



Effective Legal Writing

A Practical Guide

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Effective Legal Writing

A Practical Guide

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Preface

Concerns about standards in language, both written and spoken, are not new. The comparatively recent articulation by a range of authorities that regulate tertiary education in law of the standards expected of law graduates means, however, that the response of law schools to these challenges is as important as it has ever been. Indeed, as we note in Chapter 1, one of the Threshold Learning Outcomes for law graduates, Threshold Learning Outcome 5, is devoted entirely to communication and collaboration. With this increasing focus on communication skills, law students must consciously and actively work on their legal literacy skills during their studies. This book is designed to be a useful tool for educators and students alike in facilitating the development and enhancement of these skills.

Many first-year students do not know what to expect of their university experience nor what their university expects of them. Transition to tertiary studies can be a difficult process and this is particularly true for many first-year law students. One of the areas in which it is most evident that first-year law students require further assistance in understanding the expectations of their law school (and the legal profession) is in relation to writing law assignments. Although advances in technology have altered the way students can engage with their learning experience at university, the presentation of written assignments remains a constant feature of a university student's life. This is particularly so for law students and reflects the nature of the legal profession that many aspire to enter and that, in due course, they will be qualified to join. Legal writing remains one of the most common methods of assessing students' knowledge and ability to apply and analyse the law. The unique nature of the written law assignment means, however, that understanding how to demonstrate their level of knowledge and their application and analytical skills is a mystery to many first-year law students. The purpose of this book is to articulate clearly to students what is expected and how they should respond to these requirements.

This book is motivated by, and draws on, our experiences as teachers in the first-year law curriculum. It sets out to clarify expectations about good writing to law students in a way that is useful at any stage of their degree but is particularly useful for students new to law school. It also endeavours to illustrate various ways in which students can deliver what is expected of them. It does so with the aid of complementary online ancillary materials that present a range of practical exercises that are of assistance in developing new skills for old problems.

We would like to thank Jocelyn Holmes, this book's Commissioning Editor, for her vision and for her tireless efforts to bring this book into being.

Nichola would like to thank Simon for his support and encouragement throughout the writing process. She would also like to thank the members of the first-year teaching team at James Cook University for their enthusiasm, dedication and collegiate approach towards teaching and supporting first-year law students.

Brendan would like to thank his family, in particular Laura Grenfell, for their support and encouragement in this project. He also extends his thanks to the first-year teaching team and to other colleagues at the Flinders Law School for their encouragement and support of his endeavours in developing the first-year topic 'Legal Research and Writing'.

Of course, we also thank those students whom we have had the privilege to teach, in their first (and subsequent) years at law school, and who, in numerous ways, have been the inspiration for this book.

Nichola Corbett-Jarvis and Brendan Grigg

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Chapter 1

Introduction

Purpose of this chapter

The purpose of this chapter is to introduce the book and to explain what each chapter covers and how they can be used. Chapter 1 also identifies considerations that apply to written communication that generally do not apply to verbal communication. It introduces some key rules or principles that have been developed and used by courts to interpret documents and legislation and illustrates their importance to legal writing. This chapter then explains how and why these considerations are relevant and useful to assist law students to achieve the legal writing standards expected of a law graduate.

Key concepts

- The differences between written and verbal communication
- The principles used by courts to interpret legal documents and legislation
- The importance for students undertaking the Bachelor of Laws and the Juris Doctor of meeting the national Threshold Learning Outcome (TLO) standards, in particular TLO 5: Communication
- The benefits of revisiting the concepts covered in this book throughout a course of legal study to refine legal writing techniques and improve assignment grades



CONCEPT

Why and when do we write?

The answers to this question are worthwhile considering as you open a book on effective legal writing and, indeed, as you embark upon your studies at law school.

1.1

Writing is a means of communication. So is speaking. The two are not mutually exclusive, but written communication can be an efficient and effective substitute for spoken communication in many instances. So perhaps the more appropriate question to pose, at the outset of this book, is not so much why do we write, but when do we write? What are the differences between written and spoken forms of communication and how should we address these differences?

The speaker and the listener benefit from proximity in a number of ways during many face-to-face conversations. Obviously, the listener is able to request the speaker

to repeat or clarify something.¹ The speaker is able to ascertain whether his or her message has been understood and adapt the approach if necessary. Body language, facial expressions and subtleties in tone of voice can also facilitate (or obstruct) the flow of information.²

The beneficial aspects of this proximity between speaker and listener are entirely absent when communication is in writing. A writer cannot simply moderate the tone or volume of his or her voice to indicate that something is important.³ A writer must draw on other techniques to achieve this effect. Similarly, a writer cannot rephrase something if, at first, the reader did not understand it. Writing that has not been understood has not communicated and is, ultimately, wasted.

Another difference between the spoken and the written word is that the latter is permanent.⁴ This rather trite observation is nevertheless significant for legal writing given the importance of the written word in law. Contracts and wills are all examples of legal documents, the drafting of which is often scrutinised closely. In addition, the format of such documents lends itself to being shown to persons other than the intended recipient. Letters are often viewed by more than just the addressee. Sometimes the audience will be individuals that the writer did not anticipate. Emails, for example, are easily forwarded to third parties without the knowledge or consent of the writer.

It is this unique background to writing, combined with the written assignment being a primary form of assessment, which means that law students need to focus on their writing. The first step in this process is to focus on the importance of the written word in relation to the interpretation of legal documents and legislation.

'The grammatical and ordinary sense'

- 1.2 When documents such as contracts and wills are subjected to the scrutiny of the courts, the courts apply a number of principles of construction in order to interpret the meaning of a word, phrase or provision. In most cases, the courts are only able to interpret the words as they appear on the page. Subsequent evidence as to what the parties intended to achieve is usually inadmissible.⁵ This means that the focus is on the words *as written*. There are a range of rules or principles that may be applied to assist with the interpretation of contracts, wills and other legal documents. These rules of interpretation are founded on the common law principles of statutory interpretation, which the courts have developed and refined over the centuries. Even when a provision in a statute is ambiguous or its interpretation is open to doubt, the courts must apply the provision if it is relevant to the dispute between the parties. The courts must defer to the will of parliament, which means that the courts cannot disregard a statute merely because its meaning is unclear

1 Ross Hyams, Susan Campbell and Adrian Evans, *Practical Legal Skills* (Oxford University Press, 3rd ed, 2007) 55.

2 Ibid.

3 Ibid.

4 Ibid.

5 This is called the 'parol evidence rule'.

or it is badly drafted. As a consequence, a range of principles have developed over time to assist with the interpretation of words and provisions in dispute.

The ‘literal approach’, also known as the ‘ordinary and grammatical meaning’ and the ‘plain meaning rule’, is the starting point for interpreting any statute.⁶ In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384, McHugh, Gummow, Kirby and Hayne JJ reflected on the importance of the literal approach in interpreting a statute:

1.3

[T]he duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision.

Application of the literal rule results in an initial determination of what the language means in its ‘ordinary and natural sense’.⁷ Its focus is therefore on the ‘grammatical and ordinary’ meaning of a word, phrase or provision through reference only to the wording used, the grammatical arrangement of the words and the context in which they appear.⁸

This principle is also applied to the interpretation of legal documents where the courts only have the words as presented in the document as a whole to determine the meaning of the word, phrase or provision in dispute. Thus, the grammatical and ordinary sense of a word has a distinct legal significance and effect. Lawyers must ensure when drafting legal documents that the content is clear and accords with the ordinary and grammatical reading likely to be applied in its interpretation should it ever be subject to judicial scrutiny. Further, when advising a client in relation to an existing document, lawyers must be able to appreciate the significance of the ordinary and grammatical meaning so that they can properly advise a client as to the range of interpretations that may be placed on the content — and, ultimately, what this will mean for the likelihood of the client’s case succeeding. It is therefore necessary for lawyers to focus keenly on grammar and meaning in all forms of written communication.

1.4

6 *Reid v Reid* [1979] 1 NZLR 572, 594 (Cooke J). See also *Grey v Pearson* (1857) 10 ER 1216, 1234; Peter Butt, *Modern Legal Drafting* (Cambridge University Press, 3rd ed, 2013) 56; Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 8th ed, 2012) 289–91.

7 See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

8 It should be noted that the purposive approach is now the dominant approach towards the interpretation of statutes. The Commonwealth and state legislatures have prescribed that a purposive approach must be adopted in construing such statutes. See *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18. The purposive approach involves adopting a reading of the statute that is consistent with the purpose of the relevant parliament in passing the legislation. However, the literal rule is still the starting point for interpretation of a word, phrase or provision. If parliament has succeeded in expressing its intent clearly in the statute, a literal reading of the statute will lead to the same interpretation as the purposive approach. For further information, see Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 8th ed, 2012) 288–306.

Professional and pragmatic considerations: the importance of written communication for law students

- 1.5 The ability to communicate effectively in writing, in a variety of situations and to a range of audiences, is a key skill that a lawyer must develop and master to ensure professional recognition and success. Effective written communication is a skill that an aspiring lawyer too must acquire. In addition, there are several reasons why effective writing is a skill that law students need to develop and implement *while still at law school*.

The obvious pragmatic advantage of effective writing skills at law school lies in the ability for you to convey well your understanding, critique and application of the law in a range of different law school assignment contexts, whether they be theoretical, practical or assignments that authentically replicate the day-to-day work of a lawyer. In addition, plain English writing techniques, which are a critical element of effective writing, are useful in imposing discipline and structure to your writing and are thus a crucial component of the preparation and drafting of any assignment.

Effort in preparing and drafting work as well as in observing the conventions of academic writing in editing, proofing and in polishing your work will be appreciated by the marker and rewarded.

As this book demonstrates, a focus on clarity in your writing at law school demands a consideration of the context of your writing, your purpose for writing and, importantly, the reader for whom you write. Placing the reader and the reader's needs foremost in your mind as you approach, plan, execute, edit and finalise a piece of writing will ensure that you do not forget that law is about people. It is important not to lose sight of this despite the fact that much of the way in which you will study law is by reading the decisions of appellate courts, where the clients who initiated the litigation in the first instance and their needs have often been relegated to an insignificant role.⁹

Meeting the expectations of a graduate of the Bachelor of Laws or the Juris Doctor

- 1.6 The importance of communication to the legal profession is reflected in the attention given to communication skills in the standards expected of Australian law graduates in the minimum discipline-based learning outcomes known as the Threshold Learning Outcomes (TLOs).¹⁰ These standards were developed in 2010 for the Bachelor of Laws

9 Sharon Wesley, *Good Practice Guide (Bachelor of Laws): Communication (Threshold Learning Outcome 5)* (Australian Learning and Teaching Council, 2011) 14.

10 Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010* (Australian Learning and Teaching Council, 2010).

and in 2012 for the Juris Doctor,¹¹ with reference to national and international standards for law graduates.

TLO 5, devoted to communication and collaboration, is common to both the TLOs for the Bachelor of Laws and the Juris Doctor. It provides that graduates of each course will be able to:

- (a) communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences; and
- (b) collaborate effectively.

This book facilitates students' achievement of the communication standards set out in TLO 5. It does so in a number of ways. 1.7

First, it expressly embeds the teaching of writing skills within the context of the discipline of law. Plain English writing techniques, grammar rules and exercises, and the examples for academic and professional legal writing are all set in a legal context in order to illustrate that the writing task is as important as the content of the law.¹² While this book is suited to a variety of legal writing courses,¹³ it is also relevant to substantive law courses both compulsory and elective, regardless of their sequence in the degree.

Second, this book acknowledges that students build literacy skills 'over time.'¹⁴ It speaks primarily to students in their first years at law school but functions as a guide to any writing task in subsequent years. It is also particularly relevant to later year and practical legal training students undertaking assignments that authentically replicate the work of a legal practitioner. This particular component of this book facilitates the transition from law school to the workplace.

Third, this book's focus on feedback and, in particular, on assisting students to understand and interpret it will help develop active revision and editing skills¹⁵ and will encourage the development of reflective learning through review of written work combined with identification and implementation of suitable action to ensure continued improvement.

The contents of this book and how to use them

There are three principal uses for this book: 1.8

1. It is a guide to plain English writing techniques, key grammar points and rules of punctuation, the use of which are crucial to clear and effective legal writing.
2. It is a guide to writing the main types of law school assignments: you will find a relevant guide to the planning, preparation, editing and finalising of many of the legal writing assignments students face at law school in the relevant sections of Chapters 5, 6 and 7.

11 Council of Australian Law Deans, *Juris Doctor Threshold Learning Outcomes* (March 2012) <[http://www.cald.asn.au/media/uploads/JD%20TLOs%20\(March%202012\)%20Andrew%20Kenyon1.pdf](http://www.cald.asn.au/media/uploads/JD%20TLOs%20(March%202012)%20Andrew%20Kenyon1.pdf)>.

12 Wesley, above n 9, 13.

13 Your university may refer to these as 'subjects', 'modules', 'topics' or something similar.

14 Wesley, above n 9, 14.

15 Ibid.

3. It is designed to assist your understanding the importance of acknowledging the work of others in your assessment tasks. A finding by your university that you have breached the requirements of academic integrity may impact upon your admission to practise as a lawyer once you have graduated. Ensuring your work complies with the relevant academic integrity policy of your university or law school will enable you to avoid these problems.

Chapter 2 provides a guide to successful grammar use in clear legal writing, focusing on areas of grammar that present the greatest challenges to law students. It does so by introducing some key historical events in the development of English that explain why English grammar is the way it is. It considers, for example, the Norman Conquest of England in 1066 and the vast legal vocabulary that even today illustrates its lasting effects. This chapter provides a number of exercises for students to practise these rules and a number of case studies that illustrate why they matter in law.

Chapter 3 builds on this by presenting plain English writing concepts and techniques that law students can use and add to their repertoire of writing skills. It explains why legal writing has traditionally been characterised by its verbosity and complexity. It also introduces plain English writing techniques that can enhance the clarity and readability of legal writing, including your writing at law school.

Chapter 4 considers the ethical dimensions of legal writing at law school and the obligations upon law students to conduct themselves ethically and professionally at all times during their tertiary education. This chapter explains the rationale behind university academic integrity policies that require students to present work that is their own and that properly acknowledges the use of others' words and ideas. As Chapter 4 notes, a failure to do so may affect a student's application for admission as a lawyer after graduation. It therefore provides a series of steps and tips that you can use to ensure that your writing complies with your university's academic integrity requirements.

Chapter 5 is designed to guide students through the two most common types of written assignments at law school: the problem question and theoretical essay. Its primary purpose is to help students understand, and respond to, the issues and directions presented in these two types of question. This chapter takes problem questions and theoretical essays separately, providing extensive guidance on planning and preparing, drafting and refining work in accordance with the precise parameters of the task; it is intended to make explicit the expectations of law students' written work.

Chapter 6, like Chapter 5, concentrates on guiding students through particular types of legal writing assignments, but the writing tasks featured in this chapter are profession-orientated. Such 'authentic' tasks are used relatively frequently at law schools to give students an exciting practice-orientated context for their written work. Authentic legal writing assignments typically include letters, outlines of arguments and memos. The planning, preparation and drafting process for each of these unique types of document are considered in this chapter, so that students are able to ensure their work responds appropriately to the nuances of each particular type of task. In addition, this chapter also provides an introduction to drafting legal documents.

Chapter 7 is focused on enhancing several skills that are necessary for the successful study of law. It considers the importance of organisation for law students and legal practitioners alike and provides guidance on planning work both over the course of a semester and in relation to specific assessment tasks. This chapter also discusses the importance of carefully reviewing, refining and editing work. A central focus of this chapter is equipping students to make the most of feedback. Without proper reflection and identification of areas of work requiring attention or action, students are unlikely to see progress between assessment items. To assist students in understanding feedback and becoming reflective learners, this chapter sets out some of the most common feedback phrases used by markers. It then goes on to discuss what steps students should take in response to such feedback to ensure that their work and, ultimately, their grades improve.

It is, of course, important to be familiar with the content of this book as a whole to ensure that you are adequately prepared for the vast range of written assignments you may face at law school, issues of academic integrity that may arise while writing, and so that you are focused on your expression, grammar and use of plain English. However, this book is not designed to be read cover to cover on just one occasion. Its structure enables you to identify discrete chapters or sections within chapters that may assist you with a particular written assignment and just revisit those sections. For example, you can re-read the section on 'theoretical essays' in Chapter 5 each time you are presented with a task of that nature. You can at any time look up the grammar or punctuation rules contained in Chapter 2 and the plain English techniques discussed in Chapter 3 to assist you with drafting any written assignment. You can also refresh your understanding of academic integrity issues at any time by looking at Chapter 4. Upon receipt of feedback on your written work, you can consider how to review, understand and act on that feedback to produce improvement in your work in the future. Using this book in this manner enables you to respond to areas of identified need.

1.9

There is no doubt that legal writing is a skill that develops over time. Improvement occurs through a constant process of reflection, observation of the written work of others and identification of areas requiring improvement. That being said, there are a number of fundamental principles that can be applied to enhance that development process. It is the intention of this book to make those principles explicit to law students. Used as a whole or through reference to applicable chapters or sections within chapters, this book provides a suitable foundation upon which students can refine and further their legal writing skills.