Legal Writing

Christopher Enright

Another damned, thick, square book! Always scribble, scribble, scribble? Eh Mr Gibbon.

Duke of Gloucester (1734-1805), Boswell's *Life of Johnson* vol ii, p2

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To

the memory of my brother Nick (1950-2003)

Blessed are they who hunger and thirst after righteousness for they shall be fulfilled.

St Matthew's Gospel 5:3

Preface

What This Book is About

This book seeks to provide a guide to legal writing. It focuses on student and academic tasks. These, however, have substantial relevance for legal writing in practice. The account of legal writing here has two aspects although they are sometimes blended in the text:

1. An account of techniques for technical writing in general
2. An account of techniques for the specifically legal part of legal writing

Writing in General

There are three objects of discussion and analysis for the general account of writing. One consists of the text itself. The second consists of task related to the readers of the text. The third comprises the task of writing.

There are three matters concerning the text:

1. Function of a Text. A text performs three functions – storing information, retrieving information and interpreting information.
2. Structure of a Text. Structure is formed at six levels – words, forming words into sentences, linking sentences, forming paragraphs, linking paragraphs and overall structure. To write a clear and structured text it is necessary to structure the text at each of these six levels.
3. Characteristics of a Text. The chief characteristics are location, layout, headings, length and style.

In most cases a writer writes a text so that other can read it. To accomplish this part of the enterprise the writer must focus on the reader. They must perform three connected tasks – identify the class of readers for whom they are writing the text, ensure that the text addresses that class (which means that the members of this class must be able to understand it) and consider whether it is feasible to extend the class of readers without increasing the effort of writing or the size of the text beyond reasonable limits.

Finally, the book explains the major processes in writing. These consist of allocating time, designing the structure, writing down the structure then editing what has been written.

Legal Writing in Particular

The particular requirements of legal writing are covered in two ways. First, some of the specific requirements for legal writing are blended into this account of the general technique. The second way focuses on the fact that the overall

structure for legal writing is often determined by various models for working with law. The rationale is that the method for performing the task provides the structure for describing the task. These models consist of the following:
1. A model for organising law.
2. A model for enacting statutes.
3. A model for interpreting statutes.
4. A model for using law. This includes two specific models, a model for litigation and a model for transactions:
 4.1 Model for Litigation. The model for litigation explains litigation. It describes how a court defines issues of law, fact and discretion and the methods by which a court resolves these issues.
 4.2 Model for Transactions. The model for transactions explains transactions. It describes how a party performs their side of a transaction by carrying out the appropriate steps that satisfy the legal requirements for the particular transaction.

These models are explained more fully in another text – Christopher Enright *Legal Method* www.legalskills.com.au. This book provides an outline of these models.

Footnotes and Commentaries

This book uses a two-part system for notes, footnotes and commentaries. Broadly but not absolutely, footnotes provide citations for sources, while commentaries provide further reading for, and add-ons to, the discussion that is already in the text.

Commentaries

Most but not all chapters have a final section entitled 'Commentary'. Each specific commentary under this heading is linked to a footnote. Each of these commentaries has a heading. The heading takes the form 'Commentary'/chapter number/commentary number/'Footnote'/Footnote number. To illustrate, 'Commentary 12.5 Footnote 14' means that this is commentary number 5 for Chapter 12 and that it links to both Footnote 14 and to the part of the text that footnote 14 serves.

Commentaries contain additional reading and comments on the subject matter in hand. And in cases where a citation for a text is long and cumbersome, the citation may be moved to a commentary.

Footnotes

Generally citations for a text are put in a footnote. If, however, the citation is long and cumbersome, as noted above, it may be moved to a commentary.

Where a footnote is served by a commentary the footnote will indicate this by stating the number of the commentary. For example ‘Commentary 12.5’ in a footnotes indicates that there is information relevant to this part of the book located in Commentary number 5 for Chapter 12.

Thanks

I owe considerable thanks. As ever my family have given me love and support.

I have to thank my friend Terry O’Donohue. His painstaking editing of this manuscript and carefully thought out suggestions saved me from much grief. I thank Roger Vickery for his careful reading and most helpful comments.
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Newcastle

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Christopher Enright is qualified as a barrister, solicitor and chartered accountant. Chris has a Master of Commerce (Management) from the University of New England. In a former life Chris lectured in law and management at various universities. Much of his research time as an academic was working in the much-neglected field of legal skills. This research was directed to the major tasks with law, especially those that involved reasoning. These tasks are organising law, making law, interpreting law, applying law to facts, proving facts, exercising a discretion, researching law and writing law. The aim was to simplify and systematise these tasks by developing a step-by-step guide to performing them. The ideal was that this guide was as close as possible to an algorithm. The ultimate goal was to enable law schools to train lawyers so that they could understand these tasks and, when required, perform them effectively and efficiently.

Legal Skills Series

This book is part of a series of textbooks that explain legal skills and that Sinch publishes. The table below sets out the books in the series.

Authors	Title
Christopher Enright	Legal Reasoning
Christopher Enright	Legal Method
Christopher Enright	Legal Writing
Christopher Enright	Proof of Facts
Christopher Enright	A Method for Interpreting Statutes
Christopher Enright	Drafting Readable Statutes
Christopher Enright and Clare Cappa	Fundamentals of Legal Research

Contents

Table of Legislation

Commonwealth

Australian Capital Territory

New South Wales

Norfolk Island

Northern Territory

Queensland

South Australia

Tasmania

United Kingdom

Victoria

Western Australia

Table of Cases

Abbreviations	
ABT	Australian Broadcasting Tribunal
AFMA	Australian Fisheries Management Authority
DPP	Director of Public Prosecutions
GIO	Government Insurance Office
VVA	Vietnam Veteran's Association
WCIC	Water Conservation and Irrigation Commission

1. *Engineers' Case*
2. *BHP Case*
3. *Cricket Case*

4. This was reported in *The Sydney Morning Herald* 'Judge's poetic ruse fails, alas, to amuse' 16 December 2002, p 9.
5. *Overseas Tankship (UK) v Morts Dock and Engineering Co*
6. *Overseas Tankship (UK) v Miller Steamship*

Table of Diagrams

Labels

Chapter 1 Outline

Chapter 3 General Structure of a Text

Chapter 4 Legal Structure of a Text

Table of Foreign Language Expressions

Labels

Introduction

Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

Describing Items

Labelling Items

There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

Name

The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

Number

Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Letter

Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

Designating a Set of Items

It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects:
1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be ‘Elements’.

2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:
   2.1 The number of the first item in the set.
   2.2 A hyphen.
   2.3 The number of the last item in the set.

Here are two illustrations:
1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

1. Naming the Items

The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name 'Statute', and each elements in a set of elements would be 'Element'.

2. Numbering the Items

There are two possibilities for the numbering of a set, list or range of items:
1. There can be a fixed number in the set.
2. There can be a variable number in the set.

2.1 Fixed Number in the Set

In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as 'Elements 1-5'.

2.2 Variable Number in the Set

Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol 'n'. To refresh readers, 'n' stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

Null Option

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such as this the option is labelled with the symbol for nought, namely '0'. Thus the

option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

Corresponding Items

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

Single Relationships

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to causes Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

Collective Relationships

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula*

singulis. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb 'respectively' captures this notion.

Two or More Version of an Item

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:

1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.
2. There can be two versions of a fact. There are two major possibilities:

2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated 'P' and 'D' to signify the plaintiff and defendant's version. Thus the two versions are Fact 2P and Fact 2D.

2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff's satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

Subdivisions of Items

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

Possibilities: 'X', 'Y', Etc

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

Signifying Relationships

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

Symbol	Relationship	Illustration
<	Less than	X<Y. X is less than Y.
>	Greater than	X>Y. X is greater than Y.
=	Equals	X=Y. X equals Y,
≠	Not Equals	X≠Y. X does not equal Y.
≈	Approximately Equals	X≈Y. X is approximately equal to Y.
≡	Congruence Relationship	X≡Y. X is congruent with Y.
≅	Isomorphic	X≅Y. X is structurally identical to Y
Labels Diagram 1. Symbols for Relationships		

Listing Items

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

Meanings
Meaning 1
Meaning 2
Meaning n
Labels Diagram 2. List of Meanings

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when n=2. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

Diagrams

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause. Here is the illustration:

1	2	3	
Meanings	→	**Effects**	**1**
Meaning 1		Effect 1	**2**
Meaning 2		Effect 2	**3**

Meaning n		Effect n	**4**
Labels Diagram 3. Meanings and Effects			

This diagram functions in the following way:
* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.
* Column 3 shows the effect of the statue that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will 'best achieve' the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term 'Effect' aligns directly with purpose and object (which of course is why the table includes it).
* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.
* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.
2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.
3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

Probability

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

Symbol	Meaning
P(A)	probability that event A occurs
P(B)	probability that event B occurs
P(A ∪ B)	probability that event A or event B occurs (A union B)
P(A ∩ B)	probability that event A and event B both occur (A intersection B)
P(A')	probability that event A does not occur
P(A | B)	probability that event A occurs given that event B has occurred already (conditional probability)
P(B | A)	probability that event B occurs given that event A has occurred already (conditional probability)
P(B | A')	probability that event B occurs given that event A has not occurred already (conditional probability)
ϕ	the empty set = an impossible event
S	the sample space = an event that is certain to occur

Labels Diagram 4. Symbols Used for Probability

Chapter 1
Outline

Introduction
Writing
Reading
Commentary

Another damned, thick, square book! Always scribble, scribble, scribble? Eh Mr Gibbon.[1]

Introduction

One valuable prescription for clear writing is to outline a subject first then to treat it in more detail. To fill this prescription this book commences with an overview of the task of writing. This lays foundations for the remainder of this text, which provides a more detailed consideration of writing in general and of writing law in particular. In giving this outline the chapter also considers the task of reading. There is good reason to do this. Writing and reading are complementary tasks, because an author writes a text so that it can be read. This means that a writer who understands the task of reading should, in consequence, write a more readable text.

Throughout the discussion in this book the text will often refer to the writing of a book. In part this reflects the fact that a book is one of the major forms of legal writing. In part the text refers to writing a book for convenience on the basis that it represents legal writing. Consequently for the most part what is said generally applies to other forms of legal writing such as an article in a periodical or a judgment of a court perhaps subject to appropriate modifications.

Writing

I think writing, any creative process, is a constant negotiation between craft and instinct.[2]

Introduction

The discussion of writing proceeds in two stages. First the text considers the general task of writing. This lays a foundation for the second stage which entails discussion of those aspects of writing that are of specific relevance to writing law.

1. Duke of Gloucester (1734-1805), quoted in James Boswell's *Life of Johnson* vol ii, p2 n.
2. Nick Enright *The Sydney Morning Herald* 16 October 1996

Writing in General

To explain the nature of writing, imagine that a traveller asks you for directions as to how to reach a town some distance away. Your essential task is to give the person step-by-step instructions as to how to get there. In addition, although it is not required, you may also do two other things – point out some places of interest on the way and urge them to visit the town because it is picturesque.

Giving this advice to a traveller has some parallels for the tasks involved in writing. These tasks are interwoven and possibly not easily captured with simple labels, but can be portrayed in a broad introductory way as three functions. One is the objective or rational function that involves conveying information. This is represented with the step-by-step directions. A second is the sensational or emotional function. This is represented by pointing out to the traveller places of interest on the way to their destination. The third is the persuasive function. This is represented by urging the traveller to visit the town because it is picturesque.

Two of these three functions, the objective or rational function on the one hand, and the sensational or emotional function on the other, can be viewed as the basic functions of writing. By contrast a writer persuades by using some combination of these other two functions.

These two different and basic functions of writing might best be represented and highlighted by a number of distinctions, opposites or contrasts. Reason as the objective function and rhetoric as the subjective function[3] are probably the most suitable of these contrasts. Other distinctions which cover much the same field are cognitive and affective functions, intellect and emotion, sense and sensibility, head and heart, rhyme and reason, left brain and right brain, and the thinking human, *homo sapiens* as distinct from the feeling human, *homo sentiens*.

Delivering Information

It is a great nuisance that knowledge can only be acquired by hard work. It would be fine if we could swallow the powder of profitable information made palatable by the jam of fiction.[4]

Giving directions to the traveller on how to reach a distant town represents the objective or rational function of writing. This function of writing is addressed to the intellect. It conveys information which incorporates both bare facts and reasoning processes. In this task the writer has to tell the reader exactly what they want them to know. Clear writing does this best. Writing is made clear when it stems from a ‘precision of thought’.[5] It proceeds like a traveller on a

3. Commentary 1.1.
4. Somerset Maugham *10 Novels and their Authors* Chapter 1 section i.
5. Gibbs (1993) p 495

journey in a step-by-step way, where each idea flows logically from the one before it.

In order to deliver information clearly, a text performs one main task and two ancillary tasks:
1. Main Task: Storing Information. The main task of a text is to store information in an orderly or structured way so that a reader can easily understand the text.
2. Ancillary Tasks. The two ancillary tasks of a text concern understanding information and retrieving information:
2.1 Understanding Information. A text can facilitate a reader's understanding of the information within by providing appropriate aids. These may consist of either or both of the following:
2.1.1 Summary of the Text. This summary may be at the beginning or end of the text, or each chapter may contain its own summary.
2.1.2 Explanation of a Term. The text may explain complex or technical terms in an index or a glossary or just explain them in the text when the text first mentions them.
2.2 Retrieving Information. The text facilitates retrieval of specific pieces of information (for example a description of a principle) by a reader when it provides appropriate tables such as a table of statutes or an index.

Arousing Emotion

The true meaning of religion is thus not simply morality, but morality touched by emotion.[6]
A good novel tells us the truth about its hero; but a bad novel tells us the truth about its author.[7]
Embellishing directions to a traveller so as to enhance the joy of their journey by pointing out places of interest represents the subjective or rhetorical side of writing. This rouses sensation or emotion in the reader. For example, you give your reader joy because of the style with which you write.[8] This joy comes from the 'how' rather than the 'what' – the way in which you say something, a 'felicity of expression', as distinct from the content of the text.[9]

This function of writing is obviously addressed to the senses. Senses, when aroused, produce emotions, which involve not only a cognitive function but a physiological response as well. We feel something, as reflected in the metaphors that we use to describe the effect of emotional writing – it gets you going, it touches you or it moves you. This obviously happens in literary works whose

6. Matthew Arnold *Literature and Dogma* (1883)
7. Gilbert Keith Chesterton
8. Commentary 1.2.
9. Gibbs (1993) p 495

purpose is to take a reader on an emotional journey. It is, however, done to some extent in technical writing, although it is not essential for that task.

Like information, emotion is conveyed by words. This may be achieved in several ways. It can be done directly by using appropriate adjectives and adverbs, although the direct approach is generally not the best. It can be done less directly by a number of means such as choosing words with an appropriate connotation, through understatement, by approaching a topic from a different or unusual perspective, or by using imagery such as metaphor and simile.

Typically a straight description of the law in an area will not have, and usually does not need, much emotional content to convey its message. But even here there are exceptions, since some topics are naturally more emotionally laden than others. For example, a textbook on human rights will likely convey the profound commitment that our culture has towards rights, and the suffering inflicted when those rights are greatly abused. Consequently, judgments in these areas are more likely to arouse emotion. For example, a judgment sentencing a criminal for a particularly vicious crime can scarcely avoid emotional content. There is natural outrage when one person inflicts violence on another.

A classic example of emotional legal writing comes from the *Mabo Case,* where the High Court of Australia found, contrary to then current opinion, that at common law the aboriginal natives had a legal claim to their tribal land. There, Justices Deane and Gaudron described the fate of Australian aborigines following arrival of the white man in 1788 and their subsequent conquest. They called it a 'conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people and leave a national legacy of unutterable shame. This dispossession was the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is acknowledgment of, and a retreat from, those past influences'.[10]

Accomplishing Persuasion

In 2004 Barrack Obama made his keynote speech to the Democratic Convention. It was 'an elegant narrative, its simple rhetoric quite sublime'. On Wednesday 5 November 2008 Barrack Obama delivered his victory speech, having just won the vote to become the 44th President of the United States. This speech 'had the same power, delivered with the same mesmerising cadence, the same simplicity of language, and the same compelling narrative style' as his speech in 2004.[11]

10. Commentary 1.3.
11. The quotations are from Ramsey (2009).

In giving directions to a traveller a person might also seek to persuade the traveller in some way. For example they may try to persuade them that the place they seek is well worth seeing because it is picturesque, that it is not worth seeing or that it is best approached by one available route rather than another. In a similar way, some writing seeks to persuade the reader about something. For example, one function of a judge's giving reasons for a decision is to convince readers that the decision was the best possible decision in the circumstances. Failing this, the judge tries to convince readers that the decision was reasonably open and was made after proper consideration of all arguments.[12]

Persuasion is typically attempted by performing a mixture of the other two functions. It involves an appeal to both reason and emotion. In the best case these are integrated and combined to create maximum effect.

While both reason and emotion can be used there is a strong case that in law persuasion should rest to some considerable extent on the quality of reasoning in the text, especially in a judgment.[13] Common law jurisprudence views justice being fair and impartial as portrayed by the statue of the Greek goddess Themis, a stern goddess of justice and order, standing above the Old Bailey holding the scales of justice evenly balanced.

Reason

One good ground for this rests on the efficacy of reason. There are few things as compelling as the cold and remorseless logic of a clear case. In this vein Michael Kirby recommends writing in a 'simple, straightforward and 'magisterial' style', which tends to have the greatest influence 'because of the clarity of [its] expression'.[14] Cardozo is even more emphatic in rejecting rhetoric and exhorting reason. For him, a persuasive judgment 'eschews ornament. It is meagre in illustration and analogy. If it argues, it does so with a downward crush and overwhelming conviction of the syllogism and seldom with the tentative groping towards the inductive apprehension of a truth imperfectly discerned'.[15]

Rhetoric

Rhetoric is the name for oratory that seeks to persuade by reference to emotion. It is part of political life. A great example is Abraham Lincoln's Gettysburg Address. Lincoln delivered this address during the American Civil War, on the afternoon of Thursday, 19 November 1863, at the dedication of the Soldiers' National Cemetery in Gettysburg, Pennsylvania, four and a half months after the Union armies defeated those of the Confederacy at the Battle of Gettysburg.

12. Gibbs (1993) p 501. Commentary 1.4.
13. Commentary 1.5.
14. Kirby (1990A) p 705
15. Cardozo (1921) p 342

This is what Lincoln said: 'Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we cannot dedicate – we cannot consecrate – we cannot hallow – this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work, which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us – that from these honoured dead we take increased devotion to that cause for which they gave the last full measure of devotion – that we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth.'

Rhetoric is also a common part of the drama of the courtroom[16] and of legal culture,[17] especially in jury trials.[18] There are, for example, excellent and moving examples of legal rhetoric in literature. William Shakespeare's *Merchant of Venice* contains the plea that Portia made on behalf of Antonio and the plea that Shylock made on his own behalf. In a much admired speech, Portia exalts the quality of mercy:

The quality of mercy is not strain'd,		The attribute to awe and majesty,
It droppeth as the gentle rain from heaven		Wherein doth sit the dread and fear of kings;
Upon the place beneath: it is twice blest;		But mercy is above this sceptred sway;
It blesseth him that gives and him that takes:		It is enthroned in the hearts of kings,
'Tis mightiest in the mightiest: it becomes		It is an attribute to God himself;
The throned monarch better than his crown;		And earthly power doth then show likest God's
His sceptre shows the force of temporal power,		When mercy seasons justice.[19]
Diagram 1.1 The Quality of Mercy		

In another passage in the play, Shylock the Jewish financier, eloquently points out that Jews, who were treated differently from others, were in fact not

16. Laster, Breckweg and King (2000)
17. See, for example, Napley (1991).
18. See, for example, Vinson (1993), Hamlin (1984).
19. William Shakespeare *Merchant of Venice* Act IV, Scene 1, 180-187

different at all: 'I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions; fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die?'[20]

Another excellent portrayal of rhetoric arguing opposite points of view consists of the speeches by Mark Antony and Cassius in Shakespeare's *Julius Caesar* following the murder of Caesar by Brutus and Cassius. Mark Antony in praising Caesar, and Brutus in condemning him, seem equally eloquent, moving and convincing. Brutus, for example, said: 'Not that I loved Caesar less, but that I loved Rome more . . . As he was valiant, I honour him, but as he was ambitious, I slew him'.[21] In reply Mark Antony refutes the allegation of ambition: 'When the poor have cried, Caesar hath wept. Ambition should be made of sterner stuff'.[22]

Some judges acknowledge the place of rhetoric.[23] It includes 'the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the tenseness and tangle of the proverb and the maxim'.[24] This, however, leads to a problem. Appeal to the senses can mean that the judge 'is passing off emotion as reason' with the consequence that 'authority has flown out the window'.[25]

There is, however, a problem. Persuasion by rhetoric is more inclined towards emotional and cognitive manipulation than a rational outcome, as exemplified by some of the sayings about persuasion. In the classic and much cited words of Aristophanes: 'A clever rhetorician can make the weaker argument the stronger'.[26] Lord Macauly was equally blunt when he asserted that 'the object of oratory alone is not truth but persuasion'.[27] James Thomson emphasised the role that emotion plays in his lines: 'His gentle reason so persuasive stole; That the charmed hearer thought it was his own,'[28] as did Charles Churchill in referring to 'the persuasive language of a tear'.[29]

20. William Shakespeare *Merchant of Venice* Act III, Scene 1, 49-55
21. William Shakespeare *Julius Caesar* II 22, 27
22. William Shakespeare *Julius Caesar* II 97
23. Kirby (1990A) p 705
24. Cardozo (1921) p 342
25. Radcliff (1965) p xiv
26. Aristophanes *The Clouds*
27. Macauly (1898)
28. Thomson (1737) I. 103
29. Charles Churchill *The Times* I. 38

Junius highlighted one of the major snares – that 'by persuading others, we convince ourselves'.[30] William Blake stated the fundamental problem by asking the question: 'Does a firm persuasion that a thing is so, make it so?'[31] Objections to using rhetoric in law arise because common law jurisprudence views justice being fair and impartial, as portrayed by the statue of the Greek goddess Themis, a stern goddess of justice and order, standing above the Old Bailey court holding the scales of justice evenly balanced. Fittingly, a revered philosopher, Aristotle, should have the last word on this: 'The law should be reason free from passion'.[32]

Any resolution of the conflict between reason and rhetoric ultimately rests on how one views legal reasoning. There are two possibilities:
1. If legal reasoning should be totally rational, there is no room for rhetoric. As Sir Harry Gibbs put it, the 'appeal of a judgment is to reason rather than imagination'.[33]
2. If it is not totally rational, there may be room for rhetoric,[34] but the question still remains as to what kind of rhetoric and what quantity of rhetoric is appropriate.[35]

Primacy of Information

I only ask for information.[36]

While legal writing can involve functions of emotion and persuasion, the core of it is conveying information. For the most part, then, the functions of a text related to emotion and persuasion are not covered here, apart from what has been said above and some passing treatment of them in bits and pieces of the later discussion of style. Instead the book explains how to deliver information in a clear and readable manner. It does this by analysing and explaining how to create structured prose.[37]

Writing Law

It's very hard to be a gentleman and a writer.[38]

Legal writing has both a wide and a narrow scope. In the narrow sense legal writing involves writing a text that constitutes one of the three sources of law. In the wider sense legal writing involves looking at law from a wider perspective than rules and sources of law. Instead it views law from the perspective of one

30. Junius *Letter 35*, 19 December 1769
31. William Blake *A Memorable Fancy* pl 12-13
32. Book III, 1287.a32
33. Gibbs (1993) p 499
34. See Saunders (1994).
35. See Wald (1995) and Saunders (1994).
36. Charles Dickens *David Copperfield* Chapter 20 [Miss Rosa Dartle]
37. Chapter 3 General Structure of a Text and Chapter 4 Legal Structure of a Text
38. W. Somerset Maugham (1874-1965)

or more human sciences. Both of these forms of writing need to be explained before the model for writing law is outlined.

Sources of Law

Introduction

Legal writing in the pure or narrow sense involves writing a text that constitutes one of the three sources of law. It is therefore necessary to explain the sources of law to a reader. Sources of law are conveniently classified as primary, secondary and tertiary sources.

Primary Sources

Primary sources consist of law itself in its raw state. There are two major types:
1. Statutes. Statutes include delegated legislation and instruments made under the statute. Legislatures, such as a parliament or congress, make or enact statute law. Trained legal drafters, sometimes called parliamentary counsel, usually write the text of statutes.
2. Common Law. Common law is found in cases. Courts make common law. The judge or judges who decide the case write the judgments of courts. Common law has several aspects. In its purest form it consists of legal rules made by courts. It also includes the interpretation of these rules by courts. In its extended sense common law can refer to the interpretation of statutes by courts, although these interpretations can also be conceived as part of statute law.

Secondary Sources

Secondary sources of law refer to the description and analysis of law in legal texts. Examples are set out in this table:

textbooks	encyclopedias
journal articles	services
reference books	

Diagram 1.2 Secondary Sources

Secondary sources are highly valuable for learning law[39] and working with law because they organise, summarise, explain, criticise and analyse law. To put the point simply, it is generally more efficient to use a textbook as the first point of entry into an area of law (and for much later work as well) rather than to distil the law from primary sources (which consist of the relevant statutes and cases). Secondary sources of law make law more accessible.

Secondary sources of law can be written by anyone. Legal scholars or academics write many of the published texts and articles because it is part of their task.

39. Commentary 1.6.

Judges and legal practitioners also write books and articles. For example, leading practitioners in a field will often write or co-write a text on their field. Often when they write an article it is in response to a major development in the law, typically because a major case is decided or legislation is enacted or amended.

Tertiary Sources

'Tertiary sources of law' is not lexically an apt phrase since the material it includes are not strictly sources of law. However, the material relates to law and is useful to working with law. Moreover, 'tertiary sources' is a useful label for encompassing this law related material. It comprises two important types of legal text – published material that is related to law and documents that lawyers create when they work with law:

1. Material Related to Law. Some publications are related to law as distinct from just describing the legal rules. An example is a text that examines the history, operation or policy of some part of the law. Another example is a report by a law reform commission that analyses and proposes possible changes to the law. This type of tertiary source of law also falls into the category of texts that incorporate and blend law and one or more of the human sciences (which are discussed below).
2. Working Documents. Tertiary sources also include documents such as letters, opinions, pleadings, contracts, wills and affidavits that lawyers generate in the course of working with law. Most law firms will store these types of documents as precedents in a central depository. This enables lawyers in the firm to access them when required and use them, with appropriate amendment and modification, for subsequent matters.

Law and the Human Sciences

If a writer has to rob his mother, he will not hesitate; the Ode on a Grecian Urn is worth any number of old ladies.[40]

There is a broader scope for legal writing than creating sources of law. This happens because some writing on law looks at law from a wider perspective than rules and sources of law. Instead it views law from the perspective of one or more human sciences. There are numerous examples of this. Some types of writing form disciplines with their own labels such as legal history, sociology of law, law and economics and criminology. Some other types of writing incorporate these disciplines on a 'need to do so' basis according to the task or topic.

40. William Faulkner (1897-1962)

Model for Legal Writing

Introduction

Because of their complexity,[41] many people including both lawyers and non-lawyers have long regarded legal texts as difficult both to read[42] and to write.[43] Consonant with this, there is a view that it is difficult to instruct others in how to do these tasks,[44] although there certainly have been attempts to explain how lawyers can write more clearly.[45] In their efforts to understand the tasks of legal reading and writing scholars have examined them from several different perspectives. Some involve hard logic focusing on the rational components, or the delivery of information to use the phrase adopted earlier in this text. Examples of this approach are the perspectives of argumentation,[46] mathematics,[47] logic,[48] automatic analysis[49] and rationality.[50] Other approaches have looked at the more creative or sensational aspects. These have considered legal writing from the perspective of rhetoric,[51] language,[52] linguistics,[53] semantics,[54] style[55] and literature.[56]

Creation of the Model

In answer to these perceived problems with legal writing, this text presents a general model for technical writing, and adapts it to cater for the specific needs of the discipline of law. In other words the model for writing law is an adaptation of a general model for technical writing.[57]

This model is based on an analysis of the process of communication. Essentially the writer creates a text which conveys information to the reader. This process has three highly interconnected parts – the readers, the text and the process of writing:

1. Readers. A writer must identify the likely readers so that the text can be addressed to their level and understanding.
2. Text. A writer must understand the function, structure and characteristics of a

41. Wilson (1974)
42. Lyons and Tanner (1977), Davies (1987)
43. Murumba (1991), Stark (1984), Rodell (1936-37)
44. Nafziger (1980-82), Sossin (1995)
45. Willis (1978)
46. Luhmann (1995).
47. Casen and Steiner (1986), Lehman (1984).
48. Allen (1957), Allen (1962)
49. Marhno and Sorci (1986)
50. Rubin (1991)
51. Wald (1995), Saunders (1994)
52. Chaim (1983), Danet (1980), Mellinkoff 1963, Shuy (1986)
53. Goodrich (1984)
54. Moore (1981)
55. Posner (1995)
56. Nussbaum (1995). Commentary 1.7.
57. For discussion of other approaches to writing see Eagleson (1986A), Eagleson (1986B)

text so that they know how to construct it.
3. Process of Writing. A writer must understand the process of writing from first idea to final edit. This is necessary so that they can perform the task of writing competently and efficiently.

While all of these are important, by far the most important is structure, particularly the need to have a clear overall structure. For much legal writing, especially those texts that create primary sources of law (drafting legislation and deciding cases) and writing secondary sources of law, the major part of the structure is derived from the various models for working with law. The major models in this regard are the following:
1. The model for organising law.
2. The model for forming law.
3. The model for using law.[58]

Outline of the Model
The model for writing law has five components, which are summarised here and fleshed out in turn in subsequent chapters. These are:
1. Functions of a text.
2. Structure of a text.
3. Characteristics of a text.
4. Tasks with readers.
5. Tasks with writing.
As noted, in order to illustrate the model the discussion often refers to a legal textbook. It does so because this is both a common form of legal writing and furnishes a good illustration of the method.

Functions of a Text

A legal text has one basic function – to convey information.[59] And in some cases it has a creative function as well. The text of a statute actually creates a law at the same time as it tells the reader what the law is. For analytical purposes it is generally enough to refer to the function of conveying information because the creative process is subsumed within it.

A legal text will perform one, or a combination of, three functions for a reader regarding information. The fundamental function is to store information. To enhance the text there are two ancillary functions – assisting a reader to retrieve information and assisting a reader to interpret information:
1. Storing Information. A text stores information so that a reader can access it. Information takes a number of forms which are not readily amenable to a rigid classification, but the following constitutes a useful description:

58. Commentary 1.8.
59. Chapter 2 Functions of a Text

1.1 It can be in the form of words. Words are mostly located in the text itself, but may also be tables, lists, headings, citations and labels on pictures and diagrams.
1.2 It can be symbols.
1.3 It can be numbers.
1.4 It can be pictorial, as is the case with diagrams and pictures. Where a legal text is electronic it can store information as motion pictures.
1.5 Where a text is electronic it can store information as sound.
2. Retrieving Specific Information. A text assists a reader to retrieve specific pieces of information. Tables and indexes enable a reader to do this.
3. Interpreting Information. A writer assists a reader to interpret and absorb information. This is done by things such as:
3.1 A table of abbreviations.
3.2 A glossary. There are two ways of presenting a glossary. It can be either a dedicated glossary or a glossary that is incorporated into the index:
3.2.1 Dedicated Glossary. A dedicated glossary is a separate entity of that name, which sets out the names and meaning of all significant technical terms that the book uses.
3.2.2 Glossary Incorporated in Index. An alterative to a dedicate glossary is for the author to name and define these technical terms in the index. An author does this best by making each term a separate stand-alone entry so that a reader can find it, while making an additional entry or entries of the term under any topic(s) to which it directly relates.
3.3 A statement of the purpose of the text.

Structure of a Text

A text needs to be structured.[60] The point is that structured prose is clear prose. This structure has six levels, which are as follows:

Level	Task
1 Words	Choose the right words.
	Use words in their correct sense.
2 Sentences	Write proper sentences.
	Observe the rules of grammar and syntax.
3 Linking Sentences	Link sentences properly.
	Ensure that each sentence flows from the one before it.
4 Paragraphs	Form paragraphs.
	Gather sentences into paragraphs.
5 Linking Paragraphs	Link paragraphs. Ensure that each paragraph flows from the one before it.
6 Overall Structure	Create an overall structure so that the text flows coherently.
Diagram 1.3 A Structure for Writing	

60. Chapter 3 General Structure of a Text

While this general model applies to any technical writing, it needs to be adapted in parts to cater for specific disciplines, such as law, in two ways.

First, there is vocabulary. Each discipline has its own terms, which often have a special meaning for the discipline. Law has its own technical terms, as do the human sciences.

Second, there is overall structure.[61] As Level 6 requires, for the text to be clear writing should have a coherent overall structure, showing an ordered sequence of ideas or a logical flow of argument. While this requirement applies to all writing, the nature of the content differs both between and within disciplines. Moreover, there is no one set structure for all legal writing. Instead, legal writing is often a blend of individual structures that are deployed for different tasks in different parts of the text. One noteworthy reason for this is that legal writing spreads very wide, since it covers not only pure law but law intermixed with other disciplines. These individual structures can be one of four kinds:
1. General Structures. These are some structures that are widely used in all types of writing. They are discussed in this book partly for the sake of completeness and partly because they are commonly deployed in legal writing.
2. Specific Structures: Law. There are some specific structures that should be used for the purely law component of legal writing. Legal writing in the narrow sense entails writing up processes of working with law. Consequently much of this overall structure derives from the method used for performing these processes. Essentially the method for performing the task translates into the structure for explaining the task. These methods are encapsulated in various models that are used for working with law, the most prominent being the model for organising law, the model for legal reasoning and the model for using law.[62]
3. Specific Structures: Other Disciplines. Some structures are specific to particular disciplines. For example there is a standard structure for writing up an experiment in psychology. Where a text is considering both law and some other discipline these structures may be used.
4. Special Structures: Unique Topic. These are structures that are used for a unique, special or unusual topic. Sometimes the writer has to devise the structure for him or her self.

Characteristics of a Text

In delivering information a text has several major dimensions or characteristics.[63] These are location of material, layout, headings, length and style.

61. Chapter 4 Legal Structure of a Text
62. Chapter 4 Legal Structure of a Text
63. Chapter 5 Characteristics of a Text

Tasks with Readers

When writing a text it is necessary to know, or estimate as well as can be done, the identity of the readers.[64] A writer need to know the class of people who will read their text, because this will inform them about two important characteristics of these readers – their knowledge of the subject and their purpose in reading the text. Both of these will heavily influence how the writer goes about their task – what they write and how they write it. Overall there are three tasks with readers – identifying the class of readers, addressing the class and considering the possibility of extending the class.

Tasks with Writing

There are some basic rules about performing the process of writing that a legal writer needs to observe.[65] These mainly involve using time in an effective way. Discussion of this has two parts:

1. It states the fundamental truths that underlie effective writing.
2. It states rules for effective writing, which are derived from these fundamental truths.

Reading

Introduction

Discussion of reading is significant for a simple reason – an author writes a text so that others can read it. Writing and reading are complementary tasks. There any enlightenment about on of these tasks will cast light on part of the other because any technique for writing is a technique for reading looked at from the other direction.

The function of a text is to inform 'the whole assembly of potential readers' of whatever message the writer wishes to convey.[66] Therefore it is important for a writer to be conscious of the needs and capabilities of their likely readers, who fall into one or other, or both, of two categories, namely porers and delvers.

Porers and Delvers

A reader may have either or both of two purposes for reading a text. They may want to pore over the whole text and read it intently (these are called porers) or they may want to delve into the text for specific pieces of information (these are called delvers). Thus, regardless of their other purpose, a reader may be a porer, a delver or a bit of each.

64. Chapter 6 Tasks with Readers
65. Chapter 7 Tasks with Writing
66. Sheller (1996) p 3

Porer
A porer reads the text. They read it from cover to cover, or they read whole chunks of it. For example, in a textbook on torts they read the whole of the chapter that deals with a specific tort. In a judgment they read the whole judgment or the part of the judgment that deals with a specific point. This is the obvious way of retrieving information from a text. Many readers will use a text in this way, starting at the beginning of the text, or the beginning of a section, and working their way through.

Delver
A delver uses a text to find (or to delve for) specific information. To do this, they need to find and consult the specific part of the text that delivers this information. The point is that they use the text to obtain this specific information. For example, they may wish to find the date of a person's birth or death, or in a law text, the name or date of commencement of a statute.

It is also possible that a person is reading the text as a porer, but needs to delve to help them with their task. For example, whilst poring through a text they come across a reference to a case. In order to obtain a more comprehensive understanding of it they wish to find and read any other parts of the text that also discuss the case.

Middle Category
In addition there is a middle category of reader. This is constituted by a person variously described as a browser, skipper, scanner, dabbler, dipper, flipper or flicker. This category has characteristics, varying in its mix from reader to reader, of both delver and porer. They may not be a rare bird (*avis rara*) but they are a colourful one (*avis infucata*), not least because of the labels that the writer has just bestowed upon them.

Tasks of a Writer

Obviously the whole enterprise of writing is addressed to readers. In consequence there are three tasks that specifically focus on readers. These were mentioned above and they are now outlined here for greater emphasis. They are, of course explained in more detail later.

First, it is necessary to identify (to know, or to estimate as well as possible) the class or group into which the readers fall and the extent of their understanding of the subject. This will influence heavily how the writer addresses their readers. It determines what they write and the level to which they write it. Second, once the class of readers and their level of understanding have been identified, the writer must address their text to this class; they must write the text in a way that this

class can understand. Third, it may be that the writer can extend the class of readers with only a little extra effort. If so they need to consider this possibility.

Commentary

I write for the same reason I breathe – because if I didn't, I would die.[67]

Commentary 1.1 Footnote 3

The classic text on rhetoric from Greek times is Aristotle, *The Art of Rhetoric*. See also Nussbaum (1995), Sadurski (1987), Saunders (1994), Wald (1995).

Commentary 1.2 Footnote 8

So far as relevant, *The Macquarie Dictionary* 1982 Macquarie Library defines style to mean 'the features of a literary composition belonging to the form of expression other than the content'.

Commentary 1.3 Footnote 10

This quotation is from *Mabo v Queensland (No 2)* (1986) (1992) 175 CLR 1, 82. In this case the court, the High Court of Australia, recognised native title to land in Australia for the first time. In doing this it overruled *Milirrpum v Nabalco* (1971 141 FLR 141, a contrary decision of the Supreme Court of the Northern Territory.

Commentary 1.4 Footnote 12

Cook and others (2001) at p 365 claim that all 'legal writing aims at persuasion'. This is at variance with the author's view.

Commentary 1.5 Footnote 13

On one view the standing of a case may also depend on the influence and standing of the individual judge as well as on the quality of the reasoning. For assessment of the influence of particular judges see Klein and Morrisroe (1999) on judges of the US Court of Appeal, Kirby (1999) on Sir Frank Kitto, Kirby (1997) on Sir Anthony Mason, Kirby (1993) on Justice Lionel Murphy, Kirby (1990)B and Kirby (1992C) on Sir Edward McTiernan, and Sundberg (1987) on Justice Lionel Murphy. McCormick (1996) assesses the academic influence of judges.

Commentary 1.6 Footnote 39

In this reference to law as literature it is worth noting a related point that law can also be taught through literature – see Turner (1985). A good example is the role of the comic opera writer Gilbert as a legal satirist – see Turner (1987-89).

67. Isaac Asimov

Commentary 1.7 Footnote 56

Just as one can look at legal writing as literature, it is also possible to look at literature from a legal perspective – see Turner (1987-89). Further it is possible to use literature to teach law – see Turner (1985).

Commentary 1.8 Footnote 5

It is worth stating again the relationship between reading and writing. Reading is communication viewed from the receiving not the delivery end. To read law it is first necessary to understand how to write law. Reading and writing are complementary activities. An author writes a text for people to read. In writing the task is to create a structure, in reading, therefore, the task is to identify this structure.