



Promoting excellence in higher education

2011

Good Practice Guide (Bachelor of Laws)

THINKING SKILLS (Threshold Learning Outcome 3)

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Introduction

This Good Practice Guide was commissioned by the Law Associate Deans Network to support the implementation of Threshold Learning Outcome 3: Thinking skills.

The Threshold Learning Outcomes (TLOs) for the Bachelor of Laws were developed in 2010 as part of the Learning and Teaching Academic Standards (LTAS) Project, led by Professors Sally Kift and Mark Israel.¹ TLO 3: Thinking skills is one of the six TLOs developed for the Bachelor of Laws. All six TLOs are:

- TLO 1: Knowledge
- TLO 2: Ethics and professional responsibility
- TLO 3: Thinking skills
- TLO 4: Research skills
- TLO 5: Communication and collaboration
- TLO 6: Self-management

The TLOs were developed having reference to national and international statements on the competencies, skills and knowledge that graduates of a degree in law should have, as well as to the emerging descriptors of the Australian Qualifications Framework (AQF) for Bachelors Degrees (Level 7) and Bachelors Honours Degrees (Level 8).²

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.

Author

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¹ Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement December 2010*, Australian Learning & Teaching Council (December 2010) <http://www.altc.edu.au/system/files/altc_standards_LAW_110211.pdf>.

² Ibid. See relevantly the Notes on TLO 3 at 17-19 and the sources and relevant equivalent or contributing statements to TLO 3 that are summarised at 37-41.



Part 1: Literature review

Identify and articulate legal issues (TLO 3 (a))

Apply legal reasoning and research to generate appropriate responses to legal issues (TLO 3(b))

Student texts

Michelle Sanson, Thalia Anthony and David Worswick, *Connecting with Law* (Oxford University Press, 2nd ed, 2010)

Chapter 2 of this popular Australian first year text, 'Learning Law: How Can I Develop a Legal Mind', identifies the principal characteristics of 'thinking like a lawyer' as: non-assumptive thinking; facts over emotions; a tolerance of ambiguity; an ability to make connections between facts, documents and laws; verbal mapping and ordering; and automatic devil's advocacy. The chapter also sets out brief explanations of inductive and deductive reasoning, critical thinking, and the IRAC (issue – rule – application – conclusion) approach to legal problem solving.

Patrick Keyzer, *Legal Problem Solving – A Guide for Law Students* (LexisNexis, 2002)

Keyzer explains in detail the traditional method of legal problem solving – identifying the issues; stating relevant legal authorities; applying the law; arguing the facts; and reaching a conclusion – and demonstrates how the method can be applied in the solution of examination questions. Sample answers prepared by students are analysed and discussed, a feature of the text of considerable practical use to both law students and law teachers.

Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009)

Schauer's text is described as a primer on legal reasoning written for law students. Many of the chapters in the book are concerned with the traditional first year topics – the nature of law and of common law, statutory interpretation, judicial reasoning, the doctrine of precedent and the like – and the US focus makes these chapters largely unhelpful for Australian students. Chapters 3, 5 and 7, however, are more useful: Chapter 3 is about the nature of authority, and the differences between legitimate and illegitimate authorities when engaging in legal reasoning; Chapter 5 explains the relevance of analogies to legal reasoning; and Chapter 7 presents the legal realist challenge to traditional understandings of legal and judicial reasoning, as well as a brief overview of the Critical Legal Studies (CLS) contribution to the debate.

David S Romantz and Kathleen Elliott Vinson, *Legal Analysis: The Fundamental Skill* (Carolina Academic Press, 2nd ed, 2009)

Romantz and Vinson provide an overview of the foundations of legal reasoning and of the different types of critical thinking necessary to conduct a sophisticated analysis of legal problems. Their approach to legal analysis is captured by the acronym 'CREAC': conclusion – rule – explanation of the rule – application of the rule – conclusion. They insist that legal analysis should begin with the conclusion because in legal practice that is likely to be what the person the lawyer is advising is most interested in and wants to see first. They offer a number of practical tips for engaging in effective legal analysis, including justifying the conclusion with a clear, logical analysis; weaving the law and the facts together; explaining the law before applying the law; understanding the law before applying the law; analysing one issue at a time; analysing the opponent's argument; being concise; and remembering the alternative arguments. The authors also emphasise the importance of applying the law rather than mechanically memorising the law or relying too heavily on formulaic analysis.



John Farrar, *Legal Reasoning* (Thomson Reuters, 2010)

Despite the title, most of the chapters are concerned with traditional first year topics including the nature of law, a history of law, the rule of law, the legal system, case law and legislation and so on. Chapter 8, 'How Lawyers Think and Reason', is explicitly concerned with legal reasoning, but is relatively brief. It outlines the characteristics of legal language, the use of logic and of justification in legal reasoning, the historical shift away from strict legalism in conceptualising judicial reasoning, and the roles of principles and policy in legal reasoning. Chapter 14, 'Fallacies in Legal Reasoning', describes three types of fallacies in legal reasoning:

- 1) formal fallacies directly due to language (eg equivocation and ambiguity)
- 2) formal fallacies due to thought (eg irrelevant conclusions, begging the question)
- 3) informal fallacies (eg erroneous generalization).

See also:

- Michael Head and Scott Mann, *Law in Perspective: Ethics, Society and Critical Thinking* (UNSW Press, 2005) – Chapter 2, 'Legal reasoning', is part of a broader analysis of the relationships between logic, science and law in the first section of the book.
- Russell Hinchy, *The Australian Legal System: History, Institutions and Method* (Pearson Education Australia, 2007) – Chapter 8, 'Legal reasoning', contains some useful examples and exercises for students.
- LawNerds.com, 'Learn the Secrets to Legal Reasoning' (2003) <<http://www.lawnerds.com/guide/irac.html>> – A user-friendly yet surprisingly thorough guide to the 'secret of legal reasoning', built around the IRAC method (issue – law – analysis – conclusion) and including numerous practical examples and explanations of the various types of analytical tests.
- ANU Academic Skills and Learning Centre, 'Legal Reasoning and HIRAC' (2010) <<https://academicskills.anu.edu.au/resources/handouts/legal-reasoning-and-hirac>> – A help sheet for students explaining legal reasoning and the HIRAC method (heading – issue – rule – application – conclusion). It is particularly useful because it uses examples of student work in demonstrating what is and is not appropriate.

Teaching texts

Hillary Burgess, 'Deepening the Discourse Using the Legal Mind's Eye: Lessons from Neuroscience and Psychology That Optimize Law School Learning' (2010) 29 *Quinnipiac Law Review* 1

Burges presents research that demonstrates how incorporating visual aids and exercises into learning environments can help students to develop higher-order cognitive skills such as 'thinking like a lawyer'. Burgess begins by explaining what higher-order cognitive skills are and by mapping the various steps in legal reasoning onto Bloom's taxonomy of learning objectives (level 1 – remembering, level – understanding, level 3 – applying, level 4 – analysing, level 5 – evaluating, and level 6 – creating). Burgess argues that the legal curriculum traditionally teaches the lowest four levels of learning but tests the highest four levels of learning. To help law teachers to teach all six levels of learning, Burgess offers a neuroscience and cognitive psychology perspective on how students learn legal reasoning. She reviews research that indicates that students learn more, learn at deeper levels, and retain information longer when they engage in 'multimodal' learning, especially learning involving visual aids and visual exercises, and provides concrete guidelines for law teachers interested in incorporating visual aids and visual exercises effectively when teaching legal reasoning.



Fleurie Nievelstein et al, 'Effects of Conceptual Knowledge and Availability of Information Sources on Law Students' Legal Reasoning' (2010) 38(1) *Instructional Science* 23

Nievelstein et al emphasise the importance of conceptual knowledge when learning how to engage in legal reasoning. For newcomers to law school, legal reasoning is a difficult skill to learn because they have not yet acquired the conceptual knowledge needed to distil the relevant information from cases, determine applicable rules, and search for rules and exceptions in external information sources such as textbooks. The authors discuss the implications of their finding that in the absence of basic conceptual knowledge about law, access to textbooks and the like does not assist law students to learn legal reasoning skills.

See also:

- Celia Hammond, 'Teaching Practical Legal Problem Solving Skills: Preparing Law Students for the Realities of Legal Life' (1999) 10(2) *Legal Education Review* 191 – A description of the development and teaching of the subject *Legal Problem Solving* at Notre Dame University, and how the subject was structured as closely as possible to simulate the real life world of private legal practice.
- Lutz-Christian Wolff, 'Structured Problem Solving: German Methodology from a Comparative Perspective' (2003) 14 *Legal Education Review* 19 – A comparison of German and common law approaches to legal problem solving.
- Fiona Martin, 'Teaching Legal Problem Solving: A Problem-Based Approach Combined with a Computerised Generic Problem' (2003) 14(1) *Legal Education Review* 77 – A description of the process undertaken to develop a computer-based module designed to introduce law students, through the use of problem-based learning, to legal problem solving.
- John Wade, 'Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks' (1990-1991) 2 *Legal Education Review* 283 – An overview of the MIRAT (material facts – issues – rules – arguments – tentative conclusion) model of legal reasoning.
- Duncan Bentley, 'Using Structures to Teach Legal Reasoning' (1994) 5(2) *Legal Education Review* 129 – A consideration of the use of structures to teach legal reasoning, drawing upon the results of an experiment conducted at Bond University.
- Jeffrey Metzler, 'The Importance of IRAC and Legal Writing' (2002-2003) 60 *University of Detroit Mercy Law Review* 501 – According to Metzler, IRAC is much more than an organisational tool, it is an important mental exercise that forces a lawyer to a deeper understanding of the legal issues at stake, and an understanding of IRAC is the key to success on law school exams and a successful career in law.
- Greg Taylor, 'Structured Problem-Solving: Against the 'Step-By-Step' Method' (2006) 11(1) *Deakin Law Review* 89 – Taylor argues that step-by-step approaches emphasise form over content and lead to a false picture of the nature of legal problem solving.

Theoretical texts

Larry Alexander, *Demystifying Legal Reasoning* (Cambridge University Press, 2008)

Alexander's text is a theoretical analysis and critique of legal reasoning rather than a manual for students or a guide for law teachers. Alexander takes the view that there is no distinct form of 'legal' reasoning. Rather, lawyers engage in ordinary forms of



reasoning that are familiar to most advisors and decision makers: deduction from authoritative rules, empirical reasoning and open-ended moral reasoning.

Brett G Scharffs, 'The Character of Legal Reasoning' (2004) 61(2) *Washington and Lee Law Review* 733

According to Scharffs, legal reasoning is composed of three ideas or concepts, each of which lies at the heart of Aristotle's practical philosophy: (1) *isphronesis*, or practical wisdom, (2) *techne*, or craft, and (3) *rhetorica*, or rhetoric. Only in combination do practical wisdom, craft, and rhetoric create a balanced, complete, and compelling account of legal reasoning.

Bartosz Brozek and Jerzy Stelmach, *Methods of Legal Reasoning* (Law and Philosophy Library, 2006)

Brozek and Stelmach describe and criticise four methods used in legal practice, legal dogmatics and legal theory – logic, analysis, argumentation and hermeneutics – and question the assumptions behind these methods, the limits of using them and their usefulness in the practice and theory of law.

Richard Posner, *How Judges Think* (Harvard University Press, 2008)

Posner focuses upon legal reasoning by judges, and argues that when judges can ascertain the true facts of a case and apply clear pre-existing legal rules to them, they do so straightforwardly, but in non-routine cases, judges draw upon their experience, emotions, and often unconscious beliefs. In doing so, they take on a legislative role, though one that is confined by professional ethics, opinions of colleagues, and limitations imposed by other branches of government.

Legal reasoning and logic

Ruggero J Aldisert, Stephen Clowney and Jeremy D Peterson, 'Logic for Law Students: How to Think Like a Lawyer' (2007-2008) *University of Pittsburgh Law Review* 69

Aldisert et al argue that 'thinking like a lawyer' essentially means employing logic to construct arguments. They make a case for teaching all law students the fundamentals of deductive reasoning, the principles of inductive generalisation, and the process of reasoning by analogy. They also make the important point that legal reasoning is not *entirely* logical: even if premises are true and logical statements constructed properly, it is important to recognise that judges are motivated by more than the mandates of logic.

See also:

- Michael F C Scott, 'A Plea for the Study of Logic' (1968) 21(2) *Journal of Legal Education* 206 – A call for the inclusion of logic in the law school curriculum.
- Michael Head and Scott Mann, *Law in Perspective: Ethics, Society and Critical Thinking* (UNSW Press, 2005) – The first third of this introductory law textbook is a detailed analysis of the relationships between logic, science and law.
- Logic and legal reasoning: A guide for law students <<http://www.unc.edu/~ramckinn/Documents/NealRameeGuide.pdf>> – A student-authored but nevertheless useful presentation of the various logical rules and logical fallacies of relevance to legal reasoning, including numerous practical examples.

Legal reasoning and policy

Kenneth J Vandavelde, *Thinking Like a Lawyer: An Introduction to Legal Reasoning* (Westview Press, 2010)

Vandavelde's text is one of the more comprehensive yet accessible studies of legal



reasoning available. Although it is a US text it is an enormously useful resource for those looking to teach legal reasoning in a way that emphasises understanding and use not only of legal rules but also the policies underlying those rules. (In that regard the text is consistent with the sentiments expressed in the Notes accompanying TLO 3). Vandeveldt posits that the goal of legal reasoning or 'thinking like a lawyer' is to identify the rights and duties of particular individuals in particular circumstances. This involves five steps: identifying the applicable sources of law, usually statutes and judicial decisions; analysing these sources of law to determine the applicable rules of law and the policies underlying those rules; synthesising the applicable rules of law into a coherent structure in which the more specific rules are grouped under the more general ones; researching the available facts; and applying the structure of rules to the facts to ascertain the rights or duties created by the facts, using the policies underlying the rules to resolve difficult cases. 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.

Brenda Midson, 'Teaching Causation in Criminal Law: Learning to Think Like Policy Analysts' (2010) 20 *Legal Education Review* 173

Like Vandeveldt, for Midson the challenge for legal education is to teach legal reasoning so that students are better able to identify and apply unarticulated policy reasons. It is essential firstly to draw students' attention to the fact that 'invisible factors' operate in decision-making, and secondly to encourage students to look beyond the legal principles or rules in a case to identify what those invisible factors are and how to utilise them in problem-solving. Presenting the students with problems that ask them to think about a number of issues 'outside the square' of the doctrinal subject enables them come to grips with the complexity of real-life situations and the fact that the law as expressed does not always provide neat answers.

Expanding the scope of legal reasoning

Nisha Agarwal and Jocelyn Simonson, 'Thinking Like a Public Interest Lawyer: Theory, Practice and Pedagogy' (2010) 34 *New York University Review of Law & Social Change* 455

Agarwal and Simonson argue that legal education should foster in students the critical faculty to not only think logically but also to ask and answer questions about what is 'good, right and just'. Agarwal and Simonson present a method for teaching critical public interest lawyering that integrates social theory and public interest practice.

Ian Gallacher, 'Thinking Like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance' (2011) 8 *Legal Communication and Rhetoric*

http://www.alwd.org/LC&R/CurrentIssues/2011/Gallacher_1.html

Gallacher recommends that law teachers change the way they teach legal reasoning, especially to first year law students, in order to make them more empathetically aware of the circumstances by which the court opinions they study arose and the effects those opinions will have on others. He argues that such changes will not only make lawyers better people, they will make them better lawyers. He examines the dangers inherent in an overemphasis on the 'logical' form of analysis taught in law schools, and explores real-life examples of logical thinking that failed to persuade non-lawyers in the form of a jury. He also looks at a successful example of empathetic lawyering to show how it can be more effective,



and offers specific proposals to help law schools ameliorate the dangers of an over-emphasis on ‘thinking like a lawyer’.

See also:

- Michael S King, ‘Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice’ (2008) 32(3) *Melbourne University Law Review* 1096 – King argues that the law school curriculum should include ‘therapeutic jurisprudence, restorative justice and other non-adversarial modalities not as components of separate subjects but as key components integrated into the teaching of core legal subjects’.
- Jane H Aiken, ‘Provocateurs for Justice’ (2001) 7 *Clinical Law Review* 287 – Aiken calls upon law teachers to inspire their students to commit to justice.

Engage in critical analysis and make a reasoned choice amongst alternatives (TLO 3(c))

American Philosophical Association, *Critical Thinking: A Statement of Expert Consensus for Purposes of Educational Assessment and Instruction* (California Academic Press, 1990)

<http://assessment.aas.duke.edu/documents/Delphi_Report.pdf> – In 1990, under the sponsorship of the American Philosophical Association, a cross-disciplinary panel of 46 experts representing scholarly disciplines in the humanities, sciences, social sciences, and education completed a two-year project which resulted in the following conceptualisation of critical thinking as an outcome of university level education:

We understand critical thinking to be purposeful, self-regulatory judgment which results in interpretation, analysis, evaluation, and inference, as well as explanation of the evidential, conceptual, methodological, criteriological, or contextual considerations upon which that judgment is based. Critical thinking is essential as a tool of inquiry. As such, critical thinking is a liberating force in education and a powerful resource in one's personal and civic life. While not synonymous with good thinking, critical thinking is a pervasive and self-rectifying human phenomenon. The ideal critical thinker is habitually inquisitive, well-informed, trustful of reason, open-minded, flexible, fair-minded in evaluation, honest in facing personal biases, prudent in making judgments, willing to reconsider, clear about issues, orderly in complex matters, diligent in seeking relevant information, reasonable in the selection of criteria, focused in inquiry, and persistent in seeking results which are as precise as the subject and the circumstances of inquiry permit. Thus, educating good critical thinkers means working toward this ideal. It combines developing critical thinking skills with nurturing those dispositions which consistently yield useful insights and which are the basis of a rational and democratic society.

Paul F Haas and Stuart M Keeley, ‘Coping with Faculty Resistance to Teaching Critical Thinking’ (1998) 46(2) *College Teaching* 63

Haas and Keeley examine why many academics are resistant to the teaching of critical thinking. They posit that many academics have not experienced the critical thinking approach as part of their own education, have not been specifically trained in critical thinking, and are too busy providing information and helping students understand models to worry about whether students can think critically. Proactive strategies for overcoming such resistance are presented.

Nickolas James, ‘Embedding Graduate Attributes within Subjects: Critical Thinking’ in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011)

James explains the meaning and importance of critical thinking within the context of legal education and legal practice, and describes how the graduate attribute of ‘the ability to engage in critical thinking about law’ can be developed within a law



program by being embedded within the learning objectives, the learning activities and the assessment activities for the program.

Anne Macduff, 'Deep Learning, Critical Thinking, and Teaching for Law Reform' (2005) 15 *Legal Education Review* 125

Macduff describes how the learning activities in an undergraduate family law subject were designed to promote critical thinking and a deep approach to learning. The activity designed to facilitate this learning required the students to identify their view on same sex marriage and write a page of supporting arguments during the first class. The following classes presented information covering the different theoretical approaches to family law and the substantive law surrounding marriage formation and divorce. At the conclusion of the section, the students were asked to refer back to the statement they had made in the first class, analyse their arguments for any similarities with the theoretical positions that had been covered, identify the discourse that would respond critically to their initial position and explain why, and either develop counter arguments to the critique or accept the critique and modify their position. The activities were structured so that students used their critical thinking skills and recently acquired legal and theoretical knowledge to learn deeply and engage with their own perspectives on issues relating to law reform and social change.

See also:

- Stella Cottrell, *Critical Thinking Skills – Developing Effective Analysis and Argument* (Palgrave Macmillan, 2005) – A guide to developing critical thinking skills, with an emphasis upon argument and logical reasoning.
- Peter A Facione, *Critical Thinking: What It Is and Why It Counts* (2011) <<http://www.insightassessment.com/CT-Resources/Critical-Thinking-What-It-Is-and-Why-It-Counts>> – An engaging essay about the meaning and importance of critical thinking.
- Alison Fulcher, 'Teaching Analysis Skills in the Context of a Commercial Transaction' (1997) *Journal of Professional Legal Education* 181 – A description of an action research project designed to assess and improve the teaching of analysis skills in the context of a commercial transaction.
- Vijaya Nagarajan and Archana Parashar, 'An Empowering Experience: Repositioning Critical Thinking Skills in the Law Curriculum' (2006) 10 *Southern Cross University Law Review* 219 – A description of how to incorporate critical thinking skills into the law curriculum, equip students with skills to make critical judgments, and connect politics to social responsibility.
- Nickolas James, Clair Hughes and Clare Cappa, 'Conceptualising, Developing and Assessing Critical Thinking in Law' (2010) 15 *Teaching in Higher Education* 285 – A description of the embedding of critical thinking as a graduate attribute in a first year subject at the University of Queensland.

Think creatively in approaching legal issues and generating appropriate responses (TLO 3(d))

Amy M Azzam, 'Why Creativity Now? A Conversation with Sir Ken Robinson' (2009) 67(1) *Teaching for the 21st Century* 22

Robinson argues that students can be taught generic skills of creative thinking, just in the way they can be taught to read, write, and do math. According to Robinson, creativity can be taught to students by encouraging them to experiment and to innovate, and by not giving them all the answers but giving them the tools they need to find out what the answers might be.



Kathleen Magone and Steven I Friedland, 'The Paradox of Creative Legal Analysis: Venturing into the Wilderness' (2002) 79 *University of Detroit Mercy Law Review* 571

According to Magone and Friedland, on the one hand law is a science based on a finite body of decisions, statutes and other raw materials that can be studied and from which new disputes can be resolved, but on the other hand, law is also an art form 'infused with imagination and creativity' with rarely only a single conclusion or only a single path to that conclusion, and it is difficult to reconcile law as science and law as art in the context of legal education. While in practice legal reasoning often utilises a considerable degree of creativity, it is usually taught to law students in a way that emphasises technical proficiency and structural similarity over innovation and exploration, and the effort by law teachers to develop analytical rigour in their students often leads to a minimisation of creative talents and creative thinking. Magone and Friedland describe how they introduced creative thinking as a tool to promote analytical thinking in a law subject. They experimented by using student creativity in their classes in combination with, and as a supplement to, traditional case analysis. The use of the creative arts – such as painting, photography and filmmaking – was incorporated as an optional part of student assignments and examinations. The authors found that having students use creative arts in their legal education promoted reasoning abilities and engaged them 'actively, frequently and happily' in the learning process. It also emphasised and illuminated an important aspect of the analytical enterprise, deliberation in thinking, because the students and teacher had more time to think about the particular case or legal principle.

Janet Weinstein and Linda Morton, 'Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education' (2003) 9 *Clinical Law Review* 835

Weinstein and Morton examine the mental process of creative thinking. They discuss what it is, why lawyers have difficulty engaging in it, and how we can overcome this difficulty through specific techniques and a more conducive environment. Much of the thinking done in law school can be labelled as 'critical' thinking; its focus is to doubt, to critique, or to find fault with what already exists. The focus of creative thinking is to come up with new alternatives. Creative thinking is an essential component to problem solving. From the perspective of law practice, critical thinking is useful when lawyers are engaged in traditional legal problem solving in the adversarial context. On the other hand, lawyers use creative thinking to help clients consider what alternatives might exist for solving their problems. In training future lawyers, law teachers must do a better job of incorporating and supporting creative thinking in legal education. The authors conclude the article with a description of some of their efforts toward this objective.

Edward Phillips et al, 'Exceeding the Boundaries of Formulaic Assessment: Innovation and Creativity in the Law School' (2010) 44(3) *The Law Teacher* 334

Phillips et al describe how in their Land Law subject at the University of Greenwich the students were required to create a web page. The topic of the assignment was 'What is land?' The students were instructed to take, or find, a photograph of an object or structure which may or may not form part of the land, and to present an argument as to whether or not their chosen object does or does not form part of the land. The assessment task was intended to bring out the creative side of the students and to engage them in the subject.

Hal Blythe and Charlie Sweet, 'Why Creativity? Why Now?' (2010) 20(1) *National Teaching and Learning Forum Newsletter*

Blythe and Sweet focus upon two important aspects of teaching creativity – the creative environment and the creative process. Establishing a creative environment requires an open atmosphere where students are free to take risks, bad guesses aren't pounced on, every answer isn't necessarily right or wrong, and students are free to look at things in ways without fear of punishment, condescension, or a bad



grade. Teaching the creative process involves facilitating the development of certain skills by the students, such as goal orientation (creativity often emerges when working towards a goal), brainstorming, piggy-backing (building upon an existing idea), perception shifting (looking at something from a different angle), synthesis, and meta-cognition.

See also:

- Lorin Anderson and David Krathwohl (eds), *A Taxonomy for Teaching, Learning and Assessing: A Revision of Bloom's Taxonomy of Education Objectives* (Longman, 2001) – A revision of Bloom's Taxonomy to situate 'create' as the highest of higher-order learning skills.
- Gordon A MacLeod, 'Creative Problem-Solving – for Lawyers?!' (1963) 16 *Journal of Legal Education* 198 – A description and evaluation of a subject in creative problem-solving delivered to law students at the University of Buffalo.
- Robin Yeamans, 'Creativity and Legal Education' (1971) 23(3) *Journal of Legal Education* 381 – A call for legal education to cultivate creative thinking as well as logical and critical thinking.



Part 2: Summary of key points

Identify and articulate legal issues (TLO 3(a))

Apply legal reasoning and research to generate appropriate responses to legal issues (TLO 3(b))

TLO 3(a) is the ability to examine a text or scenario, identify the key legal issues (including, if relevant, key factual and policy issues), and clearly articulate those issues as a necessary precursor to analysing and generating appropriate responses to the issues. TLO 3(b) is the ability to apply one's knowledge of the law and the process of legal reasoning to the key issues in order to identify the range of appropriate responses (both legalistic/adversarial and non-legalistic/non-adversarial) to those key issues. TLO 3(a) and TLO 3(b) are considered together both here and in the literature review because the identification of issues and the application of the law to generate responses to those issues are typically considered together in the literature and taught together under the broad heading of 'legal reasoning'.

Legal reasoning is taught implicitly and constantly throughout a law student's legal studies in the sense that they are called upon to engage in legal problem solving in almost all of their law subjects. All law students also receive *explicit* instruction in formal legal reasoning, usually in the first year of their legal studies as a component of an introductory law subject. At the ANU College of Law, for example, legal reasoning is a component of the first year subject Foundations of Australian Law; at Bond it is a module in Legal Skills (a subject taught in connection with other relevant substantive law subjects over a number of semesters during the degree); at Charles Darwin University it is taught in the first year subjects Introduction to Legal Studies and Legal Interpretation; at the University of Queensland it is taught in the first year subjects Legal Method and Law in Society; and so on.

There is an abundance of academic literature concerned with the nature of legal reasoning and the teaching of reasoning and problem-solving skills to law students, including:

- texts addressed primarily to students that explain legal reasoning as an essential skill for both the study and the practice of law (eg Sanson et al; Head & Mann; Hinchy; Keyzer; Schauer; Romantz & Vinson)
- texts addressed primarily to legal academics as teachers that offer techniques for teaching legal reasoning (eg Burgess; Nievelstein et al; Hammond; Wolff; Martin)
- texts addressed primarily to legal academics as scholars that are concerned with clarifying the precise nature of 'legal reasoning' by lawyers and judges, and determining the differences, if any, between legal reasoning and other forms of reasoning (eg Alexander; Scharffs; Brozek & Stelmach; Posner).

Legal reasoning is often taught to first year law students as a formalistic series of steps labelled with an acronym such as IRAC (Sanson et al; LawNerds.com), HIRAC (ANU Academic Skills and Learning Centre), MIRAT (Wade), or CREAC (Romantz & Vinson). Students are taught how, when presented with a set of facts in the form of a tutorial problem or an exam question, they should identify the legal issues and, considering each issue carefully and logically, apply the relevant legal rules to the facts in order to reach a rational and convincing conclusion about the legal consequences of the particular situation. Some writers (eg Metzler) praise such approaches to legal reasoning. Other writers (eg Taylor) are more critical of such approaches. The prevailing view in Australia appears to be that formalistic techniques such as IRAC are useful for students new to the study of law, but as they progress through their legal studies the 'scaffolding' offered by the step-by-step



techniques should recede into the background in favour of a greater emphasis upon 'flow' in the student's reasoning and consequent improvements in subtlety and persuasiveness.

Law students would benefit from at least some training in basic logical reasoning (Sanson; Scott; Aldisert et al). When judges and legal theorists synthesise numerous legal decisions into a general legal principle they engage in inductive reasoning. When lawyers and judges apply a general legal principle to a particular legal problem they engage in deductive reasoning. When lawyers argue about whether or not a particular precedent should be followed they engage in reasoning by analogy. An understanding of the principles and standards of logic that support and legitimate these various forms of reasoning and argument is an extremely useful tool for any lawyer seeking to construct their own arguments or to understand, or undermine, the arguments of others.

Strict legal formalism as a model of legal reasoning has been criticised by numerous legal theorists. According to the critics of formalism, the use of formalistic techniques such as IRAC does not produce 'correct' or even realistic answers to legal problems. At best it assists in the identification of the range of possible legal responses. Other considerations come into play when judges and other legal decision makers have to choose between these possible responses. Often these other considerations are policy considerations, and a number of writers (eg Vandeveld, Midson) have emphasised the importance of law students learning to engage in a form of legal reasoning that takes into account not only the relevant legal rules but also the various policies underlying those rules.

Formalistic methods such as IRAC are also seen as inconsistent with commercial considerations and the realities of legal practice. In law school students are presented with legal problems and instructed to resolve them in the manner of a judge, considering both sides of the argument and identifying the best or most likely conclusion. In practice, lawyers are often instructed to begin with a particular position – one consistent with the desires of the client – and then work 'backwards' to construct legal arguments that support that position. This suggests that law teachers should give some thought to the ways in which legal problems are phrased, and what law students are instructed to do (Vandeveld).

According to the Notes to TLO 3, the range of possible legal responses identified as an outcome of legal reasoning should include not only adversarial responses (eg 'X can sue Y for breach of contract') but also non-adversarial responses (eg 'X should be encouraged to approach Y and suggest mediation as means of resolving the dispute'). It is not the case that law students can only be encouraged to consider such non-adversarial possibilities when being taught legal reasoning for the first time; these possibilities can and should also be explored as part of the content of the various doctrinal law subjects (King).

Other writers insist that the teaching of legal reasoning should include references to social justice issues (Agarwal & Simonson, Aiken) or encourage empathic awareness (Gallacher).

These and similar texts make the point that the teaching of legal reasoning should emphasise not only formalistic problem solving and logical reasoning but also policy considerations, commercial realities, non-adversarial solutions and a concern for social justice and the wellbeing of others. Treating these matters as somehow separate from 'legal reasoning' may be tempting, but may not be appropriate. It would send an inconsistent and troublesome message to law students if they were told in some law subjects to strive to be logical, rational and unemotional and in other subjects to aspire to be good, do good and care for others. It would be better if these ideals could be reconciled in a more nuanced approach to the development of



legal reasoning skills from their very first class.

Engage in critical analysis and make a reasoned choice amongst alternatives (TLO 3(c))

TLO 3(c) is the ability to critically analyse a legal text, claim or argument in order to understand it more thoroughly, and to evaluate the text, claim or argument in order to determine its truth value or correctness, its consistency with an ideological standard (the rule of law, gender equality, social justice etc), or if it is the best option from among a range of choices.

Analysis and evaluation are two of the key skills associated with the ability to engage in 'critical thinking', and it is therefore appropriate to refer to the critical thinking literature when determining what it means to teach law students how to analyse and evaluate and why it is so important that they learn to do so. The APA report is a good starting point. The six critical thinking skills identified and described in the Report are interpretation, analysis, evaluation, inference, explanation and self-regulation. The skills of direct relevance to TLO 3 are the first four. The other two skills relate to other Threshold Learning Outcomes: 'explanation' relates to TLO 5: Communication and collaboration, and 'self-regulation' relates to TLO 6: Self-management.

This conceptualisation of critical thinking skills reveals how critical thinking and legal reasoning are not mutually exclusive. Instead, legal reasoning can be seen as a specific application of critical thinking skills. When a lawyer identifies a legal issue, they are exercising their interpretation skills to understand the facts with which they are presented, and their analysis skills to separate the material facts from the irrelevant facts and identify the underlying legal issue. When they identify the relevant legal rules, they are exercising their interpretation skills and analysis skills to recognise which legal principles are relevant. When they apply the rules to the facts of the problem, they are exercising their evaluation skills by assessing the facts in light of the rules. And when they reach a conclusion, they are exercising their inference skills to draw a conclusion from the earlier exercise of their other skills, their explanation skills to present a clear and well argued conclusion, and their self-regulation skills to double check their reasoning.

The APA Report is not alone in its emphasis upon the importance of critical thinking. Critical thinking is widely seen as a form of higher-order thinking, and is frequently referred to in lists of assessment criteria and standards across a range of disciplines including law. However, unlike legal reasoning, critical thinking is rarely taught to law students explicitly, and it is usually something left for the students to work out for themselves or is assumed to be something already understood by the students by the time they arrive at law school. This is not a phenomenon unique to the law school (Haas & Keeley).

There are many accessible sources of information about critical thinking and how it can be taught, including texts about critical thinking written for students and for anyone seeking to develop their own critical thinking skills (eg Cottrell; Facione) and texts written for teachers about how best to teach others how to think critically (eg James; Macduff; Fulcher; Nagarajan & Parashar; James et al).

Most of the critical thinking literature identifies critical thinking as a combination of certain skills (including analysis and evaluation) and a certain attitude or disposition, and argues that students benefit from critical thinking being taught explicitly rather than the ability to engage in critical thinking being assumed or left to the students to teach themselves. At the very least explicit training in critical thinking clarifies for students the meaning of terms such as 'interpret', 'analyse' and 'evaluate' that they are likely to encounter throughout their studies.



Think creatively in approaching legal issues and generating appropriate responses (TLO 3(d))

TLO 3(d) is the ability to approach legal issues and generate responses to those issues 'creatively', that is, with an awareness of the full range of possible responses and with an ability and willingness to consider responses that are innovative, unorthodox, or unexpected. It includes the willingness to propose non-adversarial solutions to legal problems.

The importance of creativity has been acknowledged beyond the discipline of law (Anderson & Krathwohl). The ability to think creatively is clearly of relevance and use to lawyers, whether they are drafting a contract, negotiating a deal or arguing a case in court (Weinstein & Morton; Yeamans). However, creativity is not something that is usually taught explicitly at law school. Legal education has traditionally focused upon developing the ability to engage in structured, logical and constrained forms of thinking, and creativity by law students has not been encouraged (Magone & Friedland). (The traditional distrust of creativity is reflected in the reassurance in the Notes to TLO 3 that "the term "think creatively" does not mean that it is appropriate to ignore precedent and practice, and just "make things up".)

In order for law students to learn to think creatively in the manner envisaged by TLO 3, the curriculum must include the study of forms of alternative dispute resolution and non-adversarial approaches to legal problem solving. Should it also include instruction in creative thinking? In recent years a number of scholars – from both within and beyond the discipline of law – have called for creativity to be encouraged, and even explicitly taught, at university, and there is a small but growing number of scholarly resources available to law teachers to assist them in this endeavour (Robinson; Weinstein & Morton; Magone & Friedland; Phillips; Blythe & Sweet). While it is unlikely to be feasible for standalone subjects on creative legal thinking to be made part of the law curriculum, it does appear possible for law teachers to create more opportunities within existing subjects for creativity to flourish, and for assessment tasks to recognise and reward creative thinking by students.



Part 3: Further work

Consistent with the explanation of TLO 3 in the LTAS Statement, 'thinking skills' has been conceptualised in this Guide as a combination of legal reasoning, critical thinking and creative thinking skills. The emphasis in this Guide has been upon identifying a variety of explanations of the nature and importance of each of these skills as well as, to a lesser extent, the ways they can be taught to law students. Relatively little has been said, however, about how these skills can and should be assessed. This is a topic for subsequent exploration.

Other important questions suitable for further consideration include:

- Are 'thinking skills' something best taught as a discrete topic in a discrete subject, or should they always be taught in the context of a particular doctrinal area?
- Can the ability to identify issues be taught explicitly, and if so how?
- When teaching legal problem solving, how much emphasis should be placed upon developing the ability to identify and resolve (a) policy issues and (b) factual issues?
- Should *all* law students be obliged to complete subjects/modules on logic and critical thinking?
- When teaching legal reasoning, what is the most appropriate balance between teaching students to be amoral and objective, and encouraging them to be ethical and empathetic?
- Should creativity be taught explicitly to law students, and if so, how?





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