perhaps vaguely formulated rule applies to the particular facts in front of you. Rules that sound clear and sensible in the abstract can often become frustratingly vague and uncooperative when brought face to face with the nitty-gritty of factual situations.

TIP: DO NOT SIMPLY RE-STATE THE FACTS

It is important that you do not simply restate or summarise facts in your analysis. The reader will have had access to the problem question and will largely be familiar with the facts. Restating them will waste your limited word count and you need that for your analysis. To the extent that you need to refer to the facts, make sure they are vital to your analysis (directly applicable to the issues and rules you have identified) and communicated succinctly.

Not every factual situation given in a legal problem (either in law school or in legal practice) will fit neatly into the existing categories of the law. Do not expect the facts always to be readily captured by the existing rules. Indeed, as noted above, the facts in law school problems are very often constructed precisely to pose a problem in this regard. Dealing with such mismatches is a key part of common law reasoning, as the development of the common law has for centuries thrived on mismatches between new facts and existing rules. It is one of the main ways in which new precedents are developed.

Despite the difficulties you may encounter in connecting rules and facts, bringing the law to bear on

the facts is crucial in answering legal problems. Do not just state the relevant law and then shy away from applying it to the facts in the hope that the rules will apply themselves or the reader will finish the task for you. That task is yours, and if you do not apply the law to the facts, you will probably fail the question.

TIP: APPLY THE LAW, DON'T JUST ANALYSE IT

Students sometimes stumble when answering problem questions by providing only an analysis of the facts, or only an analysis of the law, when what they need to do is go on to *apply the law to the facts*. This leads to an incomplete response that does not adequately answer the issues identified.

Step 6: Reach a conclusion

What is the result of applying the rules to the facts? How are the issues you have identified actually answered? What is the relevant resulting legal position of the person (or people) whose factual situation you have been considering? Will the law provide the remedy that the person seeks?

As always, the conclusion should answer the question asked. For example, if the original question was 'advise on the admissibility of Dorothy's recorded confession to the police at 7 am on 3 April 2021', your conclusion may be that Dorothy's confession is unlikely to be found to be involuntary and so will be admissible on that point but is likely to be found to be inadmissible due to the breach of the statutory recording requirements by police.

If a conclusion can only be tentative (e.g. because the evidence is not certain, or the law is undeveloped or unclear), give an appropriately qualified conclusion. Conclusions must be clear, but they need not always be certain. Sometimes the best answer is one that is appropriately tentative or qualified.

TIP: FINISH THE JOB

Never leave it to your reader to work out your conclusion, no matter how obvious you think you have made it. Always state explicitly the conclusion that you want your reader to take away from your analysis. This is useful from a persuasion point of view but also prevents misinterpretation or misunderstanding of your conclusion.

Summary: IRAC

To summarise the above processes, it can be useful to remember the acronym 'IRAC' for 'issues, rules, application and conclusion'. There are various acronyms in the literature on legal problems. They all point in more or less the same direction.

This acronym does not provide a formula or fixed structure for answering legal problems. It is more a heuristic device; that is, a tool to help you work through a problem but which will need to be adapted

and developed as you use it in particular cases. IRAC should at least help to remind you of the main basic tasks that most legal problems require you to perform in some way in properly answering them. A good answer demonstrates that each of these tasks has been performed.

TIP: CONSIDER STARTING WITH THE END

Think of IRAC as your 'working out'. Before you start to construct your full sentences and multi-paragraph answers, IRAC can help you identify the relevant answers to make the whole process significantly easier.

Sometimes it can be useful to adopt a 'CIRAC' approach in which you state your conclusion *at the start* and *at the end* of your answer so that your reader knows the context in which your answer sits from the beginning.

For example, instead of starting with:

> The issue is whether Dorothy's recorded confession to the police at 7 am on 3 April 2021 is admissible

you could start with

> Dorothy's recorded confession to the police at 7 am on 3 April 2021 is likely inadmissible. This is because [identify the sub-issues here that will lead your reader to your conclusion].

Note that you should add this part in **after** you are satisfied with your analysis. Do not construct an analysis to suit the conclusion you want before you have established that the law and the facts work together to support that conclusion.

6.4 Tips and warnings

This section contains tips and warnings which elaborate on some of the points made in section 6.3. They mainly concern answering legal problems in time-restricted examinations.

6.4.1 Plan your answer

It is essential that you take time to plan your answers. This is usually a key step in producing well-structured answers. It may feel counterintuitive but if you have one hour to answer a question, taking five to 10 minutes to plan your answer is time very well spent. It is usually best to first identify the main issues to be addressed and sketch a coherent overall plan based around those issues. You can then 'sub-plan' the sections within that bigger picture. However, you do not need to plan every step of your answer before you write. A plan is not a rough draft of your answer.

TIP: USE A PLAN TO KEEP TRACK OF THINGS

Whether you have one hour under exam conditions or a week with research time, a plan will keep you on track while you are writing your answer and enable you to make sure that you address all of the points you want to make.

6.4.2 Answer the question

A quick way to lose marks is to fail to answer the question. There are at least three ways to fail to answer the question. The first one is to fail to write anything at all. (That will get zero marks.) The second way is to write something which does not answer the question actually asked. (Perhaps it answers a question the student wishes had been asked.) A third way is to write something that is on track to answering the question but ends before a conclusion is articulated in answer to the question. While this third way is the lesser of these three failings, it is still best to finish your answer and state your conclusion explicitly.

Do not avoid coming to a conclusion just because you are not sure that it is 100 per cent certain. If the conclusion is not certain (and there is no reason to assume that all or even most answers to legal problems must be certain), then still draw your conclusion and indicate how likely the result is that you have identified.

TIP: QUALIFY YOUR CONCLUSION APPROPRIATELY

The facts and the law will not always lead you to a clear or certain conclusion. This is true both in law school and in legal practice. Sometimes the most reasonable conclusion can only be tentative or less than precise. Where this is the case, you should qualify your conclusion, noting the existence of the particular factors that you think are uncertain or unclear. If appropriate, use words like 'likely' or 'may' to qualify your answer without reducing its impact. Be clear about what aspects of your conclusion are not as clear or as certain as one might wish.

6.4.3 Give reasons for your claims

A good answer to a legal problem does not just present 'the correct answer'; it shows *why* it is the correct or preferable answer by presenting the arguments for it. This means that you should give reasons why you think your answer is the right or best answer. Thus, though the conclusion reached is very important, just as important (and sometimes more so, in terms of your assessment as a law student) is the quality of the reasoning or argument by which you reach that conclusion. Indeed, a large portion of the marks will be allocated to the discussion of the law's application to the facts so an answer to a legal problem should not just provide a one-line response (e.g. 'Wei's evidence is inadmissible') but should also explain why that conclusion is the most reasonable one to draw. Never assume that your reader will understand the reasoning for your conclusion without you having to lay it out for them.

Significant weight is put on your reasoning because it is here that some of your most important skills as a lawyer are shown. Over the long run, it is good legal reasoning skills, not memorising selected areas of law, that will yield better answers.

Good reasoning skills are also usually linked to good communication skills. A finely modulated speaking voice or a good eye for formatting a document are not worth much if what you convey in your speech or your document is logically flawed or incoherent. Reasoning skills are essential in enabling you to convey meaningful thoughts.

(a) Be explicit about the strength of your conclusions

Reasons for a conclusion should provide logical support for that conclusion. That support, however, need not always be a matter of guaranteed certainty; it may often be more a matter of degrees of support.

As noted above, good answers to legal problems are not always certain. The support they receive will often be only a matter of 'more likely than not' or 'on the balance of probabilities'. It is important to remember that law often does not have certain answers – indeed, that's why lawyers exist – and the best answer one can come up with might be not at all certain. A good answer to a legal problem will, therefore, demonstrate an awareness of the strength of its conclusion. If a tentative conclusion is the most reasonable one, then be tentative. But be clear that that is what you are doing.

It is particularly important in law to be aware of the relative strengths of rival positions. Be alert to alternative arguments and the degree of support they provide for rival conclusions. Sometimes there may be almost equally good reasons for both sides of the question (or all three or four sides, for that

matter). On such occasions, one can be confident that the most reasonable conclusion is that there is an even balance between the different arguments. However, avoid the easy way out of shrugging one's shoulders and saying, in effect, 'I do not know; the decision is up to the court'. If the arguments are evenly balanced, you should say so.

TIP: CLEARLY ARTICULATED NUANCE IS STRONG, NOT WEAK

Where there is a rival conclusion that would have a good chance of being accepted by the court, say so. You can say '*The court will likely find X, but there is also a good chance that it will find Y.*' Where there is important nuance, make sure to articulate it clearly and communicate not just why X will be the more likely outcome but also why there is a good chance that Y will be the outcome. An answer that fails to notice complexity and nuance when they are present is made weaker, not stronger, by that omission.

(b) Is there no one right answer?

It is sometimes said that there is no one right answer to a legal problem, only better arguments in support of a particular answer. A deeper point sometimes made is that there can be a 'correct' answer to a legal problem but that the correct answer is simply the conclusion to the best argument. According to this view, the quality of the argument is the criterion for the correctness of the answer, as there is no other mode of access to correct legal answers.

Regardless of how these theoretical questions are to be settled, it is at least clear that well-reasoned arguments for one's conclusions are essential. You can still earn valuable marks in an exam on the quality of your reasoning, even where your final conclusion is unfinished, or where you reach a conclusion with which the examiner disagrees.

The converse is true, too: bad or weak arguments will lead to wrong or weak answers. Even if it is true that there is ultimately no one right answer, not just any answer will be a good one – there can still be plenty of bad ones. Planning your answer and following IRAC will bolster the strength of your legal reasoning.

(c) Legal authorities

Giving reasons includes citing authorities in support of your assertions as to what the law is. This is an essential part of the problem solving process. So, avoid merely stating a legal rule. You should also cite the relevant case or statutory provision that is the source of the rule. Full citations are usually not required in time-restricted examinations; abbreviated forms of citation are normally acceptable (e.g. the case name or the statute name and section number).

Where the relevant legal rule is contentious or uncertain, it may be appropriate to critically analyse the relevant cases or statutes and argue for a particular interpretation. For example, you could argue that a recent statutory amendment changes the way in which an existing High Court case should be applied. This critical analysis sometimes involves policy issues about what the law should be, but be wary of getting too distracted by policy or interpretation issues or engaging in lengthy reviews of the law when the question does not ask for it. Your discussion should always be directed to helping you to answer the question.

Also, do not get too distracted by the facts of precedents. If you need to mention the facts of other cases, stick to the relevant ones and state how they apply, or are to be distinguished, concisely. A case brief is not required.

TIP: DON'T TRY QUOTING YOUR WAY TO SUCCESS

Avoid copying out slabs of legal rules in your answer. Your skills as a textual transcriber are not being tested. Long quotations from cases or legislation, even where the quoted rules are relevant, will not advance you very far toward answering the question, especially if you do not then apply the rules to the facts to generate an answer. Paraphrasing the relevant principles and applying them directly to your scenario is much more effective.

6.4.4 Be objective and impartial

Unless you have expressly been given the task of being an advocate on behalf of one side or the other, you should remain impartial. Legal advice is like a physician's diagnosis: an objective assessment of the client's position (cf. a patient's medical condition), which may well not be what the client would prefer to hear.

(a) Consider both sides

As part of being impartial and to ensure that your answer is comprehensive and well-founded, you should consider the arguments for and against particular positions. Not every issue can be thrashed out in detail in your written answer. Focus on the more important and more contentious issues. You will need to judge which issues are important enough to warrant a fuller treatment.

(b) Consider alternatives

Where the facts are uncertain or a legal decision could go either way and it is important which way the matter is resolved, you should consider the alternative answers. For example, it would be a poor answer that ran along the lines of:

> The facts do not say when Dilbert became bankrupt, so it is not possible to answer this question.

A better answer would examine the main alternatives and their consequences:

> If the date of Dilbert's bankruptcy is found to be 5 May 2003, then he may apply for an early discharge, and if successful he may then apply to the bank for the loan before the vendor's offer lapses. However, if the date of bankruptcy is found to be after that date, then he will not be able to apply for an early discharge and will therefore be unable to apply for the loan before the offer lapses.

6.4.5 Be relevant

A common weakness in student answers is failing to keep answers relevant to the issues. Read the question closely and think carefully about what issues are raised. Make sure that your answer is always in some way contributing to answering the issues raised. Students often go off on tangents by

mis-identifying the relevant issue and discussing matters at cross-purposes with the problem at hand. This is why taking time to identify all of the issues at the beginning is so important – strong issue spotting makes it easier to tell what is relevant.

Relevance is sometimes a matter of degree and there can be reasonable disagreement about it. However, it is part of your legal training to develop a sense of legal relevance and, importantly, a capacity to show how something is relevant to something else.

6.4.6 Cover all the main issues

Even if what you write is relevant, it may not be *all* that is relevant. In other words, there is the problem of covering only some of the main issues and leaving others out. A common weakness in student answers is to grab hold of the first issue spotted and dart off to write about that one issue, without a backward glance to the other issues left by the wayside. If you do not spot all the relevant main issues, your answer will be incomplete. This is a good way to lose significant marks. It is usually worthwhile to take time to think carefully about what the issues are and to plan your answer accordingly.

Not every conceivable issue is worth pursuing, and so you will often have to make a judgment as to which issues *are* the 'main' issues and should be addressed and which are the more peripheral ones that you can afford to bypass. Being able to identify the difference is an essential legal skill.

TIP: COVER SMALL BUT NECESSARY ISSUES, BRIEFLY

Just because you have decided an issue is not, on the facts, a *central* issue, you may still need to address it for your answer to be complete if the issue relates to a necessary part of the relevant legal test. You can often tell if an issue is 'central' by its uncertainty or contentiousness within the particular problem. Where you need to address an issue that is not central, but is still necessary to your analysis, be brief.

For example, imagine you are answering a question about whether a comment posted on social media is defamatory. It may be obvious on the facts that the element of 'publication' is satisfied and there does not need to be a lengthy discussion about this issue. Do not take it for granted that your reader will know this. If you skip this part of the discussion, your reader may assume that *you* do not know that publication is an element of defamation.

To deal with issues that are relevant but not controversial in your answer, you can say:

> The publication element is not controversial on these facts because the post was made on social media and seen by 73 people before it was removed. This satisfies the publication element pursuant to [cite the relevant rule].

6.4.7 Structure your answer clearly

Good structure is essential to a good answer. Many students' answers to legal problems suffer from poor structure – they are rambling, repetitive, and do not progress clearly and logically from issue to issue. An answer that is clearly and logically structured from the first paragraph will almost always

gain marks purely on that score, even if the arguments it contains are no more cogent than the arguments discerned (eventually) from a poorly structured answer. A clear but weak argument is still preferable to a jumbled and weak argument.

It is usually a good idea to identify distinct issues clearly and then go through the 'RAC' process (rules, application, conclusion) with each issue/sub-issue separately. Thus, in a problem where several distinct issues are raised (which is the case in most problems), the RAC process will need to be done repeatedly. This can sometimes mean that the same basic set of facts will need to be addressed a number of times, from different angles, with respect to different issues. Even if you are repetitive in your working out during the RAC stage, you will be able to tidy this up when you construct, review and revise your final answer.

EXAMPLE 6.1

Overarching issue: Whether Tania is liable for defamation for the comments she made about Peter.

Sub-issue 1: Whether Tania published her comments.

Rule? Application? Conclusion to sub-issue 1?

Sub-issue 2: Whether Peter was identified in the comments.

Rule? Application? Conclusion to sub-issue 2?

Sub-issue 3: Whether the comments were defamatory.

Rule? Application? Conclusion to sub-issue 3?

Overall conclusion: Tania is / is not liable for defamation for the comments she made about Peter because [sum up the conclusions from sub-issues 1, 2 and 3].

(a) Avoid being too rigid in your structure

While it is generally good to have some match between the structure of an answer and the various functions the answer performs, sometimes students are overly rigid in their structuring of answers to legal problems. This is especially common where IRAC is treated as a universal template for structuring answers. Remember that the IRAC process is the *working out stage* of your preparation. It identifies *tasks* to be performed or functions to be fulfilled in *preparing* your answer and need not correspond to structurally distinct *parts* of the *final* written answer itself. The final written version need not fixedly re-present each of the stages of your preparation.

A common rigidity in this regard is where students doggedly produce distinct sections with the headings 'issue', 'rule', 'application' and 'conclusion' under which they, respectively, state the relevant laws, apply them to the facts and then draw the relevant conclusions. While this is not an error (indeed, for beginners it can be helpful to start practising by laying out answers in this sort of way), it can be a rather plodding way to approach matters. It can sometimes be a little blinkered and repetitive, and it can take up space and time that will often be better used in doing all three tasks more or less at the same time, allowing you to move on to cover further ground. It is sometimes better to

identify the relevant legal rules at the same time as you apply them to reach a conclusion. That is, you can *show* your understanding of the relevant rules when you apply them.

EXAMPLE 6.2

A relatively pedestrian approach (using generic terms here to save space) would be:

> **Issue:** Whether Derrick is guilty of the offence of X.
>
> The next issue to consider is whether Derrick is guilty of the offence of X.
>
> **Relevant rules of law:**
>
> It is a criminal offence to do X. As contained in section 123 of the *Miscellaneous Crimes Act 1999* (Vic), the offence of X comprises the following three elements: E1, E2 and E3.
>
> **Application:**
>
> On the facts given, Derrick satisfied E1 when he did A, satisfied E2 when he did B, and satisfied E3 when he did C.
>
> **Conclusion:**
>
> Having satisfied all the elements of X, Derrick is therefore very likely to be found guilty of X.

There is no basic error here, but depending on the context, it may be quicker and no less revealing of your legal understanding to write something more concise:

> Is Derrick guilty of X? In doing A, B and C, Derrick clearly satisfied, respectively, the three elements of the offence of X under s 123 of *Miscellaneous Crimes Act 1999* (Vic) and so is likely to be found guilty.

This more concise kind of treatment may be more appropriate where the issue is not the most central one or is not so controversial. It is a matter for your judgment based on what you think are the most important points to be covered from the scenario. Part of the skill you are developing is knowing when to be more concise and when to be more detailed in your arguments. The easiest way to figure this out is by looking to the uncertainty or contention raised by the facts and paying more attention to those issues. Be prepared to be flexible in your approach but your overall aim should be to leave your reader in no doubt as to your reasoning for your ultimate conclusion.

Where time is not a constraint, it can sometimes be useful to follow the more structured approach outlined above as part of an initial rough draft answer. Then, as you revise and edit your answer, you will discern which parts of the answer can be profitably edited and streamlined, and when an approach could be varied. In most exam situations this will not be feasible; you will only have time for some basic planning and then writing just one draft. But by practising answering legal problems beforehand, you will develop your capacity to judge when and how to streamline, vary, condense or expand the structure of your answers.

(b) Headings

Good use of headings will usually help you to make the structure of your answer clearer. They will normally help you in your writing and also help the reader (i.e. the examiner) in their reading by giving them signposts. If you have a good structure, the headings should be easily inserted, as it will be clear what each paragraph or group of paragraphs is doing.

TIP: USE SPECIFIC, MEANINGFUL HEADINGS

Make your headings specific, concise and relevant to the discussion. **Avoid** using headings like:

'Issue', 'Rule', 'Application'

Instead, **prefer** headings like:

'Liability for defamation', 'Publication', 'Identification', 'Defamatory material'

Using headings like this means that your reader can know, at a glance, what each section is dealing with. The particular issues that you need to address will usually provide the main headings for your document. These can even be phrased as questions.

(c) Introductions

It is usually helpful to start your answer with a brief introductory paragraph. The main function of an introduction should be to identify the main issues to be covered in the answer. It can also be helpful to state the conclusion drawn at the end of your answer already in the introduction. This gives your reader a context in which to process your answer.

But be concise. You do not need to spend half a page setting the scene, or reviewing academic debates in the area, or previewing the arguments you will present in the main body. It is especially important that you do not waste time summarising the facts. Some students fall into the trap of using their introduction to outline their arguments in so much detail that they find their 'outline' has taken up a page or more and anticipates too much of their main presentation, while not yet being a full enough treatment to stand as the main presentation itself.

It is usually enough simply to note the main issues raised by the problem and which are to be duly addressed in the answer. For example, an entirely satisfactory introduction could run as follows:

> To advise whether Dorothy's recorded 7 am confession is admissible, the following issues need to be determined: (i) whether the confession was voluntary; (ii) whether the police complied with the statutory recording requirements under s 464H of the *Crimes Act*; (iii) whether it would be unfair to admit it pursuant to s 90 of the *Evidence Act*; and (iv) whether, under s 138 of the *Evidence Act*, the probative value of the confession outweighs the prejudicial effect of the manner in which it was obtained.

An example of an introduction which states the conclusion at the outset could say:

> Dorothy's recorded 7 am confession is inadmissible, despite being voluntary, because the police did not record the confession (s 464H, *Crimes Act*). Moreover, it would be unfair to admit the confession due to the police officers' conduct, pursuant to s 90 of the *Evidence Act*. The probative value of the confession does not outweigh the prejudicial effect of its manner of collection under s 138 of the *Evidence Act.*

In either case, the main body of the answer could then proceed by systematically going through each issue, with each numbered point having its own heading: ie, (i) voluntary confession, (ii) recording requirements, (iii) unfairness, (iv) probative value versus prejudicial effect.

6.4.8 Do not change the facts

It is rare for every relevant fact to appear in the scenario given in a legal problem. This is not a failure on the part of the person setting the question. Gaps in the facts occur frequently in legal practice, and learning to deal with such gaps is an essential skill.

If you think the facts as given to you do not provide a sufficient basis for drawing a conclusion, say so, and indicate what facts would fill the gap and how they might do so. Do not get in touch with your inner novelist and add to the facts to fill in perceived gaps. Where different results turn on different possible but unknown facts, make that clear. There may even be inconsistencies in some factual scenarios. Again, this happens in real life, especially where there is more than one witness making a statement. Deal with such problems as they arise by noting the problem and what its effects are. None of this grappling with uncooperative facts gets in the way of answering the problem; it is part of what is assessed.

6.4.9 Be wary of questioning the question

It is true that sometimes a good answer can show that the original question makes a problematic assumption or is misconceived in some way. For example, a question may ask ‘On what date did Joanna start trading while insolvent?’ After a rigorous analysis of the facts given, you may legitimately find that at no stage did Joanna in fact trade while insolvent, because she was never in fact insolvent. If so, then note this and present your arguments for this conclusion.

However, this is a very rare situation, so be wary of taking this route or, where you do, of going too far in this direction. In answering legal problems you are not engaged in an intellectual debate with the person who gives you the facts and sets the task (whether a client, senior solicitor, instructing solicitor or your teacher). For example, let’s say the question asks you to:

> Advise as to whether Wei’s hearsay evidence is admissible.

It is not a good idea to respond by arguing:

> the question fails to consider the Victorian Law Reform Commission’s recent report recommending that all hearsay evidence be prima facie admissible, which I shall now discuss.

This is a direct route to irrelevance. This warning is not intended to stifle your intellectual freedom or to force you to be compliant. It is a matter of learning what the actual task in front of you is asking for.

Moreover, if you think the question is wrong, or has an error within it, go back to your notes and double-check that you have fully understood the lectures and readings before taking a contrary stance. In essence, make sure you are confident about it before you outwardly disagree with the premise of a question posed as an assessment task.

6.4.10 Do not repeat the facts or the question

This was mentioned briefly above but is so important that it is worth restating. Do not waste time repeating large parts of the facts or repeating the whole text of the question at the beginning of your answer. It will often be appropriate to refer to certain facts in the course of your answer, or to note what question it is that you are answering at a particular point, but too many students pad out their answers by needlessly repeating what is already written in the examination paper. This is a waste of time and words and contributes nothing to your answer.

6.4.11 Write clearly and concisely

Clear, precise and concise English expression is essential to getting your ideas across to the reader. Your marker can only assess what is on the page in front of them, so your document must stand on its own feet and communicate effectively. A reader cannot be persuaded by that which they do not understand.

Write clear, grammatically correct and properly punctuated sentences. Aim to be as clear and direct as possible. Try to keep your sentences grammatically simple. Long, complex and convoluted sentences rarely help to improve your writing, especially in exams. Use distinct paragraphs for distinct stages of your answer (headings will help here). As you progress from sentence to sentence, and from paragraph to paragraph, there should be a clear sense that the argument or analysis is unfolding in a logical way.

6.4.12 Use of bulleted or numbered points

When done well, it is acceptable to use bulleted or numbered points to make sentences that are grammatically correct but whose physical layout does not follow the traditional paragraph of running text. Consider this passage:

> Dorothy's confession was not voluntary, because she was subject to oppressive conduct in not having received any food in the whole 12 hours she was in police custody and in not being given an adequate bed to sleep in. Moreover, she was induced to confess by Constable Doright's offers to let her friend Sharon go if she confessed to the crime herself and to 'forget' her drugs charges from 2004.

You might instead lay the text out as:

> Dorothy's confession was not voluntary, because she was:
>
> - subject to oppressive conduct in:
> - not having received any food in the whole 12 hours she was in police custody; and
> - not being given an adequate bed to sleep in; and
> - induced to confess by Constable Doright's offers to:
> - let her friend Sharon go if she confessed to the crime herself; and
> - 'forget' her drugs charges from 2004.

Or you could even lay it out like this (with numbered points):

Dorothy's confession was not voluntary, because she was:

i. subject to oppressive conduct in:
    a. not having received any food in the whole 12 hours she was in police custody; and
    b. not being given an adequate bed to sleep in; and
ii. induced to confess by Constable Doright's offers to:
    a. let her friend Sharon go if she confessed to the crime herself; and
    b. 'forget' her drugs charges from 2004.

This format can be a way to present your points clearly, but be wary of overdoing it. If a whole answer consists mostly of bulleted or numbered points, it can become much *harder* to read. Moreover, some students combine bullet points with an ungrammatical, truncated form of writing which uses less ink but creates plenty of confusion and ambiguity. It might be quicker for you to write, but it can often take longer for your reader to read than clear, concise, grammatically correct sentences. Giving your reader more work to do rarely works in your favour.

TIP: USE BULLET POINTS CONSERVATIVELY

Use full sentences and full paragraphs for most of your analysis. Rely on bullet points only for lists, outlining elements of the law, or dealing with several relevant facts that apply to the same rule or issue.

6.4.13 Practise answering problems

The best way to learn how to answer legal problems is to practise doing it. In most of your black-letter law subjects you will most likely be given problems to work on during semester. It can also be very helpful to look at past exams, where available, and practise on those. When you do, it can be a very good idea to do so under simulated exam conditions (e.g. limit your time and the materials you use.)

Studying recent past examination papers can also give you ideas about the kinds of problems and questions that may be posed in particular subjects and can be a guide to the sort of thing to expect in future exams. However, proceed very carefully here, as the content of many subjects will evolve, as will exam formats. Check with the relevant subject coordinator about what might be valuable in past exam papers.

6.4.14 Be familiar with your exam notes

Most law examinations are 'open book'; that is, you are allowed to bring in notes and books to use in the exam. (But always check the rules for particular exams.) Take advantage of this and prepare good notes for use in exams. Do this steadily throughout the semester and not just in the last week or two before the exam. Give your notes practice runs by using them to answer legal problems from class or from past exams, and then refine them in the light of that practice.

There is no one format for such notes, but most good sets of notes will contain, among other things, summaries of the relevant rules of law, concise case notes on the important cases, and specific guides and tips on answering problems relating to particular issues (e.g. a flowchart on how to answer a problem about bail).

In producing your exam notes, do not just cut and paste your notes from class or from your reading. (Still less should you cut and paste the lecturer's notes, brilliant as they may be.) Write a new document, drawing on multiple sources and informed by your own experience in answering problems in the relevant area. This is a great way to revise the subject materials. By writing your own notes afresh, they will become more familiar to you and so will be much easier to use in an exam than text just copied from somewhere else. Your notes should also be clearly indexed so that you can find things quickly (consider using tabs or flags). It is highly desirable to be very familiar with your exam notes, so that you may use them efficiently and effectively in the exam. It is too late to start reading the law for the first time in the exam hall.

The main feature of exam notes is that they should help you to answer legal problems well in exam conditions. This means that good exam notes are unlikely to be very long and do not need to form a comprehensive textbook on the relevant subject matter. Indeed, often short, dot-pointed and colour-coded checklists make the best exam notes. Some students seem to take comfort in producing weighty tomes into which every last bit of material covered in the subject is jammed. Most such students discover (too late) that equipping themselves with these unwieldy compilations is not very helpful, primarily because they are not written for the purpose of being used as a tool in answering legal problems under exam conditions, or they are too dense and cannot be easily navigated.

6.4.15 Learn from judgments

Note that the process of identifying issues, identifying and applying rules of law and coming to a conclusion are essentially what judges do in their written judgments, which contain the reasons for their decision. When law students apply the law to the facts in legal problem-solving, they are effectively trying to predict how an impartial judge would decide the case. That is, they are thinking like a judge. This means that you already have thousands of examples of answers to legal problems available, in the judgments of the courts. So, it is a good idea to read cases carefully, not just to get the rules of law from them, but also to see how judges go about answering legal problems.

Not every case will be a useful example and not all judgments display exemplary writing style. Some, it must be (respectfully) said, are good examples of how *not* to write. Some judgments are wordy, suffer from 'legalese' or are poorly structured. Do not emulate those sorts of judgments – but you can still learn from them. When you come across such a judgment, think how it could have been done better.

6.4.16 Answering legal problems in assignments

The above tips and warnings have mostly been about answering legal problems in time-restricted examinations. Most of them, however, are still relevant to answering legal problems in assignments, which you can do in your own time. Nonetheless, it may be helpful to make a couple of points here about legal problems in assignments in particular.

The questions posed in assignments are often likely to be a little more complex or involved than those encountered in exams, so take the time to read all the relevant material even more carefully.

One of the main things to consider is whether any legal research is required to complete the assignment. Assignments requiring legal research are sometimes set where you have not been taught the relevant law in class before receiving the assignment. Thus, the task includes teaching yourself the relevant law by starting from scratch. This can be more realistic, as real-life legal clients do not walk into your office with ‘contract termination problem’ written on their foreheads and a set of presentation slides explaining the relevant law tucked under their arm. Where an assignment does require legal research, you may be asked to give an account of your research and how you identified the relevant law.

There may be a need in assignments to spend more time analysing and interpreting the law before applying it. For example, it may be appropriate to spend more time analysing how a High Court precedent case has been restricted by its interpretation in a subsequent High Court decision or arguing how choices regarding a certain policy issue could lead to a statutory provision being applied differently.

Another fairly obvious feature of assignments is that because you have more time, a fuller and more polished answer is expected. This means you should draft your initial answer and then revise it. Editing is vitally important; you may need to do this several times to produce a properly finished work.

Chapter 7: Essays

7.1 Introduction

This chapter provides some guidance on writing essays in law school. Most law students will have become familiar with writing essays during their secondary education, or as part of a University course in a different discipline. However, there can be important differences between the essays you wrote in other contexts and the type of essays required at law school. For a start, different academic disciplines will have different expectations and standards – or 'conventions' – regarding what an essay must do or be. Moreover, because law is itself a somewhat inter- or multi-disciplinary field, during your law course you will encounter different views on what an essay involves.

Perhaps the most important common point about academic essays is that they are persuasive (or critical or argumentative) pieces of writing. That is, an essay presents arguments or reasons in support of a position on some issue or a solution to a problem. In doing so, the essay seeks to persuade the reader to accept that position or solution, or at least to take the position or solution as a serious candidate in the relevant debate. This means that there are some core aspects to essay writing:

- What is the issue, problem or question posed?
- What is your position on that issue, or your solution to that problem, or your answer to that question?
- Why should your reader accept your position, solution or answer? What reasons can you give your reader to adopt your view? That is, what is your argument?

We shall examine these aspects of essay writing (and a couple more) below.

This chapter's structure is based on the four basic stages of essay writing:

- preparing the ground, which involves interpreting the question and planning your answer
- gathering the materials, which involves gathering relevant information and views, in order to build a solid essay
- constructing your essay, which involves presenting the content of your essay in a way that achieves its purpose
- tidying up, which involves revising and editing your draft before submission.

7.2 Preparing the ground: what to do before you start writing

7.2.1 Different kinds of essay questions

It is essential to start your essay writing by not writing anything at all. Your first step must always be just reading the question. Read the question you have been set. Read it for the first time. Then read it again. Then read it several more times. Go away and do something else for a while, then come back and read it again. And read it once more for luck. Then, while writing your essay, read the question repeatedly and several times again after you have finished writing. Reading – and *understanding* – the question is fundamentally important. Many students get off on the wrong foot when answering an essay question because they do not take the time to read the question carefully and understand exactly what is being asked of them (and what is not being asked).

There are many kinds of essay question, and this book does not purport to offer any comprehensive or definitive guide to them. However, one important thing to focus on is often a key directive or command in the question. Generic terms and phrases such as ‘analyse’, ‘discuss’, ‘critique’, ‘evaluate, ‘do you agree?’ and ‘explain’, among many others, are often key to understanding the kind of task you have been set. A sampling of these terms is provided and briefly explained below.

ESSAY QUESTION DIRECTIVES AND EXAMPLES

Analyse: Break the issue or problem down into its component parts in order to show in depth and in detail what the issue or problem is and how it arises. Go beyond mere surface description or summary. Depending on the context, there may be no call for you to reach a final position of your own on the issues.

> Analyse Justice Schneider’s argument against the Australian Constitution having any substantive implied freedom of political communication.

Explain: This can mean either ‘identify the cause(s) of something’ or ‘explicate the significance of something’. In the first sense, you are being asked to give a kind historical or causal explanation of how something (e.g. an event, an issue or problem, a position or statement) arose. In the second sense, you are being asked to interpret, or lay out, or elucidate the meaning or importance of some event, issue or position. These tasks can be a matter for expository writing in simpler cases, but where things are more complex or it is contentious as to what the causes or significance of something is, then this can be a matter for persuasive writing.

> Explain the impasse the High Court has reached on the interpretation of s 80 of the Constitution.
>
> Explain the significance of the recent reforms to the fault element of stalking.

Evaluate, critically evaluate or critique: Assess the different aspects of some position, statement

or claim in order to reach a judgment or decision on whether it is itself persuasive. Examine arguments for and against the position, statement or claim. Assess their strengths and weaknesses.

> Critically evaluate Professor Leon's proposal to create a third chamber in the Australian Parliament to represent Indigenous peoples.

Do you agree or disagree? This asks you directly to state your position in relation to some stated position. It is asking for a yes or no answer, but, of course, that will not be enough. You must provide reasons for your answer, which may involve analysis, explanation or critical evaluation.

> 'Decriminalisation of personal drug use is vital if we are to stem the tide of avoidable deaths from drug use.' Do you agree or disagree?

Discuss: This remains a popular, if rather vague, essay directive. It could be asking you to do any or all of the above tasks of analysis, explanation, critical evaluation or arguing for your own position. The context should make it clear what is being asked of you.

> Discuss Justice Schneider's argument against the Australian Constitution having any substantive implied freedom of political communication.
>
> The High Court has reached an impasse on the interpretation of s 80 of the Constitution. Discuss.
>
> 'Decriminalisation of personal drug use is vital if we are to stem the tide of avoidable deaths from drug use.' Discuss.

Direct questions: Often an essay question will simply be a direct question, without a directive word such as 'discuss' or 'analyse'. Instead, the question just asks you directly why, who, what or where something is or whether something ought to be the case.

> Is there a substantial implied freedom of political communication under the Constitution of Victoria?
>
> Why has the High Court reached an impasse on recognising a tort of invasion of privacy?
>
> To what extent is the freedom of religion protected under the Australian Constitution?
>
> Should Parliament have a third chamber for Indigenous Australians?
>
> Ought the use of a drug of dependence be decriminalised?

When reading the question you have been set, examine it closely and identify its key terms. The key terms are the words that indicate the essential content of the question and will help to determine what you need to do to answer it. This way you can interpret the question in a way that enables you to frame your answer. This can be especially important when the question is broad and can be interpreted in different ways. When reviewing the draft of your essay, re-read the question to make sure that you have indeed answered it.

7.2.2 Planning your essay

Having thought carefully about what the question requires of you, take some time to think carefully about how you will go about answering the question. Students who take the time to plan their essay almost always deliver a better product.

Plan what you want to say, how you will say it and what research you may need to do in order to be able to say it persuasively. Often you will need to do the research first, in order to work out what you think and what you want to say. But even that initial research needs planning.

When working out what your essay should cover, pay close attention to the terms of the question. This includes the particular directives or commands in the question (as discussed above), but it also involves focusing on the key terms used in the question. Use those terms in planning your essay. In some cases it is safe to consider these terms to be the 'elements' of the essay question, allowing you to break them down as you would a legal principle. The terms are also useful in developing your research strategy and the search terms you will use.

Your plan should include working out a structure for your essay. But, as always, be prepared to review and revise your plan and your structure as you work on your essay. It is rare (and usually a matter of luck, not intelligence) that a good essay will look exactly like the one you originally planned. That is why it is a good idea to treat your initial essay plan as a *working* plan. It is something that you work with, but which is open to revision as you go.

TIP: PLAN YOUR ESSAY APPROACH

The first steps you should take when approaching an essay are:

- **read** the question several times before doing anything else
- **ascertain** what the question is specifically asking you to do
- **identify** the specific terms, or elements, of the question
- **draft** a plan – both of research strategy and of essay structure.

7.3 Gathering the materials: researching for your essay

For most essays in law school, some degree of research is expected. Some essays will be more research-intensive than others. Other essays can be reflections on material already covered in a subject. However, most of the time the essay task you are set will require you to do some research of your own.

'Research' is an ambiguous word. It can refer to original research, in which the researcher discovers new facts or information about some aspect of the world. The term can also mean finding out what other people have said (including their original research) about the issues you are concerned with. 'Research' in the context of writing undergraduate essays in law school usually means the latter, not original empirical studies of your own. Therefore, here we will focus on the second sense of 'research'.

7.3.1 Why research?

The point of research is to help you gather support for the positions and arguments you present in your essay. A well-researched piece will be better informed and have more impact than one that contains a series of unsubstantiated or under-informed claims. A good research essay shows evidence of its author having engaged with relevant and appropriate materials, following appropriate research methods.

As part of your law course, you will be taught how to do specialised legal research in particular subjects. It is important to stress that legal research skills are professional skills that you will (or should) take with you into your legal careers. It is not just a skill for assessment purposes at university.

TIP: FRANKENSTEIN'S ESSAY

The purpose of an academic essay is usually twofold: it tests your understanding of a specific topic *and* it tests your research skills.

As such, you are unlikely to find an article, text or other source that perfectly answers your essay question. That would defeat the purpose of the exercise, since you would simply be finding out what someone else says is 'the answer' to the question. Instead, your task is to develop *your own* understanding of the topic and issues by feeding your mind with a variety of sources.

This means that you have to build your answer from multiple research sources, drawing together the different insights they offer and allowing you ultimately to make your final point. However, not every part of your essay has to come from someone or somewhere else. There will always be scope for you to use your own contributions and provide your own analysis. Indeed, better essays are rarely an assemblage of parts from others and instead digest and combine sources in original ways, with additional original thoughts. Like Dr Frankenstein, you should add your own mysterious spark to create something new from a collection of disparate parts.

7.3.2 Be careful with the research you rely on

Exactly what sorts of materials will be appropriate and relevant to research, and the particular research methods you should follow, will depend on the issues you are addressing in your essay. Seek guidance on these matters from your teachers. The library can also help, including maintaining and providing you with various research tools.

Generally, where the research involves finding out what others have said on the topic, it is not just anyone's views that matter here but people with some claim to knowledge or 'epistemic authority', or at least something useful to contribute to the debate and discussion. In short, what makes a source credible in the context of your essay? In our online era, almost everyone can publish their views to the world. This means being able to discern the epistemically valuable wheat from the ill-informed chaff is particularly important and sometimes difficult.

When doing internet-based research, use your brain, not just your index finger. There is plenty of excellent material available online – and there is also a lot of junk and second- and third-rate stuff. You need to *search intelligently* and *sort critically* to figure out which is what. Many university students still have difficulty sorting out the good, the bad and the ugly online. Many students' work suffers because the online material they gather in their 'research', while readily accessible, is low quality, derivative or intellectually flimsy (e.g. a blog post by someone lacking expertise, a tabloid newspaper article, a lobby group's biased media release). Finding something on the internet that is connected to the topic is not sufficient reason to cite it or even use it in preparing your work.

TIP: USE APPROPRIATE DATABASES

Do not start your searches with Google or Wikipedia. Instead, start with your institution's library catalogue search function and databases. Enter key words or phrases. Using the filter tools, limit your search to peer-reviewed articles or books within an appropriate date range, and you will immediately find more useful, credible sources than Google or Wikipedia can deliver.

7.3.3 More is not always better

Students sometimes think that lots of quotations and references or a long bibliography are the defining marks of a well-researched essay. But quantity is rarely enough and often not even necessary. Instead, much depends on the question, the kind of answer you are giving to it, the state of the relevant literature, the quality of the works referred to and what use you make of those works. Depending how these factors play out in a given case, an essay with only five very good references could be much better than an assignment on the same topic, and taking the same position, which has 25 references that are of low quality and which makes poor use of them. There is little to be gained in just amassing references.

7.3.4 Evaluating the sources found through your research

Not everything that your research yields will be equally useful, and even relevant sources can be useful in different ways. This means you will need to evaluate the sources you have found in your

research. How do you do that? This is a large question, but here are a few questions to ask when you evaluate the fruits of your research.[1]

EVALUATING RESEARCH

What kind of document is it? Is it a journal article or a chapter from a book? If from a book, is it an introductory textbook for students or an academic monograph that presents original, cutting-edge research? Is the document perhaps merely an online pamphlet published by an organisation with a particular agenda?

Who is the author? What authority or reputation does the author have? What reputation does the publisher have? If you are looking at a journal article, what sort of reputation does the journal have?

Who is the intended audience? Is the text addressed to the general public? Practicing lawyers? University students? Other academics? Is the text restricted in its jurisdictional relevance? That is, is it only concerned with the law of a particular jurisdiction, with little relevance beyond that jurisdiction?

How current is the text? How up to date is the information within it? How accurate or reliable is the information?

What are the arguments being put forward by the text? Are they clear, cogent and persuasive? Do you feel justified in relying on or deferring to them?

1. We draw here from Anita Mackay and Pascale Chifflet (eds) *Legal Institutions and Methods* (Lawbook Co, 2nd ed, 2021) [15.380].

7.4 Constructing your essay: putting the pieces together

This is the most important part of the process – the stage where you start writing your essay. In order to start writing you need to have a sense of what you want to say, what you need to say and how you will say it. To unpack these tasks, in this section we discuss the importance of:

- relevance – answering the question
- structure – presenting your content in an orderly way
- using your research fairly but creatively
- independent thinking
- argument – giving clear and cogent reasons to support your answer.

7.4.1 Answering the question: the importance of relevance

Your essay must answer the question. Whatever that question is, you must answer it and not a question that was not asked. This is the matter of relevance: what you say is relevant to the question or topic when it answers the question posed or is part of the build-up to answering that question. Answering the question actually posed (rather than the question that you wish had been posed or that you mistakenly thought was posed) is essential to writing a successful essay. Doing so shows insight into the scope and nature of what the question requires. It also shows that you are aware of, and responding to, the needs of your audience. A document that does what is asked of it displays a clear understanding of its audience and the relationship between the author and the audience. This means your document is doing its communicative job effectively.

QUESTION, PROMPT OR TASK

It is best not to think of essay questions as ‘prompts’, as that can encourage viewing the question as a nudge (or shove) to set you off on a writing adventure of your own. Such an approach can lead to written documents that lack relevance because they do not answer the question. Treat the question as setting you a specific task that you have to perform.

Do not assume that just because you have said something ‘in response to the question’ or something ‘on the topic of the question’ you will have *answered* the question. Always reflect critically and carefully on what you have actually said to see if it constitutes an answer to the question that was actually asked. Of course, some questions will allow a wide variety of answers, while other questions will be narrow and specific about what counts as an answer.

EXAMPLES OF WHAT NOT TO DO

Consider the question, 'What are Hart's main contentions in his book *The Concept of Law*?'

It would not be an answer to this question to say, 'Hart was a very influential legal philosopher who reinvigorated 20th-century jurisprudence'. Nor would it be an answer to say, 'Hart's legal positivism was blind to the issues of racial and gender injustice'.

These may be answers that are sincerely believed (and perhaps even true). They are also 'in response' to the question and are 'on the topic' of Hart's thinking. But they do not *answer the specific question* that was asked.

Sometimes a question is not well-formed or makes false or misleading assumptions. In such cases, you cannot really answer the question properly or in good conscience. If you have formed the view, after careful thought, that the question is flawed in some way, ask your teacher for clarification. If that is not feasible, you should make clear in your essay exactly what the problem with the question is and how you think the problem is best resolved.

7.4.2 Answering the question in an orderly way: the importance of structure

To present your answer to the question effectively, you need to do things in an orderly way. This means that your document should have a clear, comprehensible and appropriate structure that is quickly apparent to your reader. This way the different parts of the document have a clear interrelationship and your reader is led in a logical way, stage by stage, through the various issues.

Exactly what structure is appropriate for any given essay depends on the particular case, so we do not try to lay down even a generic suggested essay structure here. Nonetheless, most essays will have clearly discernible parts, with each part performing a distinct function, such as providing background, presenting an argument, laying out a rival position, mounting a defence and so on. It is usually best if one basic function is being performed by each discernible part, so that the reader can easily follow what is happening at any particular stage.

TIP: INCLUDE AN INTRODUCTION AND CONCLUSION

Even though there is no one type of essay structure, it is best to assume that your essay should include an introduction and a conclusion, unless otherwise stated in the task instructions.

Generally it is better to avoid a simple 'for and against' structure in which you present arguments *for* a proposition and then present all the arguments *against* it. That will often lead to needless repetition.

It is usually better to address different themes and sub-issues and consider the arguments for and against these in one place. This enables you to incorporate relevant counterarguments as you go.

SAMPLE ESSAY STRUCTURES

Here is an example of a possible essay structure in answer to the question:

> Critically evaluate Professor Leon's proposal to create a third chamber in the Australian Parliament to represent Indigenous peoples.

1. Introduction
2. The current structure of the Australian Parliament
3. The issue of better parliamentary representation of Indigenous Australians
4. Professor Leon's proposal for a third parliamentary chamber
5. Strengths and weakness in Professor Leon's proposal
    a. Strengths
    b. Weakness
    c. Possible replies by Leon
    d. Responses to the replies
6. Conclusion

Here is an alternative structure for the same essay:

1. Introduction
2. Background: the current parliamentary structure and the problem of Indigenous exclusion
3. Professor Leon's proposal for a third parliamentary chamber
4. The issue of the functions and powers of the new chamber
5. The issue of who may be a candidate for the new chamber
6. The issue of who may vote for members of the new chamber
7. Conclusion

Both structures could underpin an A-grade essay, which highlights that there is no one way to structure an answer to this question. Moreover, pretty much the same content could be found in both structures – they could simply be different ways of dividing up the same material and arguments.

Of course, the structure of the final version of your essay may differ from the planned structure that you started with. This is a common experience, but it is usually a sign that things have gone well. It probably means that you have thought carefully and critically about your essay's initially planned

structure and reworked it as you came to grips with the material and your arguments. But it is still important to begin with a working structure or plan, while being open to revising it as you progress.

7.4.3 Understanding the fruits of your research: the importance of using your research fairly but creatively

It is not enough to just gather good quality materials in your research. You need to show that you understand what you have gathered. This means it is essential that, where appropriate, you clearly, accurately and fairly expound the relevant materials. This goes hand in hand with showing that you understand what the essay's core and derivative issues are and how the various texts and sources you have gathered connect with them. So, you show the breadth and depth of your insight into the relevant issues at the same time as you show your understanding of materials you have researched, including their contexts and implications.

This underscores the very important point that your essay is not a 'research report' in which you tell your reader about the things you found in the course of your research. You need to *use* the material you find in your research in ways that advance your essay. This means deploying the material in ways that serve *your* argument. Your primary goal is to persuade the reader of the position you adopt in your work and that it is a position to be taken seriously. Research will be necessary to help you persuade the reader. But that research is just a step toward this goal; it is a tool or a means to an end, not the end itself. So, the fruits of your research need to be intelligently sorted and analysed, and appropriately deployed to help the essay achieve its purpose. This means that you need to 'put your own stamp' on what you put into your essay. There will always be some level of creativity involved in how you choose to deploy the material gathered in your research.

Note that the point of research is not simply to find documents that support what you want to say, to be used as 'back-up'. In your research you will usually find opposing views and views which are simply different to the line you are presenting in your essay. Do not ignore such sources. Very often these will be very helpful because they provide counterarguments to your position. How you deal with such opposing views and arguments will often be a measure of the strength of your essay as a whole. Do you rebut such arguments, concede some valid points, put the views in their proper context and so on?

It is also much better if you can avoid over-reliance on just one or two sources. The weaker student essays tend to latch on to one or two authoritative or sympathetic sources and just hitch a ride with them. (This is often apparent in the footnotes where "ibid." recurs at length.) Try to make use of multiple sources and points of view in relation to each issue, to demonstrate the breadth of your research.

7.4.4 Thinking and speaking for yourself: the importance of independent thinking

It will depend on the question, but most academic essays require you to engage in and display independent thought. Most essay questions are asking you to give *your* answer to the question, not someone else's answer. Weaker essays often show signs of being largely derivative of the work of others. The weakness is compounded when poor research has yielded only mediocre or poor sources to derive ideas from. It is important to be selective and discriminating when choosing the sources you will use to support your arguments.

Persuasive, argumentative writing thus requires you to go beyond expounding others' views and to start presenting your own. However, selective exposition of others' views may often be a stepping stone in presenting your own position. Moreover, it is not as if exposition does not itself involve the use of logical arguments.

In 'taking a position' on the relevant issue, you can, of course, give your own personal view. You are indeed encouraged to do so. (University is still a place where you are encouraged to develop your own ideas about the world.) And if you are not really sure what *you* think, then you are free to *adopt* a position for the purposes of the exercise, even if you are not personally convinced of the position yourself. But the role you play in writing the essay is still the somewhat generic one of 'the author' of your piece.

Taking a position does not mean that you have to adopt a stark, extreme or uncompromising stance. On the contrary, your position on a given issue may well be nuanced and subtle, or make compromises where compromises are warranted, or be provisional and tentative. What matters most is that, whatever position you take, it is articulated clearly and plausibly.

Giving your own *opinion* on an issue is not the same as telling the reader your *feelings* about the issue. Unless you're writing a reflective essay in which you are asked to discuss your personal responses, keep your focus on your *reasons* for the position you are defending, not on how it feels to be in that position. This is not to assume that appeals to emotions have no role to play in reasoned argument. But such appeals should be more than simply a matter of expressing your own emotions. Remember that your job is not simply to 'be yourself', but to be reasonable and persuasive in a communicative exercise with your reader. You are being assessed not on your personal sincerity or authenticity but primarily on the quality of your reasoning.

7.4.5 Why should anyone believe you? The importance of argument

Your essay is not merely giving expression to your thoughts. As a piece of persuasive writing, it should also attempt to persuade your reader to share your view or, at least, to take your view seriously as meriting a considered and reasoned reply. This means giving the reader reasons for the positions you take. These should justify your position intellectually. That can include:

1. arguments directly in support of your position
2. arguments to defend your position against (possible or actual) criticisms
3. arguments against opposed positions, or
4. any appropriate combination of these three types of arguments.

Your critical arguments should aim to be fair and show the genuine strengths or weaknesses of the relevant positions. You should certainly consider both sides of a case (or more, as appropriate) as part of being fair and thorough. Of course, ultimately you should take a position – fairness does not entail indecisiveness.

Who is your reader? Whom do you seek to persuade? In reality, your reader will be the lecturer or tutor who is assessing your work and who knows a fair bit about the topic you are writing on. But you should treat your assumed reader as someone who is reasonably well-informed generally about the area you are writing on but who is not quite familiar with the particular issues or literature you are engaging with and who has a reasonably open mind about which way they might be persuaded to think. Your attempt to persuade them involves presenting reasons for the position you take. This

also means that it is not enough simply to identify with a particular position on some issue, without presenting reasons for your position, expecting the reader to simply share your views. Try to avoid ‘preaching to the converted’ by simply repeating views you assume any right thinking reader will already share with you. Try to engage with those who might disagree with you by assuming your reader is mildly sceptical of your approach or is cautious about accepting your position (though do not assume they are prejudiced against you, either).

In this respect, having a clearly laid out argument which flows logically is very effective in presenting a persuasive essay. Often, a key part of what makes an argument persuasive is that the reader can easily grasp what the argument *is*. Readers are much more inclined to be persuaded by what they understand clearly. This underscores the importance of having a clear, coherent and cogent structure.

Some students worry about getting the correct answer, but for most law essay topics, there is often no consensus as to what ‘the right answer’ is. Your reader is not looking to see whether you have reached the right conclusion but rather to see how you got there. That is a matter of having clear and coherent arguments for your conclusion.

TIP: TELL YOUR READER YOUR ARGUMENT

An effective way to make sure your reader understands your arguments is to make sure you have a clear introduction that prepares your reader early on to be persuaded by the rest of your essay. The introduction should not just introduce the topic or issue but the whole of the essay by giving a concise preview of it. Do not be worried about spoiling the story by telling the reader up-front what your arguments will be. An essay is not a murder mystery in which the culprit is revealed at the end.

If your reader does not know the basic gist of the argument by the end of the introduction, you will most likely be losing them, not building up a sense of anticipation. So, let the reader know early on what you are arguing and make sure that the subsequent structure of the essay’s argument backs that up. You will often also benefit from concisely recapitulating the argument in your conclusion.

7.4.6 What is an argument?

It is all very well to be told to present a clear and cogent argument. But what actually is an argument, and what format should the presentation of an argument take? Whole books are devoted to these questions. We shall just present a very brief outline here.

(a) Argument as the reasons that support a conclusion

What we are concerned with here are the *reasons* you put forward that logically *support* the position you want to maintain. Those reasons are what you present in answer to the question ‘Why should I believe or accept your view?’ Those reasons, then, are the premises which logically support your conclusion. Your argument is, in effect, the reasons for your conclusion. (Note that logicians use the word ‘argument’ to refer to both the premises and the conclusion as a whole.)

The key idea is that the reasons or premises *lead logically* to the conclusion. The arrival of the

conclusion is signalled by words such as ‘therefore’, ‘hence’, ‘thus’ or ‘so’. Consider the following statements:

1. Parliament should take whatever steps lead to saving lives.
2. Decriminalising the use of illicit drugs would save lives.
3. *Therefore*, Parliament should decriminalise the use of illicit drugs.

Statements 1 and 2 support or justify the conclusion (statement 3).

We can also reverse the order by first making a claim which is then justified by the supporting statements. Here the signals are words such as ‘because’, ‘since’ and ‘as’. They signal that the justification for the claim is about to be presented.

1. Parliament should decriminalise the use of illicit drugs, *because*
2. Parliament should take whatever steps lead to saving lives, *and*
3. Decriminalising the use of illicit drugs would save lives.

There are two basic kinds of logical support that the premises of an argument can provide for the argument’s conclusion: deductive and inductive.

TWO KINDS OF ARGUMENT

In **deductive arguments**, the premises (if true) *logically guarantee* the truth of the conclusion.

In **inductive arguments**, the premises (if true) do *not* logically guarantee the truth of the conclusion, but they do give the conclusion some appreciable *degree of logical support*, such that is it *rational* to accept it.

(b) Deductive arguments

In a deductive argument, the premises (if accepted as true) necessitate or guarantee the truth of the conclusion.

> If Ruritania[1] uses the death penalty for drug trafficking, then it has an obligation to ensure its criminal trials observe the strictest procedures to ensure reliable guilty verdicts. Ruritania does use the death penalty for drug trafficking. Therefore, Ruritania has an obligation to ensure its criminal trials observe the strictest procedures to ensure reliable guilty verdicts.

Or:

> No country that is serious about children’s rights would set the minimum age of criminal responsibility at 10 years. Ruritania sets the minimum age of criminal responsibility at 10 years. Therefore, Ruritania is not serious about children’s rights.

In these two arguments, if the premises are accepted as true, then the conclusion *must* follow. In

1. Ruritania is a fictional country. For background, see Anthony Hope’s 1894 novel, *The Prisoner of Zenda*.

assessing an argument as deductively valid, we assume the premises are true. This means that the logic of an argument is an *internal* matter of how the premises and conclusion relate to each other. However, the premises of an argument may turn out to be false, in which case the conclusion may or may not be true even though it is the logical conclusion of the premises. Also, even where we have good reason to accept the truth of the premises of an argument, it may be that those premises are themselves only non-deductively supported, and so the conclusion is no more certain than the weakest premise, even though it logically follows. (There is also the problem of the audience not accepting the premises, but that is not strictly a problem in logic.) A deductive argument is said by logicians to be a 'valid' argument if the premises, *if* true, necessarily lead to the conclusion; it is said to be a 'sound' argument if it is valid *and* the premises *are* true.

(c) Inductive arguments

Inductive arguments provide logical support for their conclusions without guaranteeing their conclusions in the way deductive arguments do. But they still provide good logical support that makes it reasonable to accept the conclusion. An inductive argument is said by logicians to be 'strong' if the premises, *if* true, provide good support for the conclusion; it is said to be a 'cogent' argument if it is strong *and* the premises *are* true.

There are various kinds of inductive arguments. We will briefly outline three of the main ones here.

Inductive generalisation

Inductive generalisation is where the premises are (or summarise) particular statements and the conclusion is a general statement.

1. Of the 1500 Victorian lawyers surveyed this year, 85 per cent support decriminalising the use of illicit drugs.
2. Therefore, 85 per cent of all Victorian lawyers support decriminalising the use of illicit drugs.

The idea is that from the observed specific cases of Victorian lawyers' support for the decriminalisation of drug use, we can draw a more general conclusion about all Victorian lawyers' support for the decriminalisation of drug use. The observation about the surveyed lawyers provides a *good reason* for the conclusion, though the truth of the conclusion is not guaranteed.

There is much discussion as to what sorts of premises are needed to provide strong inductive support for general conclusions. For example, in this case, how many lawyers need to be surveyed, and how are they to be selected, before we can be confident that the sample is representative of all Victorian lawyers?

Inference to the best explanation

This is an inductive (non-deductive) form of argument where the conclusion is reached on the basis that it is the *best explanation* of the facts described in the premises.

Given that:

a. the DNA on Vincenzo's corpse matches that of Darius
b. Darius hated Vincenzo
c. Darius was alone with Vincenzo just before Vincenzo's death
d. Darius had taken out life insurance on Vincenzo a week before, and

e. there is no other plausible explanation for Vincenzo's death.

It is therefore clear that the best explanation of those facts is that Darius murdered Vincenzo.

This inductive argument does not guarantee the truth of the conclusion, but it is still rational to accept the conclusion because it is the simplest and most plausible explanation of the event (the death). This can often mean that if you are presenting an inference to the best explanation, you will need to show the weaknesses of rival explanations as well as the strengths of the 'best' explanation.

Argument by analogy

Another kind of inductive argument is argument by analogy. (Argument by analogy and the doctrine of precedent often work together in law.) An argument by analogy involves arguing that because two things are similar in some respect, they are likely to be also similar in some other respect.

> If a person is abused on the basis of their sexual orientation, the effect will often be much the same as being abused on the basis of their race. In both cases, something that can be integral to a person's sense of self is denigrated and this can be deeply wounding. Victoria's anti-vilification laws already protect people from racial vilification, so they should be amended to protect people from vilification based on sexual orientation as well.

Exactly when an argument by analogy works can sometimes be contested; not all analogies are created equal. There is a need for an important connection between the established similarities and the new, asserted similarity. If you are presenting an argument by analogy, be careful and clear about why the established similarities support there being a new similarity.

(d) Fallacies

A fallacious argument is one that appears to be logically persuasive, but which, in reality, is not. Critical readers look out for fallacies and good writers try to avoid them. There are many kinds of fallacious arguments.[2] We will note just a few here to illustrate.

Fallacy of equivocation

This is where someone's argument relies on some term or concept that has two or more meanings and shifts from one meaning to another.

> It's the duty of the media to publish news that's in the public interest. There is great public interest in UFOs. Therefore the media has a duty to publish stories about UFOs.[3]

This purported argument relies on treating two senses of 'public interest' (public welfare and public curiosity) as if they were the same.

Fallacy of begging the question (circular reasoning)

This is the fallacy of assuming the truth of the proposition that one is seeking to prove.

> We should believe that Derrick is innocent of murder because he denies he did it; we can trust his word because he's never done anything illegal.

2. An informative and user-friendly website on fallacies is *Thou shalt not commit logical fallacies* (http://yourlogicalfallacyis.com).
3. The example is taken from Theodore Schick, Jr. and Lewis Vaughn, *How to Think About Weird Things: Critical Thinking for a New Age* (McGraw Hill, 3rd ed, 2002) 300.

This purported argument assumes that Derrick has no criminal past in order to prove that he has not committed a crime. That is, it assumes the truth of what is in issue, namely whether Derrick is innocent of murder. This is bad reasoning because the argument does not *prove* what it is supposed to prove; it just *assumes* it is true.

The ad hominem fallacy (to the person)

This is where the arguer brings in a personal criticism of someone in order to sway their audience not to be persuaded by that person.

> Professor Quin says her research indicates that the decriminalisation of drug use leads to an overall reduction in drug-related deaths, but don't believe her – she's stood as a Greens candidate at the last three elections.

The professor's political activity is *not relevant* to issues relating to law reform and health statistics.

Then again, perhaps in some cases, certain personal characteristics might be relevant. For example, what if someone's dishonesty might legitimately undermine the trust they should be accorded? If someone wanted to argue that Professor Quin should not be believed because she has recently been found guilty of plagiarism and fabrication of research data, then perhaps that is relevant? If so, then the relevance of the factor in question should be expressly stated and critically assessed.

7.4.7 Presenting your arguments

As a very generic way of presenting your argument, it is usually helpful to let the reader know at the start just what the *issue* or *question* is that you will be answering. Your *position* on that issue or your *answer* to that question is, then, the *conclusion* for which you will be *arguing*. Your argument for that conclusion will consist of *reasons* for that conclusion. It is also often helpful to consider *objections* to your position or argument, as well as *rival or alternative* positions, and *respond* to them.

PRESENTING ARGUMENTS

In short, a generic way to present an argument in your essay is to follow this general structure:[4]

1. **The issue:** What is the question or issue in dispute?
2. **Claim or position:** Where do you stand on the issue? What is your answer to the question?
3. **Reasons:** What reasons can you present in support of your claim or position? What kind of logical support do those reasons give your conclusion? Is it a matter of logical deduction (such that the conclusion necessarily follows from the premises)? Or do the reasons provide inductive support (making the conclusion more likely than not)? In turn, what other, more general principles or broader ideas support the reasons you

4. This is a loose adaptation from Wayne C Booth, Gregory G Colomb, Joseph M Williams, Joseph Bizup and William T Fitzgerald, *The Craft of Research* (University of Chicago Press, 4th ed, 2016) 111.

offer?

4. **Objections and other positions:** What objections might someone raise to your position or argument? What other positions or claims are there, whether opposing, rival or simply different to yours? What reasons are there for those positions or claims?
5. **Response:** How do you respond to those positions and reasons?
6. **Conclusion:** What is your final position? It should usually be the same as at point 2 above, but now clarified and perhaps elaborated.

7.5 Tidying up: the importance of reviewing and revising your draft

A good piece of writing almost never emerges from the first draft. The very best writers review and revise their work, often numerous times. Though you need to know generally what you want to say before you start to write, you often do not know specifically what you want to say until you have written it. This means that good writing very often involves writing followed by rewriting as one, integrated practice.

Many student essays show every sign of not having been reviewed and revised, very much to their detriment. This is a shame, because in many such cases significant improvements could easily have been made if the time had been taken to review and revise the draft. Often the difference is worth a whole grade or more.

We discussed the importance of reviewing and revising your draft in section 3.4. Refer to that section for a reminder of this all-important but often neglected practice.

Chapter 8: Law reform submissions

8.1 Introduction

This chapter provides some advice on writing law reform submissions. These are documents that argue that particular changes to the law ought to be made. This is another common form of assessment in law school.

In this chapter we cover:

- the nature of law reform
- the nature and role of law reform submissions
- law reform submissions as a form of assessment
- writing on your own behalf or on behalf of an organisation
- what format should your law reform submission take
- what should go into a law reform submission.

8.2 What is law reform?

The law is continually changing. Statutes are frequently amended, and case law evolves and adapts. Often the changes relate to more technical or formal matters and are intended to help the law work more effectively or more efficiently. Sometimes the changes, especially to statutory law, can be more substantive and reflect a change in the policy or values that the law is seeking to serve. Unsurprisingly, there are often intense debates about how the law should be changed. Those debates can take place in all sorts of forums, and the kinds of contributions to those debates can vary considerably.

A very important part of the law reform process is the various bodies whose role includes making recommendations for law reform. Most jurisdictions in Australia have their own law reform commissions, such as the Victorian Law Reform Commission and the Australian Law Reform Commission. These bodies stand at arm's length from the government of the day. There are also many parliamentary committees, at state and federal level, that conduct inquiries into issues and often make recommendations for law reform. There can also be specific inquiries, such as royal commissions, created to review the law and practice in certain areas. The royal commission into the banking sector by Kenneth Hayne, a former Justice of the High Court, which took place from 2017 to 2019, is one of many examples. Many of these reviews and inquiries produce reports which make recommendations for changes to practice or the law or both.

8.3 What is a law reform submission?

A law reform submission is, as the name suggests, a document that takes a substantive position on a law reform issue and seeks to persuade its target audience to agree with that position. The target audience is usually an organisation with the power to make or formally recommend changes to the law. A law reform submission is thus a submission *to* that organisation.

When a law reform inquiry or review starts, the organisation conducting it usually seeks submissions from members of the public and interested organisations. In most such inquiries and reviews, anyone is free to make a submission. It is part of the rights that mark out democracies that ordinary members of the public may petition the government to make changes without fear of reprisal from the government. Law reform submissions can be seen as coming within that broader right to petition the government.

Law reform submissions can be wide-ranging or narrow. They can urge the relevant commission, committee or commissioner to make certain recommendations, or simply offer information about the issues. Depending on the degree of public interest, some inquiries and reviews can receive hundreds of submissions.

Often, particular organisations or certain key office-holders make submissions to law reform bodies. Many of these organisations and office-holders are referred to as ‘stakeholders’ because they have a professional or formal interest in the outcome of the inquiry. They are often expressly invited to make submissions as to how they think the law should be changed or indeed whether it should be changed at all.

WHAT IS A STAKEHOLDER?

A ‘stakeholder’ in this context is some person, office or organisation with a particular interest (whether professional, financial, operational, political, personal or intellectual) in the outcome of a policy decision, often because it directly affects what they do. In that sense their interests can be said to be ‘at stake’ in the decision. They often include lobby groups (organisations that work for change in government policy or legislation) as well as professional associations and relevant industry representative bodies. Examples include the Victorian Council for Civil Liberties, the Federation of Community Legal Centres, the Victorian Bar, the Law Institute of Victoria, Victoria Legal Aid, the Office of Public Prosecutions and the Judicial College of Victoria.

In short, then, a law reform submission is a document that outlines a position about an issue being considered as part of a law reform inquiry or review. It can be long or short, broad or narrow. It can focus on one issue in particular or on several at once. It can argue for or against a change in the law – depending on the preferences of whichever stakeholder is drafting it. What makes a document a law

reform submission is the fact that it is submitted as part of an inquiry or review into matters of law reform.

8.4 What is a law reform submission as an assessment task in law school?

A common form of assessment in law school is writing a law reform submission to a law reform commission, a parliamentary committee or similar official body or office-holder, such as the Attorney-General. It might be that there is an actual inquiry or review being conducted at the time the assessment is set, but most often the task is fictional. Your teacher might pretend, for example, that the Victorian Law Reform Commission is conducting an inquiry into drug decriminalisation and ask you to make a submission to that fictional review. The task thus involves a ‘role-playing’ writing exercise, modelled on real-world writing tasks. This can put the issues you are studying into more concrete, practical contexts. It is a good form of assessment because it allows you to practice a lot of lawyerly skills all at once: researching the issues, identifying the important points and delivering a clear argument either way. It does not require you to come to a ‘correct answer’. The document is simply presenting, and arguing for, a particular position.

8.5 Writing on your own behalf or on behalf of an organisation

You can write your submission in your own name but, depending on the subject, it can sometimes be useful to write on behalf of an organisation (real or imaginary). If you are writing on behalf of an organisation, you will need to adopt a certain role or perspective, and think through the issues from that perspective. It is a vital skill, for lawyers and others, to be able to understand how to approach various issues from different perspectives. Thinking from different perspectives can also help you in the development of your own thinking about an issue, especially if, at the start, you are not sure what you think yourself.

Simply adopting a perspective will not, however, generate all your arguments and thoughts. Still less does it mean that your perspective should unduly limit what ideas, concepts and values you can bring to bear on the issues. Much hard thinking and careful arguing is still necessary, no matter what perspective you adopt, if you want to be persuasive. If you write as a representative of an organisation, you may assume that you have the authority to formulate and state that organisation's policy position.

TIP: YOU DON'T HAVE TO BELIEVE WHAT YOU WRITE

With this type of writing you do not have to personally believe in it yourself. You are not representing your own opinion, but the perspective of the organisation you represent. This can free you up to explore new ideas that you might not personally hold. If you are not sure what you yourself believe with regard to a particular law reform issue, it can thus be easier to approach the task as a spokesperson for an organisation.

If you are representing an organisation, be clear which organisation it is. If you write 'on behalf of' a real organisation, you need to ensure that your submitted work does not appear to be a genuine document from that organisation. So, if you adopt the role of spokesperson or representative of an actual organisation or office, then you should make sure your submitted work cannot be mistaken for an actual submission. For example, you could state on the front cover or as a header that the document is fictional and prepared only for academic purposes. Discuss this with your teacher if in any doubt.

8.6 What format should your law reform submission take?

Real-world law reform submissions take a variety of forms partly because they are not a formal legal document (compared with, say, a lawyer's memorandum of advice) or a standard academic task (such as an essay). It is also partly because anyone is free to make a submission to a law reform body or the government. That does not mean that every submission is equally effective. Many are weak documents indeed if we assess them in terms of whether they are taken seriously by their audience.

The best advice is to *learn* from actual examples, rather than *follow* them. Many law reform commissions and committees make publicly available copies of the submissions they receive. As a rule of thumb, be more inclined to learn from the examples of leading legal stakeholder groups, such as the Federation of Community Legal Centres, the Victorian Bar, the Law Institute of Victoria and the Law Council of Australia. Also, lobby groups such as Liberty Victoria often make valuable and useful submissions.

TIP: LEARN FROM GOOD EXAMPLES

Most law reform submissions are publicly available and you can access examples with relative ease. Have a look at the different types of submissions and decide which ones you think are most effective and compelling. Pay attention to why that is and emulate that in your work (as long as you still abide by the specific assessment instructions).

While there is no standard or official format for law reform submissions, the following generic format will be helpful for students who have not written a law reform submission before.

GENERIC FORMAT FOR LAW REFORM SUBMISSIONS

1. **Introduction:** State the purpose of your submission clearly and concisely. If your submission is in response to a call for submissions in relation to a law reform inquiry, make this clear. In your introduction, briefly summarise what you are recommending.
2. **Background:** This should include identifying the relevant issues and why they are important. You might summarise the problems, as you see them, with the current situation in the law. It may be useful to provide some history of the relevant law or its problems, if this sheds light on the current problems. Your research will be important in this section.
3. **Recommendation(s):** State fully what it is that you are recommending and set out

reasons why things should be changed or, if you are defending the status quo, why things should not change. Be direct and clear about your recommendation(s) and your reasons for them. If it is not clear what your submission is actually recommending, or why that recommendation should be accepted, then its impact will be greatly weakened. Present positive arguments in support of your position clearly and rationally. It will usually also be useful to consider arguments against your position and to make clear why they are not persuasive. As in the background section, your research should provide support for your arguments here. It may be useful to use subheadings in this part.

4. **Conclusion:** Very briefly conclude with a restatement of what it is you want your audience to do.

This generic format can be adapted and revised for particular cases. Whichever format you use, aim for clarity. You want your reader to know right from the start what your document is doing and how each part serves that task. Be clear about what specific issues you are addressing, what your recommendations are on those issues and what your arguments are for your recommended positions. Your structure should reflect these different subtasks of your submission

8.7 What should go into a law reform submission?

In many respects, a law reform submission is similar to an academic essay that takes a reasoned position in relation to some issue. So, much of the intellectual content of your submission will be very similar to an academic essay (see Chapter 7). However, in a law reform submission you should be even more clearly in favour of a specific position. Moreover, it is the *reasons* for your position that will count. Also, you will most often need to consider alternative or opposing policy positions and the reasons for them. So, be balanced and reasonable, not in the sense of being non-committal, but in the sense of considering relevant and reasonable options and giving reasons for your recommendations.

TIP: WHAT THE LAW SHOULD BE MIGHT BE WHAT IT ALREADY IS

Remember that the issue is not what the law is, but what it should be. Your submission needs to present a clear position on what the law should be, even if your argument is that it should remain unchanged – defending the status quo can be a perfectly respectable position.

Your aim in writing is ultimately to rationally persuade your reader (here a law reform commission or similar body) to adopt the position you recommend. This means that the reasons you give for taking that position should not merely be the reasons why *you* adopt that position but should be reasons that *your audience* should adopt as theirs. Think carefully about how best to get your audience to agree with you or at least to take your view seriously enough to warrant a considered response.

This means that logical arguments supported by credible evidence and appealing to shared or common values and normative principles are likely to be your main tools of persuasion. Because your concern is with what the law should be, not what it is, citing legal authorities to back up your argument will often be of limited use. Of course, if you are saying something *is* the law, then you should cite the authority for that. But law reform arguments are more likely to be grounded in political, social and ethical principles such as justice, human rights or economic efficiency.

TIP: IT'S NOT ABOUT YOU

Your emotional convictions will be of little use in this persuasive task. Your goal is not to give full and satisfying expression to your feelings. Simply saying how strongly *you* are convinced of some matter is unlikely to give your audience a reason to *share* your conviction. Rather, your goal should be to *persuade* a reasonable person or group of people to *agree* with your position or at least take it seriously. You should aim to give your audience reasons *for it* to adopt your position. This means it might not be enough to articulate your *own* reasons for adopting the position you adopt. Think what reasons you can give your audience for *it* to adopt as *its* reasons for taking that position or at least taking it seriously.

A law reform submission should be informed by research. Many real-world submissions are under-informed or ill-informed and weaker because of that. So do not follow those examples in particular. Look for submissions that have strong referencing. Remember that the better support you have backing up your submission, the more persuasive your arguments will be. As always, your research should be properly cited.

Further reading

It is highly recommended that you do at least some further reading on the topics covered in this book. There is no shortage of such reading: there are hundreds of books and other resources to help you improve your writing in law school. The following are just a few.

Books

Grammar and punctuation

- Michael Meehan and Graham Tulloch, *Grammar for Lawyers* (LexisNexis Butterworths, 3rd ed, 2013)
- John Seely, *Oxford A–Z of Grammar and Punctuation* (Oxford University Press, 3rd ed, 2020)
- RL Trask, *The Penguin Dictionary of English Grammar* (Penguin, 2000)
- Mark Tredinnick, *The Little Green Grammar Book* (UNSW Press, 2008)

Writing style (general)

- Wayne C Booth, Gregory G Colomb, Joseph M Williams, Joseph Bizup and William T Fitzgerald, *The Craft of Research* (Chicago University Press, 4th ed, 2016)
- Pam Peters, *The Cambridge Guide to Australian English Usage* (Cambridge University Press, 2nd ed, 2007)
- Mark Tredinnick, *The Little Red Writing Book* (UNSW Press, 2006)
- Kate L Turabian, *A Manual for Writers of Research Papers, Theses, and Dissertations*, revised by Wayne C Booth, Gregory G Colomb, Joseph M Williams, Joseph Bizup and William T Fitzgerald (University of Chicago Press, 9th ed, 2018)

Legal writing

- Michèle M Asprey, *Plain Language for Lawyers* (Federation Press, 4th ed, 2010)
- Paula Baron and Lilian Corbin, *Legal Writing: Academic and Professional Communication* (Oxford University Press, 2016)
- Nichola Corbett-Jarvis and Brendan Grigg, *Effective Legal Writing: A Practical Guide* (LexisNexis, 3rd ed, 2021)
- Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (Oxford University Press, 5th ed, 2022) ch 5 ‘Writing and Drafting’
- Lisa Webley, *Legal Writing* (Routledge, 4th ed, 2016)

Legal problem-solving

- R Krever, *Mastering Law Studies and Law Exam Techniques* (10th ed, 2019)
- M Brogan and D Spencer, *Surviving Law School* (2nd ed, 2008) chs 5 and 13
- B Wolski, *Legal Skills: A Practical Guide for Students* (2005) ch 3
- E Campbell, R Fox and M de Zwart, *Students' Guide to Legal Writing, Law Exams and Self Assessment* (3rd ed, 2010)

Online resources

- La Trobe University has an online module on writing: http://latrobe.libguides.com/writing
- Purdue University's Online Writing Lab (OWL) is a good resource for general academic writing: https://owl.purdue.edu/owl/purdue_owl.html
- The Academic Phrasebank from the University of Manchester can be particularly useful in building academic vocabulary: https://www.phrasebank.manchester.ac.uk/

Other resources

- R Finkelstein and D Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 5th ed, 2014)
- Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 3rd ed, 2017

Versioning history

This page provides a record of changes made to this textbook. Each set of edits is acknowledged with a 0.01 increase in the version number. The exported files for this book reflect the most recent version.

If you find an error, please contact eBureau@latrobe.edu.au.

Version	Date	Change	Details
1.00	June 2024	Book published	

Review statement

La Trobe eBureau open publications rely on mechanisms to ensure that they are high quality, and meet the needs of all students and educators. This takes the form of both editing and double peer review.

Editing

This publication has been reviewed by an IPED accredited editor to improve the clarity, consistency, organisation structure flow, and any grammatical errors.

Peer review

Two rounds of peer review were completed for this publication on 15/05/2023 by:

- Laura Williams, La Trobe University
- Nichola Corbett-Jarvis, CQUniversity

The peer review was structured around considerations of the intended audience of the book, and examined the comprehensiveness, accuracy, and relevance of content, as well as longevity and cultural relevance.

Changes suggested by the editor and reviewers were incorporated by the author in consultation with the publisher.

The authors would like to thank the reviewers for the time, care, and commitment they contributed to the project. We recognise that peer reviewing is a generous act of service on their part. This book would not be the robust, valuable resource that it is were it not for their feedback and input.