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LEARNING LAW: HOW CAN I DEVELOP A LEGAL MIND?

What we will cover in this chapter:

- How learning law is different from other disciplines
- Inductive, deductive and analogical reasoning
- Threshold Learning Outcomes (TLOs) in law and graduate attributes
- How to succeed in law school
- Being an ethical student

RECOMMENDED APPROACH TO LEARNING THIS TOPIC

This chapter helps you understand what it means to have a legal mind, to 'think like a lawyer'. This is something you will develop across the course of your studies and beyond, and you will see that this 'forensic' skill can be applied across various fields of endeavour. You will also see what you can expect to achieve from your law studies—in terms of the areas of knowledge you will have, and the skills and attributes you will develop. This book, and the subject it is being used with, will begin the development of that knowledge and skills, and those attributes. We recommend you read through the material under headings 1, 2 and 3, and then spend quite a bit of time reflecting on each of the outcomes and attributes you will find under heading 3. To what extent do you already possess them, based on your experience in life, studies and the workplace so far? The more you can link what you are learning to what you already know, the better it will be anchored in your mind. Then it's time to look at the material under heading 4: 'Success in law school'. You can start to try out techniques for being productive in your studies straight away. Experiment with different options and then use what suits you best—there is no one 'right' way. In your first year of law school you will have the opportunity to develop your legal writing and problem-solving skills, and you may have your first exams as well. We recommend that, once you have completed your first term or semester, you come back to this chapter and also look at Chapter 14 and give some further thought to what you could be doing outside the classroom to increase your development of these attributes.

KEY TERMS

Critical analysis = using powers of observation, reasoning, reflection and questioning to interpret information and make findings or form opinions based on it.

Deductive reasoning = using a general theory to test specific facts. For example, 'All dogs bark. Rufus is a dog. Therefore, Rufus barks.'

Diversity = the coexistence of differences in gender, age, culture, capacity and perspectives.

Ethics = a field of thinking about what is morally right, appropriate and acceptable.

Graduate attributes = generic skills, attitudes and values, plus specific content knowledge, expected of students who have completed a tertiary course of study.

Independent learning = taking the primary responsibility and initiative for one's learning, including being able to recognise gaps in their learning and where to find the information to fill them.

Inductive reasoning = using specific examples to create generalisations. For example, 'Apples rot. Pears rot. Bananas rot. Therefore, all fruit rots.'

Information literacy = knowing what information is available, when it is needed, and how to find it and use it effectively; and recognising its inherent strengths and limitations.

Lifelong learning = a perspective that holds that continuous learning is a fundamental part of one's personal and professional life.

Self-management = strategies and processes by which a person manages their time, thoughts, feelings, goals and actions.

Threshold learning outcome = the minimum discipline-based learning outcome of a course of tertiary studies. For law there are six—knowledge, ethics and professional responsibility, thinking skills, research skills, communication and collaboration, and self-management.

1 LAW AS A DISCIPLINE

Law, in contemporary Western societies such as Australia, is formally an autonomous discipline. This means that, while our law may be affected by morality, or politics, or religion, it is separate from them. For example, we may have a law against murder, but the basis for that law is found in cases and legislation, not in the Bible or the Ten Commandments, the Qur'an or the hadiths, the Sutras, the Vedas or the Torah. Thus, this secular system is different from religious systems of law, where the holy text is also the text of the law. For example, the basis of Shari'ah, which applies in some countries as the law between Muslims, is the Qur'an itself.

A benefit of law being treated as an autonomous discipline is that one legal system applies to all people in a country, from many different backgrounds and religions. A consequence, though,

is that legal reasoning often appears to exist in a vacuum, and to a person not trained in legal reasoning it may seem that arguments can follow a path of mental gymnastics to generate an outcome. For example, someone who has not studied law may immediately conclude, as a matter of opinion, that a person who kills a child should be 'imprisoned' as 'punishment' for a 'crime'. A legal thinker resists reaching these direct conclusions, but instead follows a process of reasoning that involves addressing whether the person has committed a crime, considering the relevant legislation and its interpretation, and then considering whether a punishment of imprisonment is warranted and appropriate, and within the scope of penalties provided in legislation. Applying a process of legal reasoning may result in a child killer walking free, and this can be difficult for non-lawyers to comprehend or accept.

TIP
Law is not completely apolitical. For example, Chapter 12 will consider the political process of judicial appointment, Chapter 3 will look at the relationship between sovereign power and the rule of law, and Chapter 7 will examine theoretical understandings of law as a political domain.

REFLECTION EXERCISE

Assume these comments were made about law by first-year law students from other countries.[1] What does it tell us about their perception of the law, and legal studies?

'At the moment we need to execute criminals, because it's the only way we can change people's behaviour, by sending a strong message. Maybe in the future once our system of law and order is established more effectively, like police and courts and prisons, then we can move to other forms of punishment but for now, fear of punishment has to be the main deterrent.'

'It is not for a law student to question the law, it is for the law student to learn the law. That is the purpose of legal training, and the good law graduate is someone who knows the law and can correctly apply it. In my country, thinking critically about it will only get law students into trouble.'

'Completing law will put me in good standing and enable me to represent the needs of people in my village. Our people have a lot of discrimination and suffering from the central government because we are not educated, we don't know our rights. Our practice of turning away and saying the government is not our government, and just doing what we have always done? It's not working, the government won't leave us be. If we are to have any chance to protect our way of life, we must understand and use the system.'

HOW LAW IS DIFFERENT FROM OTHER DISCIPLINES

Every discipline—be it law, science, arts or theology—has its own style and way of thinking. Lawyers tend to throw around ideas in an abstract manner, focusing more on the law and how it could be applied to a particular problem or situation than on what that application may actually mean for the lives and fortunes of those involved. Sociologists tend to adopt a holistic approach to reasoning, always bearing in mind the bigger picture, including predicted and potential/unpredicted consequences. Scientists and mathematicians seek a final answer from their reasoning processes, and indeed when people with a science background come to study

1 These comments are 'based on a true story' in that they are derived from real conversations with law students and practitioners in other countries, but have been edited for the purposes of this reflection exercise.

law, they can often find it frustrating that there may be several 'correct' answers to a legal problem—it is all about the way you reason, not just the outcome that your reasoning produces. Journalists focus on the stories of cases and their significance and newsworthiness, and a student with a background in journalism often writes a law essay like an article, usually with a 'top' that is linked to the 'tail'. A person with an arts background may throw in a quote from a poem or famous person at the beginning or end, and engage in a flowing discussion of its relevance to the topic at hand.

Law is different—it is a narrow, focused, succinct, judicious and frill-free process of thinking and writing. Formal legal writing is rarely flowery prose, and there should be no unsupportable presumptions. There is often no one 'right' conclusion, and merit in arguing both sides. At the same time, it is important to reach *clear* conclusions. It can be infuriating for others that lawyers think everything 'depends'—which, of course, it does. But despite the law being based on 'abstract principles', it is an *applied* discipline that requires careful consideration of how the facts of a case affect the legal outcome.

In recent years there has been a shift away from purely legal reasoning and towards interdisciplinary approaches. This can, for example, involve the analysis of a particular problem such as drink-driving from a legal and sociological perspective; or consideration of sentencing from a legal and psychological perspective, mortgage default from a legal and economic perspective, or evidence from a legal and scientific perspective. There have been innovative steps taken in some law schools where students from different disciplines have the opportunity to work together in a clinic setting, assisting real clients in trouble with the law in areas such as social work and financial planning, as well as legal assistance. The proliferation of 'double degree' studies in Australia will also help to create a generation of interdisciplinary thinkers. There has also been a proliferation of critical legal studies (see Chapter 7) that engage alternative philosophical, sociological, economic, cultural, gendered and even psychotherapeutic approaches to understanding the practice of law.

2 LEGAL REASONING

THINKING LIKE A LAWYER

Legal reasoning is so different from reasoning in other disciplines that the phrase 'thinking like a lawyer' has been coined. It was famously used in the 1973 Hollywood movie *The Paper Chase*,[2] where a law professor says to his students: 'You come here with minds full of mush, and leave thinking like a lawyer.' However, students rarely have minds of mush; they mostly have open minds that will take to thinking like a lawyer in a diligent and yet critical manner.

What exactly does it mean to 'think like a lawyer'? From a narrow perspective, it means being able to read cases and statutes and use them to develop legal arguments based on issues identified from a factual matrix. From a broad perspective, it is about precise, rational,

2 A dramatisation of John J Osborn's novel, *The Paper Chase* (Cengage Learning, 1971).

dispassionate and analytical thinking. A critical perspective may see this approach as the legal profession's way of justifying its existence by making the law appear scientific and denying its human underpinnings. Other more cynical commentators may claim that lawyers make the most obvious and simple conclusion complicated; and twist and manipulate facts and words, and find loopholes, to achieve an outcome that furthers the client's interests.

In essence, we consider that there are six key aspects to thinking like a lawyer:[3]

1 *Non-assumptive thinking*—resisting jumping to conclusions, or making assumptions. For example, a lawyer would not consider whether their client is liable for breach of contract without first examining whether the contract was validly formed in the first place. Similarly, if a person was charged under crimes legislation, the lawyer would first look at the date the legislation entered into force and the place where the law applied, before considering whether the provision applied or not.

2 *Facts over emotions*—being able to detach from personal opinions, and personal notions of what is right and wrong. Instead, the facts are considered objectively, and the client's case is assessed against the law. The focus is on the strategy and the outcome that is sought, rather than on feelings of justice or fair entitlements.

3 *Tolerance of ambiguity*—being able to handle the fact that there is no black-and-white answer; that the answer depends on how you frame the question; and that the advice you give the client can never be given with absolute confidence, because everything depends on everything else and laws can change at any time.

4 *Ability to make connections between facts, documents and laws*—when the average person comes across information that they cannot understand and therefore cannot fit into their current knowledge, they tend to switch off from it and reject it. Lawyers are instead able to store surplus material somewhere in their brain, and in the future, when the missing piece that links it to something they know already comes along, they are able to make the connection. This is essential, for example, in litigation, where the significance of communications or documents may not be apparent, but later in the litigation process, links may be made when more information comes to light or when a witness gives evidence.

5 *Verbal mapping and ordering*—being able to structure thoughts and opinions, and express them orally in a manner that is more typical of written communication, for example: 'I have three points to make. First …, second …, and third …' Most people would not have three structured thoughts, but would instead have a 'stream of consciousness', where they would raise thoughts as they had them. The mental process of verbal mapping and ordering involves being able to create mental lists, or mental diagrams of relationships.

TIP

There is a difference between *thinking* like a lawyer and *becoming* that thinking. Let's say, by analogy, someone worked as a clown at children's parties—they can perform the role of a clown without *becoming* the clown. They do of course have the opportunity to bring some aspects of being a clown into their broader life, such as the skill of using humour to cope with difficult times, but they recognise that this is not the answer to everything. Similarly, a person working as a lawyer may bring their finely honed logical reasoning skills to make good decisions in their lives, while also recognising that in life being 'right' is sometimes less important than being kind,[4] and that, although technically illogical, investing time into 'uncertain' dreams and 'unproductive' passions, into spontaneity and adventure, can generate joy. (And indeed, there are some lawyers who are also stand up comedians!)

3 For an example of how these can be applied, see Chapter 6 under 'Form: How are you going to say it?'.

4 This idea is from Wayne W Dyer, who famously said: 'When given the choice between being right or being kind, choose kind.'

TIP
Learning to think like a lawyer can be a personally challenging experience—acts such as detaching from our personal opinions or seeing the truth as contingent can be de-stabilising for those who, prior to law school, were presented with information in their studies that was final and correct. See Chapter 14 for advice on student wellbeing, including how to maintain 'experiential' thinking while developing the very rational form of reasoning in law.

6 *Automatic devil's advocacy*—no position is fixed, all are arguable. Thinking like a lawyer means having the intellectual flexibility to be able to convincingly reason one side of an argument, and in the next breath convincingly reason the completely opposite view. It also involves having a view, but being open to being challenged and changing the view when new information, or more convincing reasoning, is put forward. In litigation, we use automatic devil's advocacy to intellectually stand in the position of the opposing party, to see the case through their eyes, and thus prepare better for our client by pre-empting the arguments the opposing party is likely to make.

INDUCTIVE, DEDUCTIVE AND ANALOGICAL REASONING

Reasoning involves the application of logic to test a hypothesis. There are two broad approaches—inductive and deductive reasoning.

Inductive reasoning works from the specific to the general. We begin by examining specific observations, and from them we identify patterns and similarities, which enable us to create hypotheses to explore. The resulting outcomes are broad generalisations and theories. This can also be described as reasoning from a minor premise to a major premise. We use inductive reasoning when we perform case analysis—we consider several individual cases in order to describe broad rules of law.

Inductive arguments are always open to question because they are based on examination of only a limited portion of information to make assumptions and generalisations about the whole. For example, a student may attend a Legal Research lecture and find it boring. The student may then attend a Contracts lecture and find it boring, followed by a Torts lecture, which is also boring. Using inductive reasoning, the student concludes that all law lectures are boring. This is open to question, because the student is making a broad generalisation from a limited sample of all law lectures. The only way to prove the rule would be to attend every law lecture everywhere, which of course is impractical.

Deductive reasoning works from the general to the specific. We begin with a general theory that we use to create a hypothesis, and we test that hypothesis by specific observations in order to determine whether they confirm our original theory or not. This can also be described as reasoning from a major premise to a minor premise. We use deductive reasoning when we do a research essay on an area of law.

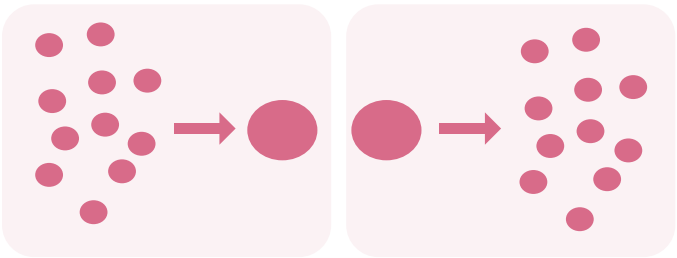
Syllogisms are commonplace in deductive reasoning. A syllogism is a logical argument where a conclusion is inferred from two premises, one major and one minor. The most famous syllogism is:

Major premise—All humans are mortal.
Minor premise—Socrates is human.
Conclusion—Socrates is mortal.

Deductive reasoning is less open than inductive reasoning, because we set out to confirm a specific hypothesis, whereas in inductive reasoning we explore specific instances to find

unlimited potential conclusions. In practice, we often use both forms of reasoning, and move between the two in the process of reasoning on an area of law. The legal profession treats the 'law' as deductive, but in reality Australia's system of precedent is based on inductive reasoning (Figure 1.1; see also Chapter 10).

FIGURE 1.1 INDUCTIVE AND DEDUCTIVE REASONING



Inductive reasoning Deductive reasoning

EXERCISE: INDUCTIVE AND DEDUCTIVE REASONING

Identify whether the following statements use inductive or deductive reasoning.

1 Taking a person's life is always wrong. Capital punishment involves taking a person's life. Therefore, capital punishment is always wrong.
2 The right to self-determination of minority peoples is a core part of international law. Therefore, if a majority of Indigenous Australians vote for self-government, they must be allowed to govern themselves.
3 Six in 10 children who are allowed to drink at home with their parents become alcoholics later in life. Therefore, attitudes towards drinking are formed by others near to us.
4 Every human being has rights. John is a human being; therefore, John has rights.
5 Every time Mr Ahmed has taught Contract Law, students have achieved good results on the exam. This semester, Mr Ahmed is teaching Contract Law. Therefore, students will do well in the exam.
6 A's oral contract for sale of land was invalid in Case A. B's oral contract for sale of land was invalid in Case B. C's oral contract for sale of land was invalid in Case C. Therefore, all oral contracts for the sale of land are invalid.
7 Red cars go fast. Juanita's car is red. Therefore, Juanita's car goes fast.
8 We all have the right to equal treatment under the law. Therefore, Jane and Mary should be able to adopt a child, just as John and Mary are able to.

Go to Oxford Ascend for answers to this exercise.

Lawyers often reason by analogy, arguing that the current case is similar in some material way to another case, so by analogy, it should be treated in the same manner. This notion of 'like should be decided alike' underpins the doctrine of precedent discussed in Chapter 10. It is linked to fairness and the rule of law. Analogical reasoning can be seen as a step in the path of

inductive reasoning,[5] in the sense of identifying relationships between specifics (which are then used to create a general rule).

The fertile area for lawyers is relevance: the two situations have to be similar in some *relevant* respect. You couldn't say, for example, that because a defendant has the same first name as the defendant in another case, their cases should be decided in the same way—the name is irrelevant, immaterial and unimportant, and reasoning based on that similarity is therefore unjustified. But you could say that in a previous case, a plaintiff who was on the phone to her spouse when he was shot dead was held to have been 'present' at the scene for the purposes of assessing psychological harm done to her; the fact that your client was on Facetime with her spouse when he was killed is similar to being on the phone, so she should also, by analogy, be treated as being 'present' at the scene.

There is no mathematical formula for what is relevant in each situation.[6] The task, where analogy is used in precedent, is to apply the analogous case or 'distinguish' it from the current case in some material respect, and not apply it. How each lawyer argues relevance will depend on what best supports the client's case. There may be many factors beyond logic and rationality that apply for the client—for example, a commercial client may be factoring in their ongoing business relationships and reputation in the industry, or may be primarily interested in what they feel is just, with the best legal reasoning being less important than a recognition, apology or show of empathy by the other party. On the other hand, the client may be wanting a strong push for legal reasoning, where for example the client is a member of a group that wants the courts to define the boundaries of power. For example, a rights-based organisation may want to prevent mistreatment by a learning institution against its students, or a company against its casual staff, and so on. The same applies for the courts. James has said:

> Legal reasoning is essentially a process of attempting to predict or, in the event of litigation, influence the decision of a court. It is structured as if based on logic but in reality is impossible without reference to the underlying policies. These policies are rarely consistent and frequently in conflict, and so legal reasoning involves having to decide which of the underlying policies is to prevail. Since legal reasoning can rarely predict an outcome or result with perfect accuracy, it often involves identifying the range of possible outcomes and the relatively likelihood of each.[7]

TIP

To be a well-rounded law graduate, try to always cast the net wider than the mere facts and law of each scenario. Think about the actual people involved in the scenario, and perhaps imagine yourself in their situation. To what extent is getting it 'right' legally going to align with getting it 'right' from the perspective of their wellbeing, and the wellbeing of society?

EXERCISE: WHAT'S YOUR REASONING?

Use inductive reasoning to decide what general rule can be deduced from these specifics:

- A person is liable if their dog gets off its leash and bites someone.
- A person is liable if their cat scratches someone.
- A person is liable if a rat from their property bites through the neighbour's power cord.

5 John H Farrar, 'Reasoning by Analogy in the Law' (1997) 9(2) *Bond Law Review* 149, 155, referring to Lord Diplock in *Donoghue v Stevenson* [1932] AC 562.

6 Ibid 172.

7 Nick James, 'Logical, critical and creative: Teaching "thinking skills" to law students' (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 66, 78.

- A person is liable if their above-ground pool cracks and the water flooding from it destroys the neighbour's flower bed.
- A person is liable if they drive an oil tanker without closing off the access pipe and it goes all over the road.
- A person is liable if they leave a candle burning in their hotel room and it sets the curtains on fire.

Use deductive reasoning to decide how the general rule that 'parents are responsible for the behaviour of their children' should apply, and whether the general rule needs to somehow be qualified:

- An eight-year-old child sitting in the front of a vehicle unexpectedly reaches across and yanks the wheel of the car, causing an accident.
- A toddler is attracted to an exhibit at the local shopping centre that is not fenced off or guarded, and pulls it over.
- After being egged on by an adult leader at a school camp, a teenager puts a small homemade bomb in the toilet at school, which destroys the toilet. Nobody is injured.
- A six-year-old child plays a practical joke at the local church by mixing up the salt and pepper shakers, and an adult has an allergic reaction and is taken to hospital.
- Restaurant staff give children pictures and textas for colouring in, and some gets onto the tablecloth.
- A 12-year-old buys $5000 worth of accessories for her avatar using the password they saw over their uncle's shoulder as he entered his App Store.
- A 15-year-old child uses his drone to film a neighbour nude sunbaking, and posts it on YouTube.

Think about the bigger picture—how should the law cast the relative responsibilities people have for objects and persons in their possession or under their control? What message does this send for people, in determining their own behaviour? Where do the limits lie, what are the values at stake?

Go to Oxford Ascend for answers to this exercise.

BEYOND LEGAL REASONING

Legal reasoning is incisive, critical, analytical, methodical and evidence-based. It is like the sharp knife of the forensic pathologist undertaking an autopsy. But is legal reasoning enough for lawyers? As will be seen below, there is already recognition that 'contextual' considerations should be encompassed, and that legal reasoning should be within the boundaries of professional conduct and ethics. But what about morality and justice? What about empathy and goodness? These questions go to the heart of the issue of what is a lawyer.

Is a lawyer's role to apply legal reasoning to a set of legal issues? Is a lawyer's role to look not only at what is legal, but also at what is good and what is right? Is a lawyer's role to seek out what is just, and, if the law as it presently stands cannot achieve that, to push for an exception to the rule so as to allow justice to prevail? Is a lawyer's role to simply address legal issues, divorced from the client context, in the same way a pathologist simply identifies the cause of death, without going into whether the person on the table was someone's wife or daughter, and whether they were a nice person or a nasty person, or whether they died trying to protect or defend their child, and so on? Or is a lawyer's role to consider the whole client, as a whole person or corporate entity, where what the lawyer may see as a legal issue is also a social, economic,

financial or psychological issue for the client? If a lawyer proceeds down the path of looking at clients holistically, and dealing with them empathically, do they have the skills to do so or would they be dabbling in areas beyond their competency? They are often being paid by the hour for their legal advice—what should they charge when they shift to engaging with the client about how their toxic relationship is underlying their legal problems, or how their gambling addiction is underlying the legal actions against them to recover debts? Will moves towards a holistic approach lead to more 'human' lawyers or will it erode the very discipline of legal reasoning?

There are not always clear answers to these questions—they will be thrashed out in debate and experience in the coming years. But it is useful for law students to be aware of the bigger-picture in which their learning of law and legal reasoning takes place, and to not assume that the parameters of the ball park are fixed.

REFLECTION

What are your views on the role of lawyers in society? How do these views affect what you expect from your legal education now, at the start of your first year? It will be useful to revisit this reflection when you reach Chapter 13, 'Law in Society'.