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 and deductive reasoning
• Threshold Learning Outcomes (TLOs) in law
• 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** = students taking the primary responsibility and initiative for their own 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 which 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 law, which applies in some countries 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.

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 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. There is no flowery prose, there are no unsupportable presumptions. There is no one ‘right’ conclusion and there is 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.

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, 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, 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:

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.

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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 hits 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 on their face, 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.

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. 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 AND DEDUCTIVE 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 portion 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 which 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 (see Chapter 10).

**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.

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 empathetically, 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 no 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 context 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?
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 below, along with a depiction of where they are developed in your law degree and this book.

FIGURE 1.1 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 recognize and reflect upon, and a developing ability to respond to legal issues;
  c  An ability to recognize 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.

PRIESTLEY 11

In the early 1990s a committee chaired by the Honourable Justice Priestley, comprising representatives from the various state and territory admitting authorities, 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.

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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.

**EXERCISE: PRIESTLEY 11 REQUIREMENTS**

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

**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 ONLINE**
Go online for answers to this exercise.
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. 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.

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, such as the University of Technology Sydney, have removed a dynamic array of graduate attributes in favour of the basic TLOs, involving the merging of attributes such as social justice and global mindset into a subset of a TLO, while also adding an attribute of Indigenous awareness. Other law schools, such as the University of Western Australia, include an aptitude for law reform and the acquisition of comparative law perspectives as distinctive graduate attributes.

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.

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.