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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.

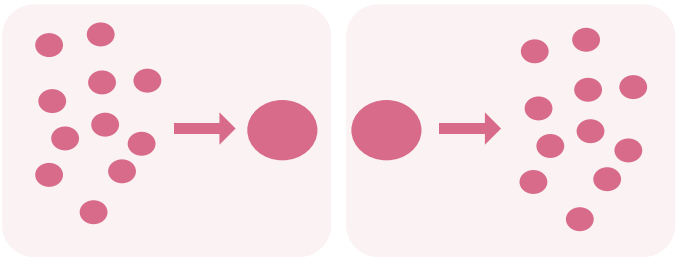
Syllogisms are commonplace in deductive reasoning. A syllogism is a logical argument where a conclusion is inferred from two premises, one major and one minor. The most famous syllogism is:

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.

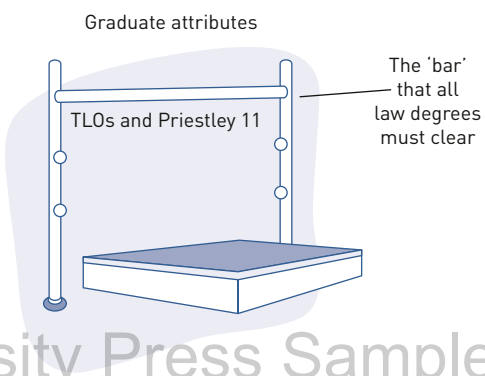
REFLECTION

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'.

3 OUTCOMES OF YOUR LEGAL EDUCATION

What can you expect to be the outcomes of your legal education? What knowledge, skills and attributes can you expect to have by the time you graduate? There are minimum requirements for all law graduates in Australia, which are a combination of what is set by the government through its oversight of tertiary education, and by the profession in its expectations of graduates. These are the Threshold Learning Outcomes (TLOs) and the Priestley 11. Beyond the minimum requirements are aspects that are unique to, or at least differentiated in, different law schools. These are graduate attributes—the characteristics and qualities, skills and capabilities that students should possess by the time they complete their law degree. The TLOs, Priestley 11 and graduate attributes are considered in Figure 1.2 and below, along with a depiction of where they are developed in your law degree and this book.

FIGURE 1.2 RELATIONSHIP BETWEEN THE TLOS, PRIESTLEY 11 AND GRADUATE ATTRIBUTES



THRESHOLD LEARNING OUTCOMES (TLOS)

The TLOs are the minimum, discipline-based learning outcomes for the Bachelor of Laws degree under the Australian Qualifications Framework (AQF) administered by the Tertiary Education Quality and Standards Agency (TEQSA). They are as follows:

TLO 1: Knowledge
Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes:

a The fundamental area of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts;
b The broader contexts within which legal issues arise; and
c The principles and values of justice and of ethical practice in lawyers' roles.

TLO 2: Ethics and Professional Responsibility
Graduates of the Bachelor of Laws will demonstrate:

a An understanding of approaches to ethical decision-making;
b An ability to recognise and reflect upon, and a developing ability to respond to legal issues;
c An ability to recognise and reflect upon the professional responsibility of lawyers in promoting justice and in service to the community; and
d A developing ability to exercise professional judgement.

TLO 3: Thinking Skills
Graduates of the Bachelor of Laws will be able to:

a Identify and articulate legal issues;
b Apply legal reasoning and research to generate appropriate responses to legal issues;
c Engage in critical analysis and make a reasoned choice amongst alternatives; and
d Think creatively in approaching legal issues and generating appropriate responses.

TLO 4: Research Skills
Graduates of the Bachelor of Laws will demonstrate the intellectual and practical skills needed to identify, research, evaluate and synthesise relevant factual, legal and policy issues.

TLO 5: Communication and Collaboration
Graduates of the Bachelor of Laws will be able to:

a Communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences; and
b Collaborate effectively.

TLO 6: Self-Management
Graduates of the Bachelor of Laws will be able to:

a Learn and work independently; and
b Reflect on and assess their own capabilities and performance, and make use of feedback as appropriate to support personal and professional development.

TIP

If your university has Course Intended Learning Outcomes (CILOs) these are outcomes that will achieve the overall graduate attributes for your law degree (there may be more than one CILO per graduate attribute) which, as discussed above, have the TLOs incorporated within them. You may also see subject/unit learning outcomes for individual subjects/units you study—achievement of these contributes to the CILOs like bricks in a wall.

TLOs for the Juris Doctor (JD)[8] are the same six TLOs, stated at an extended level that includes more advanced understanding and a focus on professional contexts. For example, while the LLB TLO 1 provides for graduates to demonstrate an 'understanding of a coherent body of knowledge', JD TLO 1 provides for graduates to demonstrate 'an advanced and integrated understanding of a complex body of knowledge' including on 'contemporary developments in law, and its professional practice'. Similarly, JD TLO 2 requires an 'advanced and integrated' understanding of ethics, JD TLO 3 requires articulation of 'complex' legal issues and demonstrate 'sophisticated cognitive and creative skills', and JD TLO 4 requires research skills needed to 'justify and interpret theoretical propositions, legal methodologies, conclusions and professional decisions'. There is no difference between the LLB and JD TLO 5 on communication and collaboration, and TLO 6 on self-management emphasises the ability to work at a 'high level of autonomy, accountability and professionalism'.[9]

PRIESTLEY 11

In the early 1990s a committee chaired by Justice Priestley, comprising representatives from the various state and territory admitting authorities,[10] held consultations on what should be considered compulsory areas of study for all law students in all undergraduate law courses in Australia. They developed a list of 11 areas, which have become known as the Priestley 11. They are: Constitutional Law, Criminal Law and Procedure, Contracts, Torts, Administrative Law, Corporate Law, Property Law, Equity and Trusts, Evidence, Civil Procedure and Professional Conduct. Professional Conduct is covered in Chapter 12 of this book, and the other areas are considered in Chapter 4. Below is an exercise to see if you know what each of the 11 areas entails.

GRADUATE ATTRIBUTES

As mentioned above, graduate attributes are the characteristics and qualities, skills and capabilities that students should possess by the time they complete their law degree. Each law school will have its own statement of graduate attributes, or in the case of Flinders University, 'qualities'.[11] All should encompass the minimum standards as set out in the TLOs, and the minimum substantive areas of law in the Priestley 11, but they will typically have further aspects, which usually differentiate one law school from another.

8 The Australian Qualifications Framework (AQF) provides for Bachelor's Degree at Level 7, Honours at Level 8, and Masters at Level 9. The JD is at Level 9, so the TLOs are analogous but extended from the LLB TLOs quoted above.

9 Council of Australian Law Deans, Juris Doctor Threshold Learning Outcomes, endorsed March 2012, <https://cald.asn.au/wp-content/uploads/2017/11/Threhold-Learning-Outcomes-JD.pdf>

10 Consultative Committee of State and Territorial Law Admitting Authorities, Uniform Admission Requirements, Discussion Paper and Recommendations (1992).

11 Flinders University, 'Law Graduate Qualities', <www.flinders.edu.au/ehl/law/information-for-students/law-graduate-qualities.cfm>.

EXERCISE: PRIESTLEY 11 REQUIREMENTS

DRAW A LINE FROM THE DESCRIPTION TO THE AREA OF LAW.

Rights and responsibilities of company directors, employees, creditors and shareholders	Constitutional Law
Legal rights in relation to the ownership of land and dwellings	Administrative Law
Negligence, trespass to the person, goods and land, nuisance, defamation, and allowable defences	Criminal Law and Procedure
Offences against the person and property, and how they are tried in a court of law	Torts
Legal mechanisms to make government officials who exercise broad discretionary powers accountable	Contracts
Legal requirements and standards for proving facts	Professional Conduct
The law under which the Commonwealth and states operate, including the basis of their power	Property Law
Ethical responsibilities and legal accounting	Equity and Trusts
Processes by which cases involving private individuals and companies are resolved in courts of law	Evidence
Legally binding promises and the issues that arise from breach of them	Corporate Law
Injunctions, specific performance of obligations, and legal tools to separate legal and equitable ownership of property	Civil Procedure

TIP
Notice that the Priestley 11 are largely substantive law areas, which align with TLO 1 'Knowledge'. They also explicitly encompass legal ethics and professional responsibility, aligning with TLO 2, and inherently require, for their successful completion, skills in researching, analysing and communicating about the law, aligning with TLOs 3, 4 and 5.

Go to Oxford Ascend for answers to this exercise.

For example, one university may have a particular social justice angle, while another may take an international focus, emphasise technology, or pride itself on producing 'practice-ready' graduates. Some law schools, for example at Southern Cross University and Charles Sturt University, have maintained an explicit reference to Indigenous perspectives as part of cultural competence; others, for example at the University of Western Australia, include an aptitude for law reform and the acquisition of comparative law perspectives as distinctive graduate attributes.[12]

12 University of Western Australia, 'Law school attributes and outcomes', <www.law.uwa.edu.au/courses/outcomes>.

EXAMPLE: LAW GRADUATE ATTRIBUTES AND OUTCOMES AT THE UNIVERSITY OF WESTERN AUSTRALIA (UWA)

During undergraduate studies, UWA Law students are expected to develop and demonstrate attributes and skills that are essential for professional competence.

Attributes and skills: expected outcomes

An understanding of fundamental legal concepts and principles

An understanding of fundamental legal concepts and principles and an ability to make connections between them, as well as an appreciation of the relationship between—and an ability to integrate knowledge across—the various areas of law.

An appreciation of the broad framework of law

An appreciation of the broad framework of law and generic legal knowledge, applicable beyond a particular area.

An awareness of the significance of law and the rule of law

An awareness of the historical, ethical, political, social, economic and philosophical dimensions and significance of law and the rule of law.

An aptitude for law reform

The ability to make and assess recommendations for law reform.

The acquisition of comparative law perspectives

The acquisition of comparative law perspectives, including an appreciation and understanding of the significance of different principles and rules relevant to common issues in interstate, state and federal, foreign jurisdictions and the potential impact of international developments on domestic law.

The ability to critically interpret, analyse and comment

The ability to critically interpret, analyse and comment on legal issues and principles, primary and secondary resources and contextual debates about the law.

Research skills

Engagement in comprehensive and independent legal research.

The ability to draw on and apply knowledge

The ability to draw on and apply knowledge across a range of areas in solving substantive and procedural legal problems and providing relevant advice.

Communication, interpersonal and organisation skills

- Clear, concise and effective writing skills using correct and plain English in communicating with others and in drafting court and other legal documents.
- Competent, confident and respectful oral communication and advocacy skills.
- Effective personal skills, including critical reflection on performance skills, learning and personal ethics and managing time and workload.
- Competent relational skills in interacting with others, working in teams, interviewing clients, taking instructions and negotiation.

The significance of both the TLOs and the graduate attributes is that they show clearly that success comes not simply from knowing the law and how to apply it. It comes from a package of personal and professional skills—such as superior communication and negotiation skills, time and priority management skills, and critical analysis skills—and attributes, such as an appreciation of cultural and gender diversity, an understanding of how to function in an increasingly international legal environment, and an understanding of how to recognise and manage ethical issues when they arise in practice. These skills and attributes, in addition to legal knowledge itself, are developed over the course of a degree. Some subjects will have more legal

IN DEPTH

LEARNING TAXONOMIES

To conceptualise the development of higher-order cognitive skills it is useful to consider two learning taxonomies.

BLOOM'S TAXONOMY

The first is Bloom's taxonomy of learning objectives,[13] which sets out six levels of learning in the cognitive domain:

1 **Remembering**—being able to recall and describe concepts, principles, terminology, classifications

2 **Understanding**—comprehending by organising, interpreting, comparing, explaining

3 **Applying**—using the knowledge in comparable or new situations, such as to solve problems

4 **Analysing**—breaking down to the elements, identifying relationships, drawing inferences

5 **Evaluating**—critiquing, justifying or defending an argument or interpretation

6 **Creating**—compiling the elements in a new way, developing new ideas, products.

The degree of difficulty increases by level, and one must achieve each level before moving to the next.

The first level, remembering, can be considered both as 'useful' and 'limited' in law—useful because there is such a large volume of information to absorb, and limited because simply being able to remember and regurgitate information, which in a secondary education context may create a good result, will at best gain a bare pass in law school. The focus at an undergraduate level is more on understanding and applying the law, and on analysing and evaluating it. Some students, by the time they research their Honours thesis or similar, begin to step into the territory of richer evaluation and creation, for example by critiquing the development of a particular concept or principle and suggesting future directions. Typically, however, the higher-order cognitive skills are seen at the postgraduate and academic level.

So, Bloom's taxonomy can be useful to understand, from the time you enter law school, that what you may perceive as showing you have learnt something may not be the same as what your teacher perceives, or if you are asked in an assessment to analyse something (level 4) but all you do is describe it (level 1) you are unlikely to achieve a good result.

13 The original taxonomy was devised by Benjamin Bloom and published in B S Bloom et al., *Taxonomy of Educational Objectives: The Classification of Educational Goals; Handbook I: Cognitive Domain* (David McKay, 1954). It used the nouns knowledge, comprehension, application, analysis, synthesis and evaluation. The revised taxonomy was developed nearly 50 years later: see Lorin Anderson and David Krathwohl (eds), *A Taxonomy for Teaching, Learning and Assessing: A Revision of Bloom's Taxonomy of Education Objectives* (Longman, 2001). The new terms, expressed as verbs, are used above.

BIGGS' STRUCTURE OF THE OBSERVED LEARNING OUTCOME

The second taxonomy which is useful to consider is Biggs' Structure of the Observed Learning Outcome (SOLO).[14] It shows how a learner's performance grows in complexity when mastering many academic tasks:

- **Prestructural**—misses the point
- **Unistructural**—identifies, does simple procedures
- **Multistructural**—describes, lists, combines
- **Relational**—discusses, compares, contrasts, applies, analyses
- **Extended abstract**—reflects, theorises, hypothesises, generalises.

If this taxonomy were depicted on a continuum, with prestructural on the far left and extended abstract on the far right, the expectations of (for example) PhD law students would be at the right end, while the expectations of first-year law students would be closer to the middle, and a little on either side of it.

How can the levels be distinguished? An example is provided here, with sample excerpts from a response to an essay question on the degree to which being a criminal is about nature and nurture.[15]

- A **prestructural response** may include: 'Children learn about how to behave from their parents. It is part of nurturing children to teach them what is wrong and right. Nature is about flowers and animals and the world around us. Parents, including most animals, nurture their offspring when the offspring are too weak or inexperienced to cope with the world unaided.'
- A **unistructural response** may include: 'Individuals are a combination of their genetic inheritance and their learned behaviours. Heredity is the passing of traits to offspring from their parents or ancestors. Inherited traits are controlled by genes and the complete set of genes within an organism's genome is called its genotype. Heritable traits are known to be passed from one generation to the next via DNA, a molecule that encodes genetic information. Nature can also influence the development of a child's ethical system. "Ethics" are norms, principles and standards of conduct, and an "ethical system" is a set of principles of right conduct. Parents play a key role in developing an ethical system.'
- A **multistructural response** may include: 'Individuals are a combination of their genetic inheritance and their learned behaviours. The role of genetics in crime has been widely accepted since the late nineteenth century—neurochemicals including monoamine oxidase (MAO), epinephrine, norepinephrine, serotonin, and dopamine are responsible for the activation of behavioural patterns and tendencies in specific areas of the brain. For example, low MAO activity results in disinhibition, which can lead to impulsivity and aggression. An individual's environment can also affect criminal behaviour—this includes the family environment (parents, siblings and children) and peers (school, work and social). A child who observes aggressive behaviour in the home may grow up to think that behaviour is normal.'
- A **relational response** may include: 'Individuals are a combination of their genetic inheritance and their learned behaviours, and, as such, criminality is about both "nature" and "nurture". An individual can have a genetic predisposition to aggressive and antisocial

14 J Biggs and K Collis, *Evaluating the Quality of Learning: The SOLO Taxonomy* (Structure of the Observed Learning Outcome) (Academic Press, 1982).

15 This example is adapted from an example in a paper by the Teaching and Educational Development Institute at the University of Queensland, titled 'Biggs' Structure of the Observed Learning Outcome (SOLO) Taxonomy', <http://uq.edu.au/teditech/assessment/docs/biggs-SOLO.pdf>.

behaviour, arising from inherited brain neurochemistry, but this alone does not explain criminality, because an individual's characteristics and personality can be modified by their environment. One can compare the outcomes of twins separated at birth and raised in different environments. Compare, for example, an individual who is genetically predisposed to criminality but raised in an environment with a clear ethical system of right and wrong, coupled with a strong system of reward and punishment, with an individual without any genetic predisposition to criminality but who is raised in a household in which violence is normalised and non-violent attempts at conflict resolution are ineffective. Neither genetic inheritance nor environment determines criminality, but certainly both influence its likelihood.'

- An **extended abstract response** may include: 'Numerous research studies over the past 150 years have concluded that an individual's antisocial or criminal behaviour can be the result of both their genetic background and the environment in which they were raised. Neither is determinative, but both influence the likelihood of criminality. However, some violent criminals were raised in good homes to parents without a history of criminal behaviour. The key may in fact be not whether a person has a genetic predisposition or whether they developed a sound ethical system through influences from their parents as a child, their school teachers, peers, employers and so forth, but the degree to which that individual accepts and adopts that ethical system as their own. Arguably, an individual who behaves in an expected manner because that is what they have been *told* is right, rather than because that is what they *believe* is right, will be more susceptible to criminality.'

One of the difficulties first-year law students who are recent school leavers may face is that their previous learning may be at the unistructural and multistructural levels—and for those with the marks to get into law, also partly at the relational level—but they do not realise that analysis is actually more than just comparing and contrasting. They hand in assignments that would earn them a high mark in high school and are deflated when they receive a pass or a bare credit at university. They cannot see how their paper is in any way deficient, because they have not yet developed advanced relational or extended abstract capabilities. This is known as metacognition, which is knowing about knowing, and thinking about thinking. It involves having an awareness of one's own learning and thinking processes.

TIP
You should not feel bad if you find it difficult at this stage to clearly differentiate between the above responses.

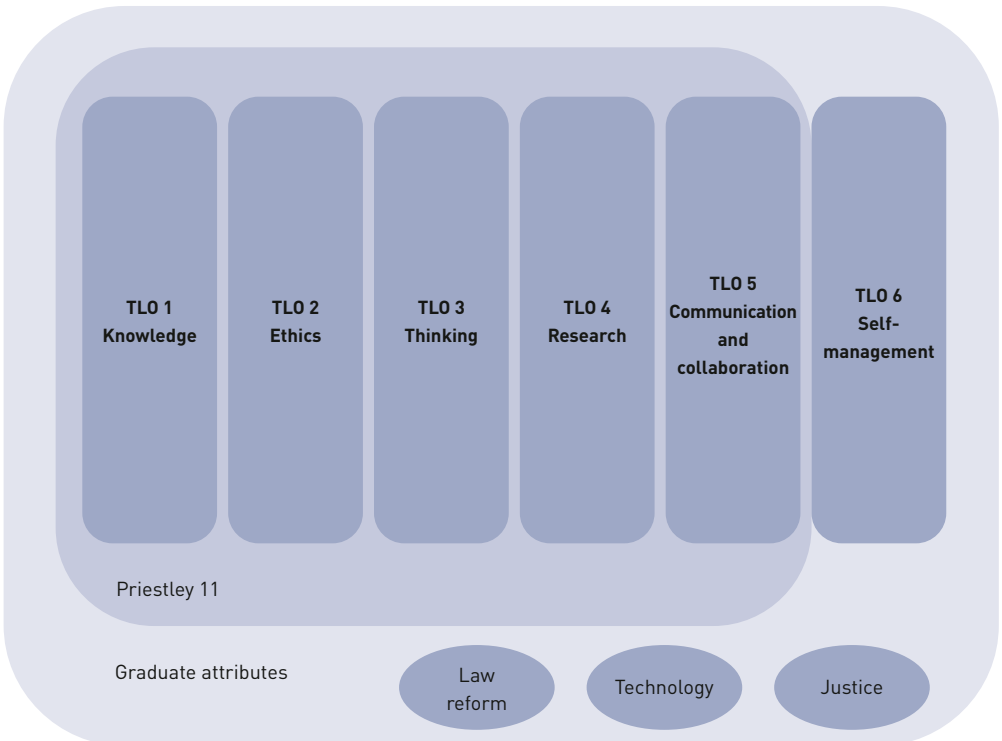
Without metacognition, it can be difficult for a first-year law student to accept why they received an average mark for a paper they consider to be excellent. It is only when they are in their later years of law studies that they look back on papers handed in during first year, which at the time they thought were excellent, and cringe. But at the time, it was immensely frustrating. This is particularly so for law students, who are typically high achievers, accustomed to performing well in everything and being unaccustomed to receiving negative feedback. Some students compound this with an external locus of control, and blame their teachers for the result—that if they didn't perform well it must be because the marker didn't mark the paper properly, or the teacher didn't teach properly. The cumulative impact is to come out disappointed and frustrated, without actually learning what is needed to improve going forward. This can have unfortunate consequences both for learning and for wellbeing. If you are not satisfied with a result, and you do not understand it, it is best to seek feedback on where you went wrong, and perhaps ask if a student who scored highly could be requested to provide a de-identified copy of their paper as a sample answer.

content, others more skills content. Some will teach ethics implicitly; others will explicitly set out the professional requirements. Some law schools will 'scaffold' development of the TLOs/graduate attributes across the degree, enabling students to develop basic, then intermediate, then advanced capacities, with the level of support and guidance gradually being removed as students' skills strengthen.

Figure 1.3 shows the interrelationship between the TLOs, Priestley 11 and graduate attributes. The Priestley 11 expressly overlap with TLO 1 on knowledge, and TLO 2 on ethics. Inherently, to achieve understanding of the remaining areas of law in the Priestley 11, a student must have thinking, research and communication skills. Graduate attributes encompass and go beyond the minimum standards in the TLOs and Priestley 11, and examples of how they do that are given in the **circles**—law reform, technology and justice. Of course, the areas are not mutually exclusive and this figure is to help with conceptualisation of the interrelationships than to provide a prescriptive division.

The following discussion is structured along the lines of the TLOs, but includes reference to the Priestley 11 and graduate attributes as relevant.

FIGURE 1.3 INTERRELATIONSHIP BETWEEN THE TLOS, PRIESTLEY 11 AND GRADUATE ATTRIBUTES



KNOWLEDGE (TLO 1)

Graduates of the Bachelor of Laws will demonstrate an understanding of a coherent body of knowledge that includes:

a The fundamental area of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts;
b The broader contexts within which legal issues arise; and
c The principles and values of justice and of ethical practice in lawyers' roles.

This TLO is what most people would think of when they think of the outcomes of a law degree—the graduate should understand fundamental areas of law. These include a number of areas in the Priestley 11—such as Contracts, Torts, Criminal Law and Procedure, Administrative Law and Corporate Law—which you will study as complete subjects in your degree. It also includes understanding what law is as a concept (known as jurisprudence, covered in Chapter 7), where it came from (covered in Chapters 8 and 9), and how it is made (Chapters 2 and 3) and applied (Chapters 4, 10 and 11).

Each law school can structure its degree its own way, but typically degrees are divided into core and elective 'subjects' (sometimes referred to as 'units' or 'courses'). The substantive areas of law you will study as part of the Priestley 11 will be core subjects (which may have different titles), usually accompanied by initial subjects such as Introduction to Law, and Legal Research and Method. In addition to the compulsory core subjects in a law degree, students have options to study specific topics of interest to them. Here are some of the 'electives' or 'alternate units' that law schools commonly offer (noting that some law schools have decided to make some of these compulsory in their programs):

- *Succession*—the law of wills (documents in which individuals provide for their assets to be dispersed upon their death). Succession covers what happens if someone dies without leaving a will, or leaves a will but cuts out one of the children, or was legally incapable at the time of making the will (due, for example, to illness, such as dementia).
- *Labour Law*—also referred to as Workplace Law or Industrial Law, this subject focuses on the legal relationship between employers and employees, including industrial awards, trade unions, enterprise bargaining, industrial tribunals and workers' compensation.
- *Family Law*—covers the recognition and regulation of relationships, including marriage, de facto and other domestic relationships, and law regarding parenting rights and responsibilities. It often also covers topics such as domestic violence and children's rights.
- *Public International Law*—the main focus is on the legal relationship between states in the international system, and in their involvement in international organisations such as the United Nations. It encompasses the law of treaties, customary international law, the concept of state sovereignty, state responsibility, settlement of international disputes, and immunities and privileges for diplomatic and consular relations.
- *Private International Law*—although one would assume the focus of this subject to be the legal relationships between private individuals in international law, it is actually more narrowly focused on the question of which particular law applies between private individuals in international law. For that reason, this subject is sometimes called Conflict of Laws.

- *International Trade Law*—covers private trade law (such as importing and exporting goods, carriage by sea or air, trade finance and dispute resolution) as well as public law aspects of trade involving commitments and legal obligations under the World Trade Organization, plus the established dispute settlement system.
- *Human Rights Law*—focuses on the principles behind, and implementation of, international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights. It may also address domestic legislation or constitutional provisions that incorporate human rights.
- *Jurisprudence*—the philosophy of law, which allows students to deepen their understanding of legal theory. The theories covered will usually depend on the areas of interest of the teaching staff, but may include feminism, race theory, postmodernism, or sociological legal theory.

TIP
Consider the structure of the law degree you are undertaking. What are the core and elective subjects? How is the structure of a combined/double degree (such as Communications/Law) different from a straight Bachelor of Laws (LLB) or Juris Doctor (JD)? Can you spot the Priestley 11 areas?

Paragraph (b) of TLO 1 refers to the broader contexts within which legal issues arise. What are these contexts? They include political, social, economic, policy, moral, historical, philosophical, gender, cultural, Indigenous, linguistic, ethical, environmental and global contexts. It is not automatic that these contexts have relevance—in fact, under a strict, formalist approach, they are not relevant as the focus of the lawyer should be on the wording of the law and what it means, separate from the context in which it is being applied. But if you look from the angle of law development and reform, the perspectives of a broad range of people to whom a particular law is addressed is highly relevant to the legal drafter, and the way the existing law generates unforeseen consequences for a particular minority or other group is highly relevant to the law reformer.

CRITICAL REFLECTION

POWER TO MAKE LAW

When introducing the Priestley 11 units above, we identified how constitutional law includes the basis of the sovereign power of states and the Commonwealth to make law, and how administrative law provides accountability of those tasked with implementing those laws. It is useful to critically reflect, from the outset, about the power to make law. Who has it, and where did they get it from? Who is bound by the laws made using that power, and what makes them binding?

This issue was given comic attention in the Monty Python and the Holy Grail clip 'Arthur and Dennis (Constitutional Peasant)' in which Dennis challenges Arthur's assertion that he is King. When Arthur invokes the Lady of the Lake as the source of his power, Dennis responds:

> Listen. Strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony.

Watch the clip online. What does this scene tell us about the power to make law? Reflect upon it now, and keep it in mind as you read about sources of law in Chapter 2; about parliamentary sovereignty and the separation of powers in Chapter 3; when you look at theories of law in Chapter 7; and when you consider the replacement of Indigenous law by English law, in chapters 8 and 9.

If we study areas of law without understanding the broader contexts within which legal issues arise, we end up (for example) knowing the rules of administrative law, such as how decisions made by government officials can be reviewed by courts, without having a sense of the power context—the whole area of administrative law is about power, and law is an instrument of power. Administrative law gives individuals the power to resist the attempted exercise of power by government bureaucrats—it limits and regulates the government's use of power and safeguards the human rights of the people.[16]

If we seek to apply the law without understanding the broader context, we can fail because it may well be that the law simply does not apply. If we consider the area of professional responsibility in the Pacific Islands, for example, it is easy for us to say that lawyers should act honestly, in the best interests of their client, without conflicts of interest, and so on. We say those things based on our own understanding of professional responsibility of lawyers as it is applied in Australia. However, if we look at the Vanuatu, Papua New Guinea or Solomon Islands context, we see that lawyers have, in addition to their duties to the court and the client, duties in society. The primary ordering of society in these contexts is kinship or wantok ('one-talk' or 'one-language') relationships—if someone shares your language, they are in your tribe, your wantok, and if they need help then you are obliged to assist them as much as you can. Failing to do so can have significant repercussions for yourself and your family. When wantok relationships are applied by those in government or the law, it can result in what we would see as corruption and nepotism. It is difficult for a lawyer to argue that they will not help their wantok because they have professional and ethical obligations, for the reason that those concepts are in themselves foreign, as is the whole notion of a state legal system. It is said that, 'For those in Melanesia it may be more important to have wantok on side and supportive, than to have the support of state law and the legal profession'.[17] In any event, there is no real mentoring system, no clearly stated rules of professional conduct, and no procedures in place for discipline or consequences for breach. If you were going to the Pacific Islands to establish a system of professional responsibility and discipline, understanding this context could mean the difference between success and failure.

Interestingly, 'context' also arises towards the end of paragraph (a) of TLO 1, where there is reference to international and comparative contexts. This is a minimum requirement that involves considering how the law fits within the international framework of law, or how it compares to other systems of law. It falls short of the graduate attribute of having an 'international mindset' or a 'global mindset', which involves situating one's learning in the global environment—recognising that what may appear to be obvious and 'natural' to us may be completely different in other countries. We may, for example, consider it natural that the first step to resolving a legal issue is to raise it with the person concerned and try to negotiate a solution, failing which a formal procedure should be followed. But this presupposes a functional underpinning of law and order in society, including a functional legal system that is relatively accessible. In some countries, particularly those with an extensive background of civil war or unrest, implementation of laws may be weak and it may be considered more obvious and 'natural' to take revenge, or to resort

16 For a critique on the teaching of administrative law as if it is power-neutral, see Lucy Maxwell, 'How to Develop Law Students' Critical Awareness? Change the Language of Legal Education' (2012) 22(1) *Legal Education Review* 99.

17 Carolyn Penfold, 'Teaching Legal Ethics and Professionalism in a South Pacific Context' (2013) 23(1) *Legal Education Review* 7, 16.

to violence as a means of dispute resolution. If we are able to develop an international or global mindset while we are in law school, or at least understand the international and comparative contexts, we will have a richer understanding of our law and an increased capacity to use our legal skills abroad.

Finally, paragraph (c) of TLO 1 refers to justice and ethical practice. These aspects of learning should be woven throughout all subjects in law school. In this book, justice is considered in Chapters 3, 4 and 13, while ethics are considered in this chapter (under heading 4, below) in relation to academic integrity, and in Chapter 12 in relation to professional responsibility.

TIP

If you are in a class discussion context and a fellow student raises a perspective different from your own, try to recognise when you are using your natural inclination to spot what is 'incorrect' and to then put your own perspective. Instead, incline yourself to really listen to what that student is saying, including asking clarifying or expanding questions and making your best efforts to replace judgment with curiosity. Whether or not you end up confirming or changing your own perspective, there is benefit in *understanding* a different perspective, and this of itself is a positive learning outcome. To practice outside class, see what happens if you pick an apparently indefensible perspective (for example random public killing), and try to understand the perspective of a person who comes to view that action as appropriate. You are likely to see your skills opf reasoning and persuasion improve.

The reference to justice in TLO 1 falls short of a graduate attribute on diversity and social justice. The key recognition of such a graduate attribute is that people are many and varied—gender, race, religious beliefs and cultural practices all vary across the world, and often a country's population comprises people from all over the world. The law is intended to be neutral and objective, such that everyone is equal in the eyes of the law. Often this is not achieved because of biases against marginalised groups. Therefore, it is incumbent on law professionals and law students to become conscious of biases or opinions about certain groups in society that underlie the law and to make sure that those biases do not affect our practice of law. This means avoiding discrimination on the basis that someone has a disability, dresses differently, prays several times a day, eats restricted foods, identifies with a gender different from their biological sex, or expresses different opinions and value judgements. Diversity should be cultivated at law school, including by recognising that your learning experience can be heightened if you are open to discussion with people who have vastly different views from your own.

TLO 1 also does not encompass law reform, which involves seeking to change the boundaries of the present law, repeal existing law or develop new law. Law students are encouraged to look at the current work of their local law reform commission, or the Australian Law Reform Commission, and, if they find something there of interest, they should consider making a submission about it (members of the public are able to do so). Focusing on matters such as law reform ties into TLO 3 (see below) on thinking skills because it involves an element of creativity.

REFLECTION

1 To what extent do you believe the law caters to diversity in society? Do you believe that law should be applied equally to everyone? Is there a difference between equality and equity? Should the focus be on equal treatment of all, or on recognising existing inequalities and having unequal treatment in order to create equality of outcome?

2 Affirmative action is an approach where the disadvantaged are given preferential treatment as a means of removing the disadvantage; for example, an employer recruiting for a position where there are two equally good candidates may have a policy for hiring the female, on the basis that women are underrepresented in the relevant field. What do you think of that approach?

Appreciating diversity and supporting the rights of groups that are exposed to injustice are part of social justice. A lawyer who has a commitment to social justice believes that all individuals, in all their diversity, have equal rights, and where there is social disadvantage or inequity, lawyers should do something to address it. Social justice is about taking individual responsibility for our own actions and for our obligations towards others and society as a whole. Not all lawyers will be actively engaged on a full-time basis in public-interest litigation, but they can nonetheless have a commitment to social justice. It may be as simple as recognising that a person needs legal help, and referring them to legal aid or a community law centre for advice. It may also involve recognising a litigant's language difficulties and need for interpreter assistance.

BIOETHICS AND PROFESSIONAL RESPONSIBILITY (TLO 2)

Graduates of the Bachelor of Laws will demonstrate:

a An understanding of approaches to ethical decision-making;
b An ability to recognise and reflect upon, and a developing ability to respond to legal issues;
c An ability to recognise and reflect upon the professional responsibility of lawyers in promoting justice and in service to the community; and
d A developing ability to exercise professional judgement.

Legal ethics is a fundamental and crucial part of being a lawyer. Broadly, acting ethically means doing the right thing morally. Ethical legal professionals act honestly, are accountable, value personal, intellectual and professional integrity, and take responsibility for their actions and the impact they may have on others. This TLO requires a demonstrated understanding of approaches to ethical decision making, of how to recognise, reflect upon and respond to ethnical issues, and how to exercise professional judgment.

Ethical situations commonly arise in practice. For example, we may come across confidential information about a company we hold shares in, and we may be tempted to use this information for our own benefit. We may have clients who ask us to lie, or to mislead the other party or the court as to certain facts or points of law. The challenge arises in the grey areas, where the legal practitioner is still technically within the letter of the law, but not its spirit.

REFLECTION

Imagine you are a lawyer acting for a major Australian company that is sued by an individual who used the company's product and suffered loss. Consider the following.

- Is it ethical to use the knowledge that the individual has limited resources to drag out the litigation into a multitude of procedural steps so that the individual eventually drops the case because they cannot afford to continue?
- Say the injury being complained of is a psychological one, where the individual goes into a state where they cannot function if their stress levels become too great. If you used this knowledge in an aggressive manner to defend the litigation, enforcing unreasonable requirements and timeframes such that the individual could not continue the case due to poor health, is that ethical?

- What about offering a small amount in settlement on the basis of immediate payment, even though you know that if the individual could hold out until trial, they would receive a great deal more in damages?
- And if the individual was not using a lawyer, and you exploited that by putting 'legalese' or jargon into your communications so they would have difficulty understanding it, would that be ethical?

Where exactly should the boundary lie between what is ethical and unethical? Should there be some extent to which you can, as a lawyer, negotiate in a way that achieves a tactical advantage?

No law school can guarantee that its graduates are ethical—the choice of how we act is in our own hands as lawyers. We can certainly approach colleagues or the relevant law society or institute to obtain confidential advice, but ultimately how we behave is our call, and different people may have different views on what legal ethics requires in a given situation. All law schools can do is ensure that you understand the importance of ethics, how to recognise an ethical problem when it arises, and how to deal appropriately with it. The aim is for you to have a mindset, or way of thinking, that is ethical—but ultimately the success in creating this outcome is in your hands. A student may answer an ethics test perfectly, but if they are applying purely academic reasoning without any engagement or commitment to ethics, it is unlikely that this intellectual strength will serve to identify ethical issues in practice.

A failure to act ethically in practice can have serious consequences, such as a finding of unsatisfactory professional conduct, which is conduct which falls below the standard expected of a lawyer; or a finding of professional misconduct, which is more serious and can result in the suspension or revocation of one's ability to practise. See Chapter 12 for more information.

REFLECTION

To what extent is there a difference between conduct that can be expected of an ethical practitioner, and conduct that does not fall into the category of 'unsatisfactory' professional conduct? Or are they the same thing—is anything above the level of 'unsatisfactory' sufficient?

THINKING SKILLS (TLO 3)

Graduates of the Bachelor of Laws will be able to:

a Identify and articulate legal issues;
b Apply legal reasoning and research to generate appropriate responses to legal issues;
c Engage in critical analysis and make a reasoned choice amongst alternatives; and
d Think creatively in approaching legal issues and generating appropriate responses.

The third TLO is thinking skills—the ability to identify legal issues, apply a form of analytical reasoning to them, and reach a form of conclusion or response. We have covered in some detail what it means to think like a lawyer under heading 2, above, and when one considers the taxonomies of learning objectives (Bloom) and outcomes (Briggs), it could be considered that what is described in this TLO traverses all the levels of these in its use of terms such as 'identify', 'apply', 'analysis' and 'creativity'.

For example, paragraph (a) encompasses the ability to consider a scenario and identify the legal issues that arise in it, and to describe those issues in a manner that others will be able to understand. The sorts of issues we identify can be factual, legal and policy issues. (Remember that although in law school we are often presented with a set of facts as if they are 'set', in reality many cases turn on their facts, not on issues of law per se.) In order for us to be able to apply legal reasoning to legal issues, we first have to be able to articulate them. In practice, this means explaining the issues to the client, and in law school this means explaining them to the class and/or the examiner. See Chapter 6 on engaging with others about the law.

Paragraph (b) involves undertaking legal research (see Chapter 5) and applying what we already know and what we have learned from our research, using a process of legal reasoning so that we can identify appropriate responses to the issues. This is closely connected to paragraph (c), which involves analysing the alternatives and choosing between them. As a law student, you may be called upon to reach a conclusion as to your view (that is, to play the role of a judge) or you may be called upon to identify the full range of alternatives that are open, based upon the facts and your legal knowledge, research and reasoning. In practice, you are likely to identify the options for the client and make recommendations as to which option would be best for them. This may include the option of litigation or another adversarial approach such as arbitration (see Chapter 3), or it may include negotiation or even non-legalistic responses, such as an apology or forgiveness.

'Critical' analysis and thinking (paragraph (c)) warrants further discussion. Perhaps the most fundamental skill is to resist accepting information as fixed. Critical thinkers consider who prepared the information, what motivations they may have had, whether the process for obtaining the data was sound, and whether the conclusions reached from it are valid. They recognise where assumptions are made and have a view on the impact of assumptions on the validity of the outcomes. They are able to compare and contrast different sources of information, and apply reasoning to form a view on which is more reliable. They are able to develop and defend arguments, and to understand and reflect upon how they fit within a larger picture.

In law school, you will be expected to engage in critical thinking from the outset. The expectations on you will be lower in first year than in your final year, but even in first year you will not be able to achieve high grades if you merely describe, or regurgitate, what you have learned. Most law exams are 'open book', meaning you can take your texts in with you. That is because what is being tested is not the capacity to find the place in the textbook and write it as an exam answer, but to think critically about the question and follow a logical process to analyse the relevant parts of that question.

EXAMPLES: CRITICAL AND NON-CRITICAL THINKING

1 Countries offer incentives to companies to engage in research and development by allowing them to register patents for their inventions (a patent gives the inventor a certain period of time in which they have sole power to exploit the invention). Patents are governed by domestic and international law (such as the *Agreement on Trade Related Aspects of Intellectual Property Rights*). There are some exceptions, for example with pharmaceutical patents, where a country is faced with a national emergency like avian flu or mad cow disease and can grant a compulsory licence to produce products under the patent.

2 The shift towards compulsory licensing under the *Agreement on Trade Related Aspects of Intellectual Property Rights* has changed the power balance between poor countries and large pharmaceutical manufacturers. While patents typically protect an inventor from competition for a certain period of time through the grant of exclusive rights, compulsory licensing enables developing and least-developed countries to announce that they will authorise the use of patented drugs in a national emergency, and the pharmaceutical company then has to decide whether the risk of having the patent in the hands of another company is greater than the cost of offering their products to the developing country at an affordable price. Here, a just outcome is achieved that would have been impossible without regulatory intervention.

Can you see that the first example, while competently written (and likely to achieve an excellent mark in high school, for example) is only descriptive? It just explains and describes, without looking at what the bigger-picture context is, or what consequences flow from changes in the law, which the second one does.

TIP
Do not confuse critical thinking with criticising—critical thinking is not necessarily negative.

In addition to being called upon to critically analyse a particular issue or argument, you will need to be able to apply critical thinking when you read cases, to examine for example how the law of precedent applies or is being used by the court (see Chapter 10) or how a particular statute may be interpreted (see Chapter 11). In first-year law, you will learn the mechanics of problem solving—for example, in this book we use the 'IRAC' acronym to help you learn a step-by-step process: to identify the **I**ssues, identify the applicable **R**ule or law, **A**pply it to a set of circumstances, and reach a **C**onclusion. This is a useful way to get started, and once you master it across your studies you will find the acronym itself fades to the background and you will naturally problem solve. This is similar to when you are learning to drive a car, where each step in the process of indicating, slowing down, turning, changing gears and so on is taught, but over time the steps are done with flow, naturally, without specific thought.

In our many combined years of experience in teaching first-year law, we have concluded that, after poor time management, failure to develop critical thinking skills is the second major reason students do not perform as well in their first semester as they would have liked. Students often have difficulty seeing that regurgitation of information is not the goal in law school—it is about thinking, analysing, reflecting and developing persuasive arguments.

EXERCISE: CRITICAL THINKING

Here is an example of an actual question from a first-year examination paper:

> 'The rule of law prevents citizens being exposed to the uncontrolled decisions of others in conflict with them … Officers of the state are not permitted to imprison or otherwise deal forcibly with citizens or their property merely because they think it is their duty to do so.'
>
> Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) *Quadrant* 9, 10.

Discuss the application and development of the rule of law in Australia in light of the above quote and the materials you have examined this semester.

This is a very common way of asking essay questions—providing a quote followed by a question. If you respond to this question by stating what the rule of law means, refer to early theorists who spoke about the concept, and describe landmark events that developed the rule of law in England and Australia, you will be lucky to achieve a pass mark in law school, particularly if the exam is open book. This comes as a bit of a shock to most first-year law students, who did exactly that in high school or in another degree and got marks over 90 per cent. Why? Because it is merely descriptive, regurgitating what is in the text and materials provided. The information is not wrong, it is just limited. It is enough to scrape through, but not enough to excel. To achieve a better mark in a law essay, you need to develop a line of argument and engage with the quote that is given and the question that is asked.

First, let's look at where this quote came from—it is from 2003, which is now at least 15 years ago, and it is by a former High Court justice who retired in 2013. We know it has been published in a journal, and the title tells us it is an article about judicial activism being the death of the rule of law, so it is important to consider that topic, and raise the relevant arguments. You may not know at this stage of the course what judicial activism is—we cover it in Chapter 10. But you will find that there are different schools of thought, so it is worth referring to them and forming an opinion of your own.

Do you think that the rule of law—which requires decisions to be made according to law, and law being applied the same to everyone—is compromised when judges, faced with an injustice or other situation that does not neatly fit within the law, go ahead and change the law, or make new law? Does that make it an 'uncontrolled decision', to use the words in the quote? Or do you think that judicial discretion is necessary and important, and does not compromise the rule of law? Can you give examples to support your view? *Mabo*, which we cover in Chapter 9, comes to mind. Indigenous people, law and perspectives definitely come to mind when one reads the words 'deal forcibly with citizens and their property', so this is fertile ground for discussion in this essay. Indigenous people have been dealt with forcibly from the eighteenth century, through to today—with ongoing policies of segregation, assimilation (leading to the Stolen Generations), the White Australia Policy (1901) and the Northern Territory Intervention (2007). Perhaps as one point in your critique you might say that the rule of law is fine in theory, but if the law is itself discriminatory, then applying it will not achieve useful outcomes.

The final paragraph to TLO 3, (d), involves the ability to approach legal issues and generate appropriate responses in a creative manner. This reflects the fact that, not only is there rarely a single conclusion, there is also rarely only one path to each conclusion. Being creative means being open to possibilities—be they possible alternative interpretations of a legal issue or situation, or possible alternative responses or solutions. The best solution for the client may be 'left field', 'out of the box'—in short, innovative. A component of creativity can be looking for synergy—ways in which the interests of opposing clients could be effectively accommodated. The parties may be focused on their fixed positions, but you can identify their underlying interests and use a creative process to brainstorm solutions, in conjunction with the lawyer for the other side and/or a third party facilitator. See Chapter 3 for more on negotiation and mediation processes.

Take this real example of a neighbourhood dispute between the owners of two apartments in a complex. Downstairs lived an elderly lady with a dog and a garden, and upstairs lived a young family with three children aged between four and 10. Both had made complaints against the other—the older lady was alleging the children were harassing her dog by throwing things

at it from the upstairs balcony, and that the noise from the children thundering around the apartment was affecting her amenity. The family was alleging that the dog's barking was a constant disturbance, and they were fed up with looking out the window to the untidy garden below, which was overgrown with weeds, and the smell from the older lady's rubbish, which was not regularly taken out. They were also sick of hearing her banging on her ceiling with a broomstick. The dispute had reached the point where both parties were making each other's lives a living hell.

In the shadow of the various litigious claims each was making against the other, the lawyers sat with the parties and looked at their interests, asking them to set aside their mutual loathing. In the process, it became apparent that the family had outgrown the apartment but could not afford to buy a house, and that they had moved from another state, so they didn't have access to a good support network to give the parents an occasional break from the children. It also became apparent that the older lady had few family members and was struggling to maintain the place, relying upon their occasional visits to help her with the shopping, the garbage and the garden. She had long since given up trying to walk the dog because she was afraid he would pull her over on the leash, but at the same time she couldn't really give up the dog because she and her late husband had bought it as a puppy and it was her only companion.

Now that the parties had moved beyond their initial positions, and understood what life was like for the other party, options for creative problem solving arose naturally. Before long, the children were taking the dog for walks (the dog now barks less and is happier) and enjoying playing in the older lady's yard; the mother was able to take time out to care for the garden, which she loved; and the older lady enjoyed minding the children while the parents went out on an occasional date together—they were the grandchildren she never had. They now laugh about how things used to be between them. But imagine if their lawyers had only stuck to the issues in dispute, addressing the issue from the perspective of trespass, nuisance, animal cruelty, and so on? Even if the legal issues were addressed, the hostile environment would have remained, and further legal issues would probably have arisen. In which option has the lawyer served a more useful purpose? Is the goal to pursue a legal competition, extract maximum legal fees from clients, and have one's day in court, or is the goal to pursue lasting solutions, and to minimise cost and delay?

REFLECTION

What can you do, as a law student, to develop your creativity in law? One way could be to keep your mind open. Another could be to make sure you do not stifle the creative process for other students. If, for example, they say something that you think might be left field, and you can't see how it is relevant, try to imagine how it could apply or be used to further the discussion, rather than shutting the person down. Instead, try to piggy-back on the 'bad' idea to come up with a good idea, or use the 'bad' idea to look at the situation from a new angle. What other options can you think of?

RESEARCH SKILLS (TLO 4)

> Graduates of the Bachelor of Laws will demonstrate the intellectual and practical skills needed to identify, research, evaluate and synthesise relevant factual, legal and policy issues.

Research skills are often encompassed in a broader graduate attribute of information literacy, meaning being able to recognise when information is needed and to use appropriate

research methods to locate and use relevant information. This encompasses understanding the relative value and authority of different sources, taking into account who created them, when, and for what purpose. A variety of resources can be used, including library resources in print and online: databases to locate cases, legislation, law journal articles, government reports, looseleaf commentary services, and so on. Chapter 5 is dedicated to developing practical legal research skills using these resources.

TIP

Legal research should be recognised as a winding road—it is rare that a course of enquiry will lead directly from the question to the answer. Instead, what you find may answer some aspects and at the same time raise new questions, and you are likely to wind and loop around, a process that can in fact be endless, and you only stop because you have exhausted your time and energy, not because you have exhausted every possible answer.

CONTEXT: TO WIKI, OR NOT TO WIKI, THAT IS THE QUESTION

Wikipedia, the online free encyclopedia, is increasingly popular. It is a form of wiki, which is a collaborative website that can be directly edited by anyone with access to it. There is nothing wrong with using Wikipedia as a way to get started on a topic you know nothing about, but it is only a start and it is not legal research! Seeing that anyone can create and update Wikipedia entries, the information there may be misleading or incorrect. Also, it is unacceptable to cite Wikipedia as a source in a legal essay, as it has no real authority. In any event, it will always be a secondary source, so you need to do a separate search for the primary documents and other sources referred to in the Wikipedia entry, and decide for yourself whether they are relevant to your research or not.

Particularly important for the modern student is understanding that there is a hierarchy of authority in sources. For example, a book by a leading expert commentator and published by an eminent publisher will carry more weight than a blog that allows anyone to post their views. Government reports are highly respected, but may be challenged where they are written with a particular motivation, such as to justify a government approach or decision. A report of an international organisation such as the United Nations may carry a lot of weight, depending on the circumstances. A non-government organisation (NGO) report may be more or less respected, depending on how well regarded the organisation is. For example, a report of Amnesty International is likely to be more authoritative and reliable than a report of a small organisation called something like 'United Manhood Against Female Domination'. NGOs that are accredited with the United Nations will generally have more credibility than those that are not. Similarly, the official website of the Department of Foreign Affairs and Trade will be more reliable as a statement of government policy than a website created by a private individual to express their own views on Australia's foreign policy.

EXERCISE: ASSESSING SOURCES

Assume you are undertaking some research on access to justice for Indigenous Australians. Let's say you find the following:

1 an Australian Law Reform Commission (ALRC) report that shows Indigenous people are afforded less time with their lawyers and have higher rates of incarceration
2 an appeal decision from the Supreme Court of Western Australia that overturned a conviction where it was shown that the Indigenous Australian defendant did not have access to an interpreter during the trial and did not speak fluent English
3 an article in the *South Sydney Herald* quoting Indigenous Australians saying they get a raw deal and don't feel that they have an equal degree of respect from people in the law
4 an amendment to the US Constitution to the effect that every person has the right to a fair and proper trial, and the right to legal representation
5 a webpage by the Aboriginal Legal Service, citing Australian Census data
6 a World Vision report on the lower birth weight and educational opportunities for all rural Australians, particularly those in remote Indigenous communities
7 an Australian High Court decision stating that everyone has a right to a fair trial, but that this does not extend to a right to legal representation.

How would you rank the authoritative value of these sources? Are any of them irrelevant? Do any of them refer to a secondary source, suggesting that you would be wise to access the original source and cite that instead? What do these research findings suggest? Do you have enough information to prepare a legal argument on the topic? If not, where else might you look for further information?

Go to Oxford Ascend for answers to this exercise.

COMMUNICATION AND COLLABORATION (TLO 5)

Graduates of the Bachelor of Laws will be able to:

a Communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences; and
b Collaborate effectively.

Law graduates understand that the key way lawyers ply their trade is by communication. No amount of legal knowledge or analysis is of any use if it cannot be communicated effectively to clients, and to the court. The drafting skills used depend on the purpose of the written communication, be it drafting a letter of advice, a legal pleading or a brief to counsel. Speaking skills also depend on the purpose of the communication—to elicit information while taking instructions from a client or preparing a witness statement, or when manoeuvring a person into revealing information in the witness box while being cross-examined. It is common also that lawyers work together, including for example a partner, lawyer and paralegal in a law firm, along with a barrister, plus non-lawyers including expert and lay witnesses, and so on. Therefore it is important for law graduates to be able to collaborate and communicate effectively, appropriately and persuasively, taking into account their various audiences.

Legal communications can be informative, analytical, persuasive and argumentative. At all times, lawyers remain cognisant of the outcome they seek to achieve, the point they seek to get across, and the optimal manner and method in which to communicate. Along the way, they monitor the effect their communication is having, and adjust their style and content accordingly. Within a law school context, students have various opportunities to develop oral communication skills—participation in class discussion, class presentations, client interviewing, mooting and witness examination. Likewise, they have a variety of opportunities to develop writing skills—essays, problem questions, court reports, legal correspondence, case notes and draft court documents. These are covered in Chapter 6.

Although being able to work effectively with others to achieve a desired outcome is fundamental and critical, law students tend to be highly competitive and less interested in working collaboratively, particularly where all members of the group will be assigned the same mark. But the reality is that group work in law school is authentic, in the sense that during your career it will be necessary to work collaboratively with people of varying competence and efficiency; and the importance of having the skills to manage potential pitfalls and maximise the opportunities of working with others cannot be overstated. Those skills are developed with practice, over time, and often with a great deal of frustration. Chapter 6 looks in more depth at both communication and collaboration.

TIP

Discussions in class and in online forums facilitate expression of different views and perspectives. Some may 'push your buttons' emotionally, and you may be tempted to move from discussion to all-out argument. Remember to separate the 'person' from the 'problem'—attack what the other person *said*, not who they are. Also, sitting quietly and trying to understand the reasoning behind another student's view is a good way to develop your intellectual flexibility. You can always agree to disagree.

SELF-MANAGEMENT (TLO 6)

Graduates of the Bachelor of Laws will be able to:

a Learn and work independently; and
b Reflect on and assess their own capabilities and performance, and make use of feedback as appropriate to support personal and professional development.

The sixth TLO, which is on self-management, describes the ability to learn and work independently, to reflect on feedback and assess one's own capabilities and performance. But the reality is that self-management comprises a vast amount of territory—it includes the things we do to look after our physical selves, our emotional and mental wellbeing, our work–life balance, our emotions, our time, our goals and our career. It encompasses a degree of self-awareness—awareness of our own strengths and limitations, our opportunities and threats. It also encompasses our capacity to harness resources necessary to achieve outcomes.

Important areas of self-management include:

- **Direction**—having a clear sense of purpose and motivation in our professional lives. This comes from assessing where we want to go, and how we are going to get there, and having a process to ensure we take regular small steps towards our goals. Having a sense of purpose and direction for the future makes us more focused and motivated in the present.
- **Growth**—being able to identify the areas in which we need to grow and develop professionally and personally. This requires a degree of self-reflection—identifying where we could have done better, where we have gaps or areas we feel lacking in confidence or understanding, and deciding on courses of action to grow and improve. For example, we may have become demanding when someone did not do what we wanted them to do. On reflection, we may realise that our behaviour was aggressive when we wanted it to be assertive, and we might attend some assertiveness training, read a book on it, or just try our own techniques to remain assertive and not progress into being aggressive and demanding.
- **Priority management**—having a method of listing what needs to be done and to assess relative priorities. Lawyers in practice often run several matters for several clients at once, and steps need to be taken at various times. Lawyers need to have processes to make sure they do not miss court deadlines and appointments.

- **Work–life balance**—there is little point in working oneself into the ground, so that any time outside work is spent recovering from it. Work to live, don't live to work. You may, from time to time, need to work ridiculous hours on a case, just as you may in law school need to tip your balance in favour of studying in the lead-up to exams. The trick is to have breaks planned, and not stay out of balance for too long.
- **Emotional intelligence**—understanding, using and managing emotions in relation to ourselves and others. Having a high intelligence quotient (IQ) is no guarantee of success in a career in law. It must be coupled with a high emotional intelligence quotient (EQ). We must maintain professional composure and be capable of separating our own emotions about a client's case, about the behaviour of others, and about fairness and justice from the outcome that the client is seeking.
- **Awareness**—we need to inform ourselves about things that can have an impact on our personal performance. These may include stress, anxiety and depression. Being aware of the risk of depression, and the high levels at which depression is experienced in the legal profession, and knowing the signs, can ensure we take remedial steps at an early stage. Similarly, knowing what triggers stress and anxiety allows us to take measures to reduce the build-up, including activities that help to release stress.

Go to Oxford Ascend for worksheets and fact sheets on self-management.

EXAMPLE: PRIORITY MANAGEMENT TECHNIQUE

A tree diagram is a useful way to manage priorities. The trunk represents the overall objective. The major branches are the major strategies. The smaller branches are the individual actions and steps to address the strategies. Figure 1.4 is an example.

FIGURE 1.4 TREE DIAGRAM: GET A LAW-RELATED JOB OR VOLUNTEER POSITION FOR THE SUMMER

IN DEPTH

A SAMPLE SEMESTER AND WEEK

Let's assume a full-time student in their first semester of straight law is studying the following subjects, with the following assessment items:

- **Introduction to Law**—court report (25 per cent) due Week 5, case note (25 per cent) due Week 9, exam (50 per cent) during formal exam period.
- **Criminal Law**—first problem-solving assignment (25 per cent) due Week 4, second problem-solving assignment (25 per cent) due Week 8, exam (50 per cent) during formal exam period.
- **Contracts**—class presentation (10 per cent) Week 3, essay (40 per cent) due Week 10, exam (50 per cent) during formal exam period.
- **Torts**—mid-semester exam (50 per cent) Week 7, final exam (50 per cent) during formal exam period.

Plotting these assessment items across the semester would look like this:

WK 1	WK 2	WK 3	WK 4	WK 5	WK 6	WK 7	
		Contracts: class presentation	Criminal Law: first assignment	Intro: court report		Torts: mid-sem exam	
WK 8	**WK 9**	**WK 10**	**WK 11**	**WK 12**	**WK 13**	**WK 14**	**STUVAC/ EXAMS**
Criminal Law: 2nd assignment	Intro: case note	Contracts: essay					Intro Criminal Law Contracts Torts

Most first-year students would get started on their Contracts class presentation, and leave their first Criminal Law assignment until after the presentation was over. But this means giving three weeks to an assessment item worth 10 per cent and only one week to an assessment item worth 25 per cent. It is better to prepare them both at the same time, as well as getting started on the Introduction to Law court report and making summary notes for the Torts mid-semester exam.

A useful method is to break down each assignment into a set of tasks. For example:

- **Introduction to Law: court report**—read the instructions, attend court, type up notes, reflect and think, drafting, references, proofing, submission.
- **Criminal Law: first assignment**—identify the relevant issues in the problem, learn the elements of the relevant crime, apply the law to the facts, reach a conclusion, draft the answer, proofing, submission.
- **Contracts: class presentation**—read about the topic, plan what to say, prepare slides, practise, present.
- **Torts: mid-semester exam**—prepare summaries of each topic, do reading on topics that do not make sense, do practice questions from a past exam, study the text and other readings, refine summaries, do exam.

These tasks could then be scheduled into your diary for each week, through creating 'artificial deadlines'. Here might be an example of your diary for Week 2:

This diary allocates the expected amount of hours in total to university studies—10 hours per subject per week. In this particular week, there have been more hours allocated to Contracts and Criminal Law, because of the assessment tasks soon to be due. It can be daunting for a new law student to see such a weekly schedule, and realise that the bulk of the work is done outside of class time. But it is important that you understand this early in your studies, as it can help you avoid seriously underestimating the amount of work needed to succeed in law school.

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
10–11: Travelling to Uni—read Criminal Law text on train 11–1: Criminal Law lecture 1–2: Lunch 2–3: Criminal Law tutorial 3–5: Intro seminar 5–6: Travelling home—more reading Criminal Law text on train 6–8.30: Dinner and TV 8.30–11: Prepare summary notes for Criminal Law, read over problem question	9–11: Torts reading for this week 11–11.30: Morning tea 11.30–1.30: Weekly Intro reading 1.30–2.30: Lunch and walk, call friend for chat 2.30–4.30: Read on topic for Contracts class presentation, list unclear areas, watch YouTube video 'Giving Effective Class Presentations' 4.30–6: Gym 6–8.30: Dinner 8.30–10.30: Read Intro court report instructions and background articles	8–9: Travelling to Uni—review this week's Torts topic on train 9–12: Torts class 12–1: Lunch 1–3: Library research: court process for Intro, Contracts topic for presentation 3–4: Intro workshop 4–5: Meet with Intro study group 5–6: Meet with Torts study group 6–7: Travelling home—read Contracts text on train 7–8.30: Dinner 8.30 onwards: Catching up with friend to see a movie	Sleep in 11–12: Prepare Torts summary notes from this week's topic 12–1: Travelling to Uni, read over Contracts photocopies made in library on Wed on train 1–3: Contracts lecture 3–4: Contracts tutorial 4–5: Travelling home, listen to iPod on train 5–6: Prepare summary notes on Contracts 6–8.30: Dinner 8.30–10.30: Plan Contracts presentation, type up, read out loud	9–5: Work part-time job 5–6: Practise Contracts presentation, changing some paragraphs to point form 6–7: Criminal Law reading for next week 7–8.30: Prepare slides for Contracts presentation, rehearse presentation using slides, check timing and adjust, convert notes to points only 8.30 onwards: Going to party!	Sleep in Swim Housework 1–4: Work on Criminal Law assignment—complete first full draft including references 4–5: Torts reading for next week 5–6: Email and chat on phone to friend 6–6.30: Quick practice of presentation for Contracts 6.30 onwards: Getting ready and going out!	Day off

Self-management is not something you master—you will be a student of self-management for the rest of your life. There will always be things that throw us off balance, and it is just a matter of recognising when this has happened and taking steps to move back into balance. It can be useful to have people we know and respect who can identify when we are out of balance, in case we do not recognise it ourselves. For example, law students can have a habit of being perfectionists. That is a positive trait, and is how you got to where you are today, but it can also be a negative trait if it means we fail to hand an assignment in on time because we are trying to make it perfect. Nothing is perfect—everything is a compromise. This is because we only have 24 hours in a day, and we all have several conflicting demands. We must make sure we produce quality work without being obsessive about it.

Understanding your personality

Part of self-management involves understanding your personality, as this is a guide on how you work best, how you are likely to respond, and where your character strengths and areas for development may lie. Psychologists have created a number of personality preference indicators that classify people according to their consistent patterns of thought, feeling and

action. The most famous is the Myers–Briggs Personality Type Indicator(R) (MBTI). It divides personalities into 16 types on four dimensions:

- **Extraverted or introverted**—whether we draw our energy from the external world, including people in groups, or internally, 'recharging our batteries' away from people.
- **Sensing or intuitive**—whether we live in the 'now' and take in information using our five senses, or whether we tend to make intuitive connections and see information with a more global, big-picture view of possibilities and dreams.
- **Thinking or feeling**—whether we make decisions based on what is logical in our head (rational thinking) or what feels right in our heart (values).
- **Judging or perceiving**—whether we make a final and snappy decision or whether we like to hold off on deciding so we can consider all the options.

Of course, in practice all of us are a bit of all of those things—but most of us tend to be one or the other in each of those dimensions, most of the time. The 'thinking–judging' ('TJ') combination is very common among lawyers (being logical and decisive).

TIP

If you experience illness or misadventure, there are avenues for seeking an extension or special consideration for your assessment. Part of self-management is recognising when this is an appropriate course of action, and taking timely steps. However, special consideration is not always available in life beyond law school, and success can require performing to a deadline despite feeling unwell, or feeling hurt by a relationship breakup or financial woe. Getting ready for this reality while at law school, through pushing ourselves to perform despite having a circumstance that could warrant special consideration, can have lasting benefits beyond the specific assessment task. It can also give feelings of personal strength to have overcome obstacles of which others know nothing about (which is what happens in careers, where we perform effectively at work and may not choose to disclose personal difficulties we are facing). The trick is having sufficient self-awareness to know when you can manage the stress and push on, and when you can create bigger issues for yourself unless you take time out to address the problem.

Knowing the key personality dimensions can help us in our interaction with others. For example, a client who is intuitive rather than sensing is likely to be impatient with step-by-step explanations. Once they have grasped the issue, they feel they have the gist and do not like to have the point laboured. On the other hand, a person who weighs up evidence is more likely to appreciate a logically structured overview and an explanation that proceeds step by step. Some clients, particularly introverts, do not like being hit with sudden floods of information and then being expected to discuss and decide immediately. They may like to go away and read legal information, think about it, and make a time to meet to discuss it further. If we can detect preferences like these from clients' behaviour, we can tailor the way we provide information to them.

Knowing the key personality dimensions can also help us in managing ourselves. For example, if you are strongly a 'thinking' person, you can remind yourself to think about how the client must be feeling, and have some empathy for their plight. If you are strongly 'intuitive', you can run your big-picture, novel legal arguments and law reform proposals past someone who is 'sensing', so they can help you to think through the practicalities and present hurdles that may arise.

Reflective practice

Paragraph (b) of TLO 6 refers to the use of feedback for personal and professional development. Feedback can be difficult to take—it is not always delivered in the form or manner we are most receptive to. There are forms of feedback in law school that first-year law students may not even recognise as feedback. For example, a mark is a form of feedback, as to your performance relative to the intended learning outcomes (ILOs)—the subject guide should provide a description of the criteria for assessment, and some may also provide a description of what standard of

performance will receive what sort of mark. Below is an example on class participation, which was part of assessment for an introductory law unit:[18]

Class Participation Standards
The following is a guide as to different qualities of class participation and the mark and grade such participation would receive.
High Distinction (8.5–10)

- The student is always prepared for class and is always interested, motivated and attentive.
- The student always responds when called on and often asks pertinent, thoughtful and insightful questions but does not dominate the class to the detriment of other students. The student's comments show an ability to think critically, deeply and to make connections between the current class and previous classes, and between the classes in this subject and in other subjects.
- The student engages in the individual tasks seriously and effectively. The student tends to take a leadership role in group activities but is not domineering while doing so.

Distinction (7.5–8)

- The student consistently prepares for class and is interested, motivated, and attentive in class.
- The student will always respond when called on and will often volunteer information, ask questions or develop points made by other students.
- The student's comments and questions are thoughtful and show that the student has engaged with the materials for class and with the class itself.
- The student takes seriously and thinks carefully about the individual class exercises and is actively involved and motivated in the group activities.
- The student is respectful of others, listens to their views and gives space for other students to contribute to the class.

Credit (6.5–7)

- The student often prepares for class.
- The student generally responds when called on in class.
- The student sometimes volunteers information. The student's contributions sometimes display evidence that the student has engaged with and thought critically about the materials for class and the class itself. Sometimes the contributions are superficial, irrelevant and a product of uniformed guesswork rather than thoughtful consideration.
- The student takes seriously the individual and group exercises in class.
- The student generally respects others in the class and works co-operatively.

Pass (5–6)

- The student sometimes prepares for class.
- The student listens in class and takes notes.
- The student does not volunteer information but will respond if called on.
- The student's responses are sometimes brief, superficial, irrelevant or poorly articulated. The student makes a genuine attempt at the individual and group exercises in class but sometimes does so superficially, without giving significant thought or effort to them.
- The student may occasionally inhibit the ability of others to learn by disrupting them (talking to them or being loud and domineering) or wasting the lecturer's time (for example with questions or comments not pertinent to the topic under discussion).

18 This is from an 'Introduction to Law' unit taught at the former University of Western Sydney.

In addition to the mark, it is common in law school for marking rubrics to be used. These are a matrix with descriptions of particular levels of performance, which enables the marker to tick or circle which cell is applicable to the student. This saves the teacher from handwriting the same thing over and over, and enables greater consistency in the marks awarded. There is usually also space at the bottom of the matrix for the teacher to provide handwritten comments which apply only to the individual student. An example of a marking rubric (taken from the same learning guide as the 'class participation standards' above) for a letter of advice is given below. This assessment involved students being given a scenario and having to research it and then write a letter of advice to the client. More about this sort of communication is provided in Chapter 6.

CRITERIA	UNSATISFACTORY	NEEDS IMPROVEMENT	MEETS EXPECTATIONS	EXCEEDS EXPECTATIONS
PROVIDE LEGAL ADVICE—TOTAL 4 MARKS				
Identifies legal issues and summarises law	Inadequate restatement of facts, identification of legal issues and/or summary of law failing to refer to relevant cases and statutes or secondary sources, or fails to address elements of this.	Limited restatement of facts, or identification of legal issues and/or summary of law referring to cases and statutes, and secondary sources which may not be relevant.	Clearly and logically restates facts, identifies legal issues and summarises law referring to relevant cases and statutes, and where appropriate, secondary sources.	Comprehensively, logically and accurately restates facts, identifies legal issues and summarises law referring to relevant cases and statutes, and where appropriate, secondary sources.
Provides legal advice to client	Legal advice to client inadequate or largely irrelevant.	Provides limited and sometimes irrelevant legal advice to client in light of sources referred to.	Provides effective, logical and relevant legal advice to client in light of sources referred to.	Comprehensively and accurately provides legal advice to client in light of sources referred to.
USE APPROPRIATE LEGAL STYLE AND PRESENTATION—TOTAL 4 MARKS				
Uses appropriate layout: address, reference, headings, paragraphing salutation	Poor presentation in relation to most elements: address, reference, headings, paragraphing salutation	Presentation inconsistent or ineffective in relation to some elements: address, reference, headings, paragraphing, salutation	Effectively presents letter, including address, reference, headings, paragraphing salutation	Letter presentation shows particular innovation and flair, without sacrificing clarity or purpose
Writes in plain legal language	Writing style generally vague, ambiguous, inappropriate, verbose or jargonistic.	Writing style inconsistently clear, precise or concise or fails to avoid legal jargon.	Writing style consistently clear, precise and concise and avoids legal jargon.	Writing style demonstrates exceptional clarity, precision and conciseness.
Writes accurately and within word limit	Frequent spelling, punctuation and grammar errors, and fails to observe word limit.	Frequent spelling, punctuation or grammar errors, or fails to observe word limit.	Letter mostly free of spelling, punctuation or grammar errors, and within word limit.	Letter flawless in relation to spelling, punctuation and grammar and word limit.

CRITERIA	UNSATISFACTORY	NEEDS IMPROVEMENT	MEETS EXPECTATIONS	EXCEEDS EXPECTATIONS
CITE SOURCES ACCURATELY—TOTAL 2 MARKS				
Includes pinpoint references using the *Australian Guide to Legal Citation* (AGLC) style	Poor, inconsistent and inaccurate citation according to AGLC.	Limited or inconsistent citation according to AGLC. Frequent errors.	Accurately cites according to AGLC, may be some minor lapses or errors.	Comprehensively, accurately and consistently cites according to AGLC.

Feedback may also be provided orally, be it during class or after a class presentation or moot exercise. It can also be provided electronically; for example, if there is an online discussion board for a class. The feedback can come from a teacher, or it can come from a fellow student. In some cases there is an opportunity for 'feed forward', which allows students to receive feedback from an academic or tutor on a draft of their assignment, or to undertake constructive reflection on drafts between peers. Feedback can even be from yourself! You could, for example, have a go at marking your own assessment task against the criteria before you hand it in—you may realise there is something you have forgotten, and there may be time to address it before submission. This is a form of feed forward.

TIP

'Reflective practice can be defined as a student's capacity to reflect on their own strengths and weaknesses, to learn from constructive criticism and to practice critical reflection by monitoring their own work performance, interpersonal interactions, and personal and professional development.'[19]

The key is how we use feedback—there is a path to wisdom and growth, and a path to frustration and rejection. The path to wisdom and growth involves reflective practice—a process by which we consider the feedback we have received, use it to identify areas of strength and weakness, identify areas we need to develop further (in our knowledge, skills or manner) and how to achieve that development (independent enquiry, peer support, mentoring, or academic or personal counselling), and then putting in place a plan of action for development, followed by a reflection on whether we have actually achieved the desired outcome. There is no hierarchy between methods of achievement—doing it yourself is not superior to gaining assistance; the method you choose depends on the nature of the area of development. It may be something that simply requires practice, such as developing comprehension skills from reading, in which case it may be highly appropriate to do this independently. But what is required may involve seeking advice and guidance from someone who specialises in the area you are seeking to develop—this may be a law librarian, an academic counsellor, a psychologist or a language support professional. Help-seeking behaviour is a far from being a weakness—it is a natural aspect of people with highly developed skills in self-management. Even Olympic athletes have coaches.

TIP

What if you do not agree with the feedback you have been given, or the mark? The first step is to fully review the feedback and consider it in the light of the criteria and standards provided in the subject guide. The second step is to meet with your teacher to obtain further feedback on the assessment task. This may result in a meeting of the minds—you may understand where you went wrong and see that the mark was correct, or the teacher may realise there has been some administrative or other error and agree to correct your mark. If this does not happen and you still feel there has been an error in your mark, universities usually have a review and appeals process. You can seek more information at your university's student centre or on its website.

19 F M Anzalone, 'Education for the Law: Reflective Education for the Law' in N Lyons (ed), *Handbook of Reflection and Reflective Enquiry: Mapping Ways of Knowing for Professional Reflective Enquiry* (Springer Science + Business Media, 2010) 89–93, cited in Anna Huggins, Sally Kift and Rachael Field, 'Implementing the Self-management Threshold Learning Outcome for Law: Some Intentional Design Strategies from the Current Curriculum Toolbox' (2011) 21(2) *Legal Education Review* 183, 209.

Reflective practice is a key professional skill, and as this is increasingly being recognised; some academics are incorporating it into assessment. You may find assessment tasks in law school, such as a reflective journal (see Chapter 6) or a requirement to post reflections to an online discussion board. Working on these throughout the semester can be a way of deepening your understanding as you proceed through your studies. Preparing all reflections the night before the assessment is due is not only questionable from the perspective of academic integrity (see below), but also severs a valuable learning opportunity.

TIP
As with any new undertaking, it may feel uncomfortable at first to engage in reflection. Try writing a personal journal for a few weeks, reflecting on one or two experiences from your day, and before long you will find that reflecting on your learning comes quite naturally.

Lifelong learning

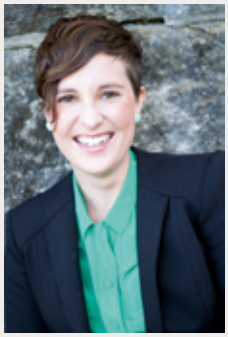
Not explicitly included in the TLOs, but ostensibly encompassed by TLO 6 on self-management, is the important graduate attribute of lifelong learning—an attitude and recognition that one never stops learning. It is a commitment to continuously update legal knowledge, skills and awareness. This is essential in the legal profession, because law is not a static body of rules and principles—new cases are decided and new legislation is enacted on a daily basis. Court procedures are amended and practice notes are issued by courts. Professional and personal development literature continues to grow, with new approaches and insights being made. Skills such as negotiation and advocacy can never be perfected—even the most famous mediators and barristers can find ways to improve.

A commitment to lifelong learning entails recognising when your current knowledge, skills, attitudes and other attributes need updating or adjustment. You might subscribe to email updates, read law journals, or attend conferences and workshops, to name just a few. You might volunteer in a community legal centre one night per week, support Aboriginal organisations or contribute to a homeless shelter. All these experiences facilitate your learning of the lived experience of the law by vulnerable groups.

TIP
We recommend that you practise setting a fortnightly time in your diary to check a legal source of some description. For example, you could visit <www.austlii.edu.au> and look at the latest decisions. Or, if you hear about a case in the news, search for the names of the parties and try to find the decision to read. This will help to get you in the habit of seeking out updated information, and habits once formed are easy to sustain.

Practitioner profile: Felicity Graham

Barrister



I am a barrister at Black Chambers. I am based in Sydney and practise in Australia and overseas.

My practice is focused on public law and human rights litigation, predominantly criminal law, intentional torts (e.g. unlawful arrests; excessive force by police), migration cases and inquiries and inquests focused on systemic issues.

Continuing the tradition of the legal profession to work 'for the public good', many of my cases involve appearing *pro bono*.

Since August 2016, I have been acting with a team of other lawyers for a group of anti-government protestors in Nauru, commonly known as the Nauru 19. They were accused of public order crimes following a protest against the indefinite suspension of the parliamentary Opposition and the unlawful expulsion of the entire judiciary of

the country. The case involves scrutiny of the Executive's use of power and overreach, and calls in aid the constitutional protections enjoyed by citizens to assemble and express themselves in dissent.

I am also a member of the New South Wales (NSW) Sentencing Council—a group of experts from across the legal profession as well as community members. It advises the Attorney-General on sentencing matters, conducts research, and reports on sentencing trends and practices. In this role, I am able to build on the work I did at the Aboriginal Legal Service (ALS) to bring about reforms to the criminal sentencing system.

At the ALS I was part of a team of lawyers and field officers who pursued strategic litigation and advocacy in the media to address systemic issues in the criminal law affecting—often disproportionately—some of the most disadvantaged members of our community. We ran cases and campaigns on bail, sentencing, police powers, prosecution of domestic violence victims, bias in the judiciary and the rights of young people and people with mental illnesses.

I decided to study and practise law because I have a keen interest in the relationship between the State and individuals—particularly the most vulnerable and powerless of us. I enjoy pursuing the ways the law can ensure that the State's powers are not misused, and when they are misused, how the law can hold the State accountable and vindicate the rights of the individual. Practising in criminal law and intentional torts especially provides many avenues for litigating that State–individual power relationship.

The criminal law, particularly when it comes to sentencing, also allows you to delve into the experiences of your client and be a part of telling human stories to achieve the 'individualised justice' spoken of in the 2013 High Court case of *Bugmy v The Queen*. In William Bugmy's case, I was part of a team of lawyers and Aboriginal community members who advocated, both in court and out, for recognition of the effects of profound deprivation when sentencing offenders. I enjoy being able to give my clients a chance to have their stories heard.

At the end of high school I missed out on a spot to study law at the University of Sydney. Instead, I started a Bachelor of Advanced Arts and then worked hard to transfer into a combined Bachelor of Law and Arts in my second year. In my last year of law, I studied at Leiden University, The Netherlands, on exchange. After graduating, I worked as Tipstaff to Justice Graham Barr in the NSW Supreme Court. That job allowed me to observe up-close and behind the scenes how the criminal justice system works.

Once admitted, I moved to Dubbo to work as a solicitor for the ALS. Over six years I worked in the Dubbo and Broken Hill offices, ultimately managing those offices, and then taking on the roles of Trial Advocate and Principal Legal Officer of the Western Region of the ALS. The incredible opportunities on offer and the challenges to overcome during my time at the ALS provided a perfect springboard to coming to the bar. Those years working in regional and remote communities turbo-charged my career in the criminal law and I forged really important relationships that I cherish every day.

Most weeks I am in court, cross-examining witnesses and making arguments on behalf of my clients to secure their liberty and protect their rights. But it is difficult to speak of a typical work day or week because my working life is so varied and unpredictable. One moment I will be addressing a jury in the District Court in Griffith and the next moment the case takes a turn and I will be seeking urgent relief from a ruling of the trial judge in the Court of Criminal Appeal in Sydney. Then I will be flying across the Pacific Ocean to Nauru and cooling off with a swim in the harbour after a day of twists and turns in court there. When I am not in court, I am doing research, giving advice, analysing evidence, writing submissions and predicting and preparing for the different eventualities in my next court case.

I love many aspects of my work—winning is definitely one of them. There is an immense degree of satisfaction in walking out of court with your client, liberty intact, rights vindicated by

compensation or a ruling on evidence, and a verdict in your favour. But even before you know the outcome of a case or where 'winning' could still mean years in jail for your client, I love the process of creating and building an argument. The law is a living creature and it's exciting to be a part of its growth and development through creative arguments.

Justice Kirby once said, 'Every day of liberty is precious. That is not a cliché of the law.' Those words often ring in my mind. The most difficult part of my role is the stress that comes with continually making decisions about how best to approach a case—decisions that affect people, decisions where the stakes involve someone's liberty and where there is no chance for a dress rehearsal.

In 2016 and 2017, I was counsel for the Central Australian Aboriginal Legal Aid Service (CAALAS) in the Royal Commission into the Protection and Detention of Children in the Northern Territory (NT). CAALAS gave a voice in the inquiry to the experience of hundreds of Aboriginal children locked up and locked out of community life through the systems of criminal justice and child protection. My role as counsel for CAALAS involved working with a committed and experienced team of lawyers and Aboriginal field officers to expose the disgraceful—and often unlawful—treatment of children in detention and the grave failings of the child protection system across Central Australia. I questioned experts across a range of fields from foetal alcohol spectrum disorder to hearing loss in the detention environment from the effects of racism on health, wellbeing and behaviour to the labelling effect of social and mainstream media portrayals of youth, and from policing to culturally appropriate education of children in detention, and so on. I also cross-examined ministers and government officials responsible for children in detention or in need of care. I appeared for children who had direct experience of the detention and child protection systems in the NT and who—in an unprecedented approach for such an inquiry—took the brave step of giving evidence about how the systems had affected them and how those systems should be changed. Throughout the inquiry, we advocated for solutions to promote respect for human rights and to secure the wellbeing of Aboriginal children by strengthening their connections to culture and community. It was a remarkable experience as an advocate to be part of a process aimed at achieving systemic changes, and to be giving a voice to those often silenced or excluded in debate and policy making.

The world of the courtroom accommodates a multitude of styles and advocates with different strengths. Of course, an ability to clearly communicate (usually complex) ideas is key, and you need to be able to adjust your style for a wide variety of audiences—your client, the bench, a jury of citizens.

The real mark of a successful lawyer is in their preparation and perseverance. There is no substitute for working really hard on whatever case comes across your desk. Because of the fast pace of litigation, an important part of preparation is being able to anticipate what issues might arise and being ready to address them to your client's benefit when they do. If the issues that you anticipate, interrogate, workshop and prepare do not arise in that particular case, then you can 'bank' that preparation and it is bound to help with another case down the track.

To work in the human rights field, and to be a part of a strategic legal practice, you need to hone your instinct for injustice—avoid becoming immune or inured to what is unjust in our communities—and then respond, not just with logic and critical analysis, but with creativity.

For me, moving to regional and remote NSW and working for the ALS provided so many opportunities for professional development, interesting work and forming life-changing relationships. It was an amazing way to kick-start a career as an advocate. I would strongly encourage anyone who wants to pursue a career in criminal law or human rights litigation to take on the adventure of working at an Aboriginal Legal Service somewhere in regional and remote Australia. While you are still a student or completing your PLT, a great way to get your foot in the door is to volunteer at an ALS office.

4 SUCCESS IN LAW SCHOOL

The pressure to succeed in law school can be great. Law school differentiates between students' capabilities to a much finer degree than does secondary education. Law students who have come to university directly from school are typically accustomed to being at the top of the class. At law school, everyone in the room was in the top of the class, and suddenly being 'average' can be a difficult thing to handle. This part of the chapter provides some tips and strategies for success in law school. But it is important to remember that 'success' is not always measured in marks. Involvement in extra-curricular activities, volunteer work or mooting can be just as important for mapping out your future. See Chapter 14, which discusses what you can do as a law student to become the lawyer you want to be.

BEING PRODUCTIVE

The competitive environment at law school means that law students can be the most over-extended group of students in any tertiary setting, and while they relish the challenge they also need tools to maximise the output of their study in a limited time period. This is part of the self-management attribute discussed under heading 3, above. Here are some tips and strategies that can help you be more productive.

- *Get organised*—make sure you keep a diary and a 'to do' list. At the start of each semester, put important dates such as assignment due dates and exam periods in your Outlook or other calendar/diary. Have a physical and electronic folder for each subject, with notes from class, summaries from readings and important cases under various tabs or folders (usually by class topic). Keep your study area clean and avoid clutter—whatever is not needed, you should throw out.
- *Plan and prioritise*—take a few minutes at the start of each day to plan what you will accomplish. Rank tasks according to how urgent and important they are, and do the most urgent and important first. Some things may not be of sufficient priority to do at all.
- *Speed-read*—you might consider taking a course that teaches you to read quickly. The average person reads between five and seven words at a time, without realising it. Speed-reading can enable you to read several lines, or even a whole paragraph, at a time. The benefits of this in law school, where the volume of reading is enormous, are obvious. Even without a course in speed-reading, you can get into the habit of skim-reading to identify important passages and slow down for them. These skills do not come overnight, and the more reading you can do, the better you become. Similarly, touch typing courses enhance your note-taking and essay-writing capacity.
- *Find synergies*—when you are busy, finding synergies can mean getting several things done at once, or, as the saying goes, 'killing two birds with one stone'. A part-time law job that involves learning an area of law doubles up as a form of study, and this is a synergy. A part-time job in a gym could also be a synergy in the sense of giving you a break from studying while at the same time maintaining your health and fitness.
- *Block out time*—the most difficult things to get done are those with no fixed time allocation. It is easy to make sure you get to a lecture which is on between certain hours on a certain

day, but what about reading a textbook? It can be useful to block out periods for things that otherwise have no specific time allocation—for example, setting aside Wednesday evenings to do case summaries.

- *Snippets*—be set up to study in small snippets by having some reading material with you at all times (even screen shots on your phone can be useful). You will be amazed how much more you get done if you use a bus journey, or the time waiting for the dentist or for a friend you are meeting somewhere. Getting five or 10 minutes' worth of study done in each of these otherwise wasted pockets of time can add up to hours across the course of the week.
- *Study groups*—get together with other students in the same subject and divide the non-assessable work between you. If there are eight key cases that week, and you have four in your group, each of you could read and summarise two, and then meet to brief each other on them, swapping written summaries of one or two pages.
- *Best time*—each of us has a 'most productive' time of day. Some are early risers, some like to work late at night. Everyone will remember times when they were 'in the zone' where they achieved great productivity and focus. These are our 'best times' and you can achieve a great deal of productivity if you time your study around your most efficient times. What might take you all day normally may take just a few hours when you work at your naturally most productive times.
- *Self-negotiation*—negotiate with yourself, do deals. For example, you might say to yourself that you will read Chapter 5 of a text and then go for a walk. Or you might proofread your essay and then watch your favourite television show. This is a way of getting that bit extra out of yourself. Remove things that will tempt you to procrastinate, such as having Facebook open, or a television on close by. If you have blocked out time to study, try turning off your mobile phone, or, if you cannot cope with that, at least turn it to silent. The cost in terms of productivity from even a small distraction can be great, particularly when you are trying to decipher complex legal concepts.
- *Back up*—be obsessive about saving your work in more than one place. Three is a good number. For example, you might save your draft essay on your laptop, on a USB stick and in the Cloud, or just email it to yourself each time you have updated it. Many students cause themselves a lot of unnecessary work (and stress) by failing to back up their work.

TACKLING ASSESSMENTS

Although the goal of academics is on students learning and understanding their subject as a whole, often the focus of students is on doing well in assessment. These two goals can connect well where the assessment tasks require demonstration of understanding of the subject. It is common for law subjects to include a number of assessment tasks—these may include a combination of exam, essay, problem-solving question, class presentation, moot or other activities. The substantive skills you will need to succeed in these assessments are covered throughout this book (including Chapter 5 on research, Chapter 6 on communication, Chapter 10 on precedent and Chapter 11 on statutory interpretation). The tips provided here relate to techniques for approaching some of these types of assessments, plus an introduction to plagiarism and its consequences (proper referencing, which avoids plagiarism, is covered in Chapter 5).

Law exams

Law exams rarely count for 100 per cent of the assessment in a subject, but they are still very important. Exam techniques include not only learning legal rules but also developing skills to apply them, especially for problem questions and essays (see below). This requires practising, in exam-like conditions, with past exams, hypothetical scenarios in your subject outline or contemporary news items on disputes, crimes or other wrongs.

Types of exams

There are four types of exams—open book, restricted open book, closed book, and take home.

An 'open book' exam is one where students can take in as much material as they want to, be it textbooks, summaries, dictionaries, law reports—anything besides communicable electronic devices. The reason for having an open book exam is that law school typically does not test memory, but tests understanding. It is artificial to expect students to memorise legislation when in legal practice they will have legislation and reference books to refer to. But having an open book exam does not mean there is no need to study. Few marks will be earned by simply looking up the topic of each question in the textbook and copying what is written in the text (indeed, this may result in issues of plagiarism).

TIP
Check with your lecturer about the requirements for referencing in exams. Usually footnotes are not required, but it is still necessary to refer to the source of your ideas; for example, by referring to the case name.

The most common pitfall in an open book exam is taking in too much material. The student then wastes time looking up and reading on the topic, instead of analysing and answering the questions. A golden rule is 'less is more'. Less material is more accessible and gives you more time writing rather than finding notes. Any material taken in should be organised with indexes, post-it notes and dividers so the information is 'at your fingertips'.

A 'restricted open book' exam is used to prevent students from making the error of taking too many materials into the exam. Students are allowed to take notes, which may be limited in the number of pages, and may or may not be allowed to take photocopies from texts. Students may be able to take their subject materials and textbooks into the exam. Essentially, the restrictions are decided by the examiner and communicated to students ahead of time, usually in the subject outline or brief. For this type of exam, you should apply the same organisational skills as for an open book exam (discussed above).

A 'closed book' exam is one where students are not allowed to take anything into the exam. These are uncommon in law. To prepare, students should condense their notes down to the very key points, and memorise those. They should also make a list of the key cases and memorise what point of law they stand for. Mnemonics are useful—these are methods to help remember things. For example, if *White's* case was about a drug dealer who tried to get a court to award him damages against a client who failed to pay for his drugs, and the court held that it would not rule on an illegal contract, a way to remember what the case stood for might be to think about white being the powder of the drug or white being innocence—clean hands, an unblemished record. It is worth having a friend or family member test you on the case list before the exam, with the helper calling out the name of the case and you stating what it was about and its legal principle.

A 'take home' exam is one where the exam paper is distributed to students with a certain amount of time (usually a few days) to complete it and hand it in. In a way, a take home exam is in between an assignment and an exam, as there is sufficient time to do research on the exact questions. It is by definition an open book exam, because students have access to information, including electronically available information, to preparing their answers. The plus side is that students have time to think about their answers and edit them, and the down side is that the quality of the expected answers is higher than for a regular exam, and may include referencing. Even though you have more time to do the exam, it is worth studying and researching the relevant topics before you receive the exam paper. It is also important to find a quiet place (which may be your home, a library or study space), communicate to friends and family that you will not be available, and switch off your mobile phone while you are doing the exam.

Types of questions

The types of questions included in law exams tend to be essay questions, problem questions, short-answer questions, and multiple-choice questions.

If you get an essay question, read it carefully, then prepare a skeleton response. Work out how many parts there are to the question and divide your time for writing between them. Say you had the essay question: 'To what extent did *Donoghue v Stevenson* change the face of Tort law? Discuss.' You would want to say what the state of Tort law was before *Donoghue v Stevenson*; what *Donoghue v Stevenson* was about; and what change it brought about. This is three sections, and if you have half an hour to answer it, allowing a few minutes to think and plan the answer, and a few minutes each for the introduction and conclusion, you have about seven minutes for each part. Being methodical like this will save you from spending 20 minutes discussing the first part and never getting to answer the question. When you have finished the answer, go back and read the question to make sure you have actually answered it fully.

TIP

Poor time management is the number one cause of failure in first-year law exams. The most perfect answers to the first half of the exam paper will mean nothing if you don't write anything for the second half. It is best to allocate time for each part of the exam and stick to it—if you finish the other part early, you can always come back to what you left unfinished.

Problem questions require you to read carefully and identify important words, perhaps by underlining, highlighting, or numbering them on the exam paper. Identify the issues and answer following a standard structure, referred to in Chapters 10 and 11, and also under 'Problem solving' in this chapter. The focus will be on identifying the issues contained in the problem question, recognising what law is applicable and how it applies, and what the outcome of the problem would be. This is discussed further below under 'Problem solving'.

Short-answer questions require about a paragraph-length answer; usually less than a page. They are usually presented as numbered subquestions within a part of the exam; if so, you should count them and divide your time for that part of the exam between them. Read them all before you start answering them. Write in full sentences, as if you were writing an essay, but without the introduction and conclusion. Write as succinctly as possible and try to give examples or authorities for everything you say.

Don't make your short answer so short that you have not given an explanation! For example, if the questions were all about whether evidence was admissible or not, and the scenario you

have to comment on is 'Clive says that Dimitri's wife told him Todd had confessed to her that he had murdered Bob', then writing 'Inadmissible—hearsay' is not enough information. A better answer would be:

> The reason this evidence would not be admissible is that it is hearsay. As stated in s 59(1) of the *Evidence Act*, 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation'. This reflects the previous common law position as set out in *Subramaniam*. There are exceptions to inadmissibility, such as the incapacity or death of the person who can give first-hand evidence.

Multiple-choice questions are uncommon, but are sometimes used as an exam component, or as an interim assessment task such as a mid-semester exam. Read the question carefully to make sure you understand what it is asking. Sometimes multiple-choice questions are framed in the negative (such as 'Which of the following is not allowed under the *Corporations Act*?'), so you should look for the 'not'. Usually with multiple-choice questions, one of the options, and possibly two, are obviously wrong. This narrows the choice. If you are unsure and you are taking too much time with an answer, take a guess and move on. On the question sheet, mark an asterisk beside the ones you guessed so that if you have time you can come back to them at the end of the exam and give them more thought.

Law essays

Typically, information on law essay assessment will be provided in a subject or course outline, which is provided at or before the first week of class. The questions themselves may not be released until a later date, but much can be done with the generic information provided in the outline.

For example, you may know that you will have a '40 per cent' essay that tests material covered in the first five weeks of semester; that the essay topic will be released in Week 6 and the essay is due in Week 9. You can immediately look at the outline for your course and see what topics are covered in the first five weeks—most likely, the first week will be dedicated to introductory material, and the next four weeks will have four substantive areas, so it is best to ensure you have done all reading on those topics ahead of the release of the essay question.

You can also break down your time for Weeks 6–9, which is the time period you have to prepare the essay (noting of course that you will not only be working on the essay, but you will also have classes and other assessments plus your ongoing work and/or family responsibilities). You might have 20 days in total, and you want to allow a day at the start to focus on what the question is asking you and how you might structure a response, plus two days at the end to focus on proofreading and tidying up your footnotes—two tasks which, if done properly, are more time consuming than initially expected. This leaves you 17 days, which you may break up as three days of reading and research; two days of initial drafting; three days of further research; three days to create a complete draft; one day to review the draft; three days for further research and writing on gaps and areas in which you have changed your mind or decided you need more; and then one day to do nothing at all on the essay, so that when you proofread it, you can do so with a clear mind. This is because if you have been working on a document for a long time, it can be difficult to see it in its entirety.

It is important, when you do the proofreading, that you start with the essay question, then read through your answer without stopping (except perhaps to highlight typos or places that

you know will need work) in order to ask yourself: have I answered what I am being asked? It is amazing how many first-year law essays speak generally about the essay topic without actually answering the question.

TIP
If you are given a problem question as an assessment during the semester, it will usually raise legal issues drawn from the law you have covered so far in the subject.

Problem solving

Solving legal problems is what lawyers do in practice (although they do tend to find a solution that best serves the interests of their client at the time). Legal problem solving in law school involves the student acting like a judge, in the sense of being neutral towards the plight of the parties. In essence, a scenario is given, and the student must identify the relevant facts, identify the relevant law, apply the law to the facts and reach a conclusion. This is known as the IRAC method (mentioned above) because it involves the following:

I Identify the **I**ssues
R Identify the applicable legal **R**ules
A **A**pply the law to the facts
C Reach a **C**onclusion

EXERCISE: BASIC IRAC APPLICATION

Try using the basic IRAC reasoning process on the following hypothetical scenarios. Read the summary statement of legal rules, read each scenario, and then apply the IRAC method by asking yourself: What is the legal issue here? What is the applicable rule? How does it apply to the circumstances in the scenario? What is my conclusion?

Go to Oxford Ascend for answers to this exercise.

SUMMARY STATEMENT OF LEGAL RULES RELATING TO USE OF PUBLIC EXERCISE EQUIPMENT

Rule 1: Public exercise equipment is made available by local councils for the use of all members of the public.

Rule 2: Public exercise equipment includes all components of benches, bars and weight-bearing machines in a designated area, the boundaries of which are marked by the extent of a padded ground covering.

Rule 3: To ensure safe use of public exercise equipment, local councils must place appropriate signage on each item of equipment.

Rule 4: Local councils are responsible for regular maintenance of public exercise equipment.

Rule 5: If a member of the public fails to follow signs for safe use of public exercise equipment and thereby causes damage to it, the member of the public may be issued a fine of $200.

Rule 6: Local councils are only liable for loss or damage if the loss or damage occurred while a member of the public was using the public exercise equipment according to instructions, and there was breach by the local council of two or more of these rules.

Scenario A: After finishing work at the fish market, Malika went to use the public exercise equipment. However, there was a sign put up by the local council forbidding fish market workers from using the public exercise equipment.

Scenario B: Arun and his friends spend their leisure time jumping from public object to public object, the challenge being to leap from one to the other and land successfully. For example, they climb up light poles and leap onto bollards, or jump from a wall onto a public

garbage bin. Yesterday, Arun jumped from the fork of a tree onto the padded ground under public exercise equipment and hurt his leg, and he wants the local council to pay for the leg brace he needs to wear for the coming month.

Scenario C: Arun's friend Joe climbed onto the top of a wooden pole which had exercise bars attached to it for people to use to do pull-ups. He jumped from the pole to the seat of an exercise bike and twisted his ankle in the process. He wants compensation from the local council.

Scenario D: Kate has started using the public exercise equipment as part of her efforts to address morbid obesity. She used a stepping machine without reading the sign that provided for maximum weight of 200 kg, and the step paddle broke. She has been issued a fine by a local council officer, which she doesn't want to pay.

Scenario E: Two weeks after Kate broke the paddle on the stepping machine, Binta used the stepping machine in the correct way, but without realising the paddle was broken. She hurt herself, and says the local council is responsible.

If you have a scenario with several issues, it is best to identify them all as the first step, then do IRAC for each issue, and then finish up with an overall conclusion. The difference is shown in the following two examples building on from the above exercise scenario. Do you agree that the first one is clearer?

Let's say we had a problem concerning Jodie, a British tourist, who was injured when she was getting onto an exercise bike in the park.

Example 1:

The issues to be addressed in determining whether the council is liable are: (a) was Jodie a member of the public, (b) was she using the public exercise equipment, and (c) did the local council fail to properly maintain the exercise bike?

In relation to (a), 'member of the public' is defined to include all people present in Australia, so even though Jodie is a British tourist, she comes within the meaning of member of the public.

Regarding issue (b), 'public exercise equipment' is defined in Rule 2 as including all components of benches, bars and weight bearing machines in a designated area the boundaries of which are marked by the extent of a padded ground covering. The exercise bike Jodie got onto was placed by local council in a designated area with padded ground covering. 'Using' is defined to include all actions which initiate, implement and terminate exercise using public exercise equipment, and as the injury took place as Jodie was getting onto the bike, even though she had not yet started riding it, this comes within the meaning of 'using' it.

Regarding (c), a failure to properly maintain is defined as a failure to exercise reasonable skill and regularity of inspections or repairs. In this case, the local council had a weekly inspection schedule and had posted a number for people to notify of any damage. The time when Jodie got on the bike was two days after the last council inspection, and nobody had called council to notify them of damage, as such it cannot be concluded that local council had failed in its maintenance efforts.

Therefore, although Jodie is a member of the public and was using the public exercise equipment, the local council did not fail to properly maintain it, and so the local council is not liable for her injury.

Example 2:

The issues to be addressed in determining whether the council is liable are: (a) was Jodie a member of the public, (b) was she using the public exercise equipment, and (c) did the local council fail to properly maintain the exercise bike?

The applicable rule for (a) is that a 'member of the public' is defined to include all people present in Australia. For (b), 'public exercise equipment' is defined in Rule 2 as including all components of benches, bars and weight bearing machines in a designated area the boundaries of which are marked through the extent of a padded ground covering, and 'using' is defined to include all actions which initiate, implement and terminate exercise using public exercise equipment. For issue c), a failure to properly maintain is defined as a failure to exercise reasonable skill and regularity of inspections or repairs.

Applying the rules to Jodie's situation, for (a), even though Jodie is a British tourist, she comes within the meaning of member of the public. For issue (b), the exercise bike Jodie got on was placed by local council in a designated area with padded ground covering, and as the injury took place as Jodie was getting onto the bike, even though she had not yet started riding it, this comes within the meaning of 'using' it. For issue (c), the local council had a weekly inspection schedule and had posted a number for people to notify of any damage. The time when Jodie got onto the bike was two days after the last council inspection, and nobody had called council to notify them of damage, as such it cannot be concluded that local council had failed in its maintenance efforts.

Therefore, although Jodie is a member of the public and was using the public exercise equipment, the local council did not fail to properly maintain it, and so the local council is not liable for her injury.

EXAMPLE: IRAC IN ACTION

Let's say, for example, you are given the following problem question for Criminal Law:

> Ivan was walking home from Uni when four males approached him. He tried to keep his head down and keep walking, but one of them grabbed his bag. Another one said, 'What's the rush, buddy?' Before he knew it he was on the ground being beaten. Through the pain and fear he heard one of them say, 'We'll have to finish him off, he's seen us', and another, 'Yeah, right'. As he passed out of consciousness he heard a third one say, 'C'mon that's a bit over the top, we're just roughing him up a bit', and a fourth saying, 'We'll do it anyway'. When Ivan awoke in hospital with broken ribs, he was told that campus security guards had spotted what was happening and come to assist him. As there were four attackers, and they'd run in separate directions, security managed to catch only two of them, Dale and Mikhail. What offences can they be charged with, and do you think they are likely to be made out?

Using the knowledge you have gained from your study of criminal law, brainstorm the issues. Here, Ivan was beaten, so that makes us think of assault.[20] He ended up with broken ribs, so it was assault that occasioned some harm to him. The intention of the attackers

20 The terminology used for specific assault-based offences varies in the different states and territories.

seemed to differ between them—three seemed to want to kill him, but one seemed content to just beat him. It is unclear which of these was Dale and which was Mikhail, but certainly one of them wanted to kill Ivan. There seems to be an issue of a joint criminal enterprise here. Therefore the outcome of your brainstorming is that you think the issues are assault occasioning actual bodily harm, attempted murder, and liability in a joint criminal enterprise, which you think is mainly relevant to the second issue.

You turn first to assault occasioning actual bodily harm, putting a heading to make it clear. You have the issue (I) and now you are going to do the RAC. You state the relevant provision of the legislation in your state or territory, and the elements of the offence. Then you need to apply each element to the factual scenario. You might reason that yes, there was an act that involved direct physical contact, because Ivan was knocked down and beaten. You might reason that it did cause actual bodily harm, because his ribs were broken. You might reason that there is no applicable defence, as Ivan did nothing to threaten Dale or Mikhail that could cause them to claim they were acting in self-defence. Now you need to state your conclusion, and, based on your reasoning, you might say it would be likely the charge would be made out.

Now you turn to the second issue, which you give a heading and start with a sentence about attempted murder. You identify the applicable section of the applicable legislation in your state or territory, and you name the elements. You then apply these to the facts, perhaps reasoning that yes, there was enough to go beyond mere preparation—Dale and Mikhail had assaulted Ivan, he was injured and lying on the ground, and they had the capacity to carry out the offence. At least one, if not both, of Dale or Mikhail had the intention to murder Ivan, as we know that three of them expressed the views: 'We'll have to finish him off, he's seen us', 'Yeah, right', and 'We'll do it anyway'. Only one said 'C'mon that's a bit over the top, we're just roughing him up a bit', which suggests he did not have the requisite intent. You are therefore only able to reach a tentative conclusion here, because you need to consider the third issue.

You create a heading to show you are moving on to discuss joint criminal enterprise. You identify the applicable section of the applicable legislation in your state or territory. You apply it to the facts, perhaps reasoning that clearly the four men were intending, at the outset, to approach Ivan and beat him up. This is a crime, and therefore they were in a joint criminal enterprise. You may refer here to some applicable precedents, such as cases where people go in with guns to rob a bank, and one of the robbers shoots someone, even though they had agreed nobody would get hurt. You may reach a conclusion that they are all responsible for each other's actions, and you tie this back to the issue of attempted murder and consider it likely that the charge would be made out with respect of both Dale and Mikhail.

As you have been down the branches of a few issues, now is the time to wrap it all up with a concluding sentence that answers the question. You might phrase it as follows: 'Therefore, the offences Dale and Mikhail can be charged with are assault occasioning actual bodily harm and attempted murder, and it is likely that these would be made out given that they were in a joint criminal enterprise.'

The above introductory discussion has looked at how to tackle law exams, essays and problem solving. We develop this discussion further in Chapter 6.

BEING AN ETHICAL STUDENT

Being ethical—a person of integrity—is a fundamental and defining aspect of being a lawyer, and the process of establishing yourself as an ethical lawyer begins in law school by establishing yourself as an ethical student who demonstrates academic integrity. Academic integrity involves adopting an ethical approach to your law studies—for example, by behaving honestly and avoiding cheating or plagiarism. To some extent, academic integrity is inherent—we 'just know' when we are doing something wrong. If, for example, we submit an assignment written by someone else as our own, or if we look across to someone else's exam paper, we know we are doing the wrong thing. But also, to some extent academic integrity is learned—we may in first year, for example, not fully understand the requirements of referencing, and may inadvertently plagiarise, which means presenting someone's words or ideas as if they are our own.

Learning proper referencing in first-year law is critical. It can protect you from committing plagiarism and thereby having your reputation and integrity called into question. Plagiarism can be deliberate or inadvertent. Deliberate plagiarism occurs where a student uses material without reference to its source, with the intention to deceive. Inadvertent plagiarism involves the same conduct, but is clearly done with no intention to pass off the material as the student's own. Deliberate plagiarism includes handing in someone else's assignment as if it were your own, or getting someone else to write your assignment. Inadvertent plagiarism includes the situation where you take notes from a book early in the semester, and put them with your notes for the assignment, and when it comes to assignment time you see the notes and think they were your own. Situations where the inadvertent plagiarism could be due to sloppy work or a lack of understanding of referencing requirements include where the person uses another person's exact words without using quotation marks and a footnote saying where they got the words from; where the person paraphrases someone else's words but does not footnote the source; or where a person has discussed the matter with someone in the profession or in their study group and includes that person's idea as if it were their own.

Universities typically distinguish between deliberate and inadvertent acts of plagiarism, although an inadvertency that may be tolerated and excused in first year may be treated harshly if done by a final-year student. Deliberate plagiarism is conduct that may amount to academic misconduct; inadvertent plagiarism may be seen as a learning opportunity.

Other acts that may amount to academic misconduct include cheating and collusion. Cheating encompasses a great many things, including bringing prohibited materials into an exam such as notes or an electronic device (depending what is and is not allowed for each particular exam), looking at another's answers in an exam, making your exam paper open to others to look at it, communicating answers with another student by signals, using a communication device to get answers from outside the exam room, or getting someone to provide input on your assignment (such as a legal practitioner) where it is not allowed and/or without attributing that assistance. Collusion is facilitating cheating or plagiarism on the part of others, and in some universities this also includes knowing about plagiarism or cheating by another student and not reporting it.

TIP

Now is a good time for you to consider the policies and rules at your own institution. Aside from the importance of the content, as they are often written in similar language to legislation it can be a good form of early practice to read them!

Practitioner profile: Patrick Togher

Artist Manager

Although each and every lawyer, has a unique pathway I daresay has a unique pathway mine has been more unusual than most.

The commencement of my combined law and economics degree at Sydney University in 1982 coincided with the start of a 17-year career as a professional operatic and concert tenor. Lectures were attended around rehearsals and notes were borrowed from obliging student friends; I was even forced to sit my Conflicts of Laws exam at the University of Western Australia because I was on tour in Perth at the time—singing in *HMS Pinafore* with Paul Eddington (of *Yes, Minister* fame).

Upon graduation, I focused fully on my career with the Australian Opera (I sang over 40 roles) and *The Phantom of the Opera* (I sang in over 1200 performances in Sydney, Brisbane and London). However, law school had caused me forever to 'think like a lawyer'. As a union delegate for my fellow singers or in my own contractual negotiations, this proved invaluable.

In 1998 I retired from the stage, returned to Sydney and founded Patrick Togher Artists' Management with my wife, the eminent soprano, Romola Tyrrell. For the past 20 years we have personally managed many of Australasia's leading singers, conductors and instrumentalists—including Roger Woodward, Jane Rutter, Slava Grigoryan and Simon Tedeschi.

Our primary work involves sourcing and negotiating professional opportunities for these brilliant artists, providing them with career guidance and operational support, and attending their performances wherever possible. Classical music is a highly emotional field of human endeavour; it depends on government funding and corporate support for its survival. It is art rather than entertainment and is steeped in history, precedent and complex human relationships.

'Thinking like a lawyer' runs through almost all my daily activities like a red thread. Will agitating for a higher fee compromise this artist's chances of re-engagement? Is this contractual clause important or can it be safely ignored or accepted? Is this opera company's behaviour towards my artist a denial of natural justice? These questions assume greater importance as the behaviour of some of Australia's performing arts organisations becomes less honourable. To that end, my role as an advocate for the nation's musical artists increasingly intrudes on my regular role as an Artist Manager.

IN DEPTH

PLAGIARISM AND ITS CONSEQUENCES

Let's use an extract from an article on the consequences of plagiarism to learn more about it. It is Mary Wyburn's 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and the Courts' (2008) 8(2) *QUTLJJ* 314, 316–17. Say we reproduce part of the article (which, incidentally, we are doing here with the author's permission), like this:

> There are various definitions of plagiarism but it is generally understood to mean the appropriation of the work (the words or ideas) of another without attribution. It is a breach of ethical principles rather than legal rules. There appears to be genuine widespread confusion about the precise parameters of the term. The definition of plagiarism adopted in university rules therefore tends to be detailed; for instance it may distinguish between intentional acts (e.g. dishonest plagiarism)

> and those acts done carelessly or recklessly (e.g. negligent plagiarism). The failure to clearly define plagiarism, in particular whether it requires intent, can create confusion.
>
> ... While the universities ensure there are detailed rules in place, the question is whether adequate time is taken in the curriculum to explain the reasons behind the rules and explore their practical application across the variety of assessment tasks students will meet in their studies.

This is plagiarism because it has taken two paragraphs from a published article and put them into a piece of work without any attribution at all (including the footnotes that were in the original article). So, what about rewording? We could alter the text like this:

> There are several definitions of plagiarism. It is usually used to refer to the appropriation of the work of another without attribution. Arguably, it breaches ethical principles more so than legal rules. Across universities there seems to be genuine confusion about the true meaning of the term. University definitions of plagiarism tend to be detailed, and distinguish between intentional and reckless acts of plagiarism. It is argued that the failure to clearly define plagiarism has caused a great deal of confusion.

Even though universities ensure they have detailed rules, the real issue is whether they have taken the time to explain the rules properly to the students and the reasons behind them.

This is also plagiarism because although it has moved around the sentences and paraphrased to some extent, the ideas are still not being attributed to the original author and there is no note to say that footnotes have been omitted. Something more is needed:

> Mary Wyburn has identified that plagiarism is defined in various ways, differentiating for example between intentional and reckless acts that result in the use of another's words and ideas without attribution.[21] She has challenged the value of having detailed university rules on plagiarism unless 'adequate time is taken in the curriculum to explain the reasons behind the rules and explore their practical application across the variety of assessment tasks students will meet in their studies'.[22] This is particularly important in first-year law, where students already face a massive learning curve in managing their own timetable, making friends, and learning how to use university resources—all time-consuming activities.

This is not plagiarism, because where there has been use of Wyburn's ideas, they have been attributed. You will notice that the first sentence, which uses her ideas but not the actual words, has been referenced at the end of the sentence. The second sentence includes actual words from Wyburn's articles in quotation marks with a reference. The final sentence brings the reader back to the argument about first-year law that the writer is using Wyburn's article to make.

The Wyburn article also provides some useful case studies on the consequences of law student plagiarism. We encourage students to read the article in full (you can do a journal search online) or in digested form (on Oxford Ascend), but here is a brief overview of some of the cases discussed.

- *Re AJG*—When undertaking practical legal training, a law student copied the work of another student and, when disclosing this to the Solicitors' Board in Queensland, he said it was an isolated incident occurring during a time of stress. The Queensland Court of Appeal took into account the fact that the plagiarism took place late in the degree, and did not consider stress to be an excusing factor for such behaviour, concluding that the student was not fit to be a legal practitioner.

21 Mary Wyburn, 'Disclosure of Prior Student Academic Misconduct in Admission to Legal Practice: Lessons for Universities and the Courts' (2008) 8(2) *QUTLJJ* 314, 316.

22 Ibid 317 (citing Terri LeClerq).

- *Re Liveri*—A commerce law student was found by her university to have handed in a published article, with only minor amendments, as her own work for an assignment. Her previous law assignments were reviewed and two other incidents of plagiarism were discovered, including another instance of using an academic's commentary as her own, and using words from a government publication without giving the source. She disclosed the findings when she sought to be admitted in New South Wales and was rejected. She then applied for admission in Queensland and was unsuccessful. Two years later she reapplied, admitting her conduct and taking full responsibility, but was again refused admission.
- *In the Matter of OG, a Lawyer*—The assignments of two business law students were found to be significantly similar, and both students received a zero mark. When it came time for them to apply for admission, one of them decided to disclose the matter and was refused admission. The other initially did not disclose the matter fully, describing it as a 'misunderstanding' and saying it was minor and was not found to be plagiarism. He was consequently admitted to practice. However, he was found by the Supreme Court of Victoria to have misrepresented the true circumstances; the court ordered that he be struck off the roll of legal practitioners.

These cases demonstrate the importance of the utmost integrity, honesty and good referencing in law school—the consequences of plagiarism being found, and receiving a finding of academic misconduct as a result, are significant.

TIP
Don't panic! Use your best efforts to understand referencing and avoid plagiarism. If you are unsure, ask your tutor or lecturer. In first-year law, if you have made a clear effort to reference correctly, any errors you make will generally not be a pathway for disciplinary action.

TIP
Ethics is really about what you do when nobody can see you, or when nobody else will know. If you do the right thing only when there is a risk of being found out, it's only calculated action. If you do the right thing even where nobody will know, because it is important to you and your own sense of self, that is the mark of an ethical individual. This may require being firm on some things that non-law student friends and relatives may think is acceptable—signing a family member's name on a form, nominating someone with more points as the driver for a speeding ticket, signing a document as a witness without actually witnessing the signature—and the list goes on.

DISCUSSION QUESTIONS

1 There can often be an imbalance of power between parties to litigation. Do you think lawyers have greater ethical obligations where their client is more powerful than the opposing lawyers' client? Why, or why not?
2 The Constitution of Malaysia allows for a combination of secular law (civil and criminal law) and Islamic law, which applies only to Muslims. There is a Syariah Court (sharia) which has civil jurisdiction over matters such as marriage and criminal jurisdiction with power to impose fines and prison sentences. What are some advantages and disadvantages of this approach?
3 Why is lifelong learning important? Do you think it is becoming more, or less important? Why?
4 Obtain a copy of the statement of graduate attributes at your place of study. What additional attributes are listed there (above the minimum standards as set out in the TLOs, and the minimum substantive areas of law in the Priestley 11)? How do you think you can best develop these attributes across your course of study? Will you be doing anything beyond formal instruction by your lecturers?
5 Think back to the exams and essays you have done in previous studies. What aspects have you found easy and difficult? Have you had trouble with running out of time in exams, or leaving too much of the work on an essay until the last minute? You can learn from these and avoid making the same mistakes in law school.

WEBLINKS AND FURTHER READING

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OXFORD ASCEND RESOURCES FOR THIS CHAPTER

- Video: Tips and Tricks for Law Study
- Answers to 'Inductive and deductive reasoning' exercise
- Sample answer: 'What's your reasoning'
- Answers to 'Priestley 11 requirements' exercise
- Answers to 'Assessing sources' exercise
- Activity sheet: Time management
- Fact sheet: Goal setting

- Activity sheet: Achieving Goals
- Fact sheet: Motivation
- Activity sheet: Finding motivation
- Fact sheet: Work–life balance
- Fact sheet: Assertiveness
- Fact sheet: Stress
- Sample answer: Basic IRAC application
- AGLC citation quiz