

Legal Writing



Lisa Webley

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AN INTRODUCTION TO LEGAL WRITING

Students often tell lecturers that they find the way they are assessed a complete mystery. They explain that they write an essay or an answer to a problem question, but do not really understand what they are supposed to do, how to go about it and what the marks they are awarded really mean about the quality of their answer. It is all just too confusing. A number of factors contribute to a good written answer, including the extent to which the student has: (a) understood the task that has been set; (b) understood how he or she will be assessed; (c) carried out research of the relevant law; (d) taken appropriate notes on relevant legal and related issues; (e) identified issues that are relevant to answering the question; (f) planned the answer; (g) written and presented the issues to answer the question; (h) referenced others' work; and (i) polished the final draft. It all sounds terribly hard work and rather complicated. Having said that, some of these writing stages come naturally to each one of us and others can be learnt. This book will take you through each one in turn to help you to improve your written work in law.

Most law students will be asked to write two main types of written work – essay answers and problem question answers. There are other forms of written assessment: reflective essays (which also follow similar patterns to standard essays but require the student to reflect on his or her own performance, skills and knowledge) and memos and briefing sheets (not dissimilar to problem question answers). Students may also research and write a dissertation at some point in their undergraduate or postgraduate studies. Dissertations are essays that include a greater research component, but are more similar to essays in written style than to problem question answers.

Despite the differences between these forms of written work, there are some easy basic rules that work for most forms of written assessment. Writing an essay or giving an answer to a problem question is simply a way to communicate what you think about the issues raised in the title or the scenario in the problem. Assessments may feel like impossible feats, but they are really relatively easy as long as you follow a few easy steps and (and this is the hard part) you start to write more than 24 hours before your deadline!

This chapter will explain the purpose of essays, answers to problem questions and of dissertations. Hopefully that will set you on the right track. After that you need to follow through the steps in the order presented and you should end up with a reasonable essay or problem answer. If in doubt, stick with the formula. If you are confident, you may come up with your own; there is no one correct way to go about writing. What follows is simply one view of how to communicate your views effectively; there are others, some of which are discussed in the books listed in the bibliography. You may wish to look at some of those as well to help you.

THE PURPOSE OF AN ESSAY

An essay question is a way of examining your understanding and your considered and evidenced views on an area of law.

Your answer displays your considered response to a question, which weighs up competing view-points.

Your answer shows how you reached your conclusions with the evidence that you have drawn upon to come to your final view.

Your first response to any essay should be to spend some time considering what the question is asking you to do. Essays are assessed against the question that has been set, not against your general knowledge of the subject area (as shown in the specimen assessment criteria in the next chapter). Your diagnosis of the nature of the question will either send you off on the correct path, or will send you off on a wild goose chase. Spend time reading the question and checking that you understand it. Once you are clear on the nature of the question, it is important that you focus on its purpose. Have you been asked to do one of the following things and, if so, are you clear on what that means?

Contrast: This is sometimes written as ‘compare and contrast’ and is perhaps easy to understand if you substitute the word ‘compare’ for contrast. You should consider the similarities and differences between the issues set out in the question and provide evidence to back up what you are saying in your essay.

Criticise: Give your views about the issues in the question. You must support your views with evidence from other legal writing. Criticise does not mean that you only write about the negative things that you find during your research. It is really an instruction to you to think critically – to consider the issue in detail and to argue against the proposition in the question, but also to concede when a point made on the positive side is a valid one.

Discuss and/or do you agree? (often after a quote): The answer to this cannot be just ‘yes’ or ‘no’! Your essay should define the issues in the question and then move on to consider different view-points on those issues, or different research evidence on those issues. You may find it helpful to write down the strengths and weaknesses or arguments for and against the proposition mentioned in the quotation. Make sure these are supported by cases and/or other writers. You should conclude by giving your considered view on the quotation once you have worked your way through others’ views and weighed up the evidence.

Evaluate: Give your opinion on the validity of a statement made or an issue raised in the question in the light of evidence you have to support differing view-points from your research/reading.

Explain: What is the significance of (whatever was set out in the question)? Give a definition of the issues raised in the question, followed by an outline of the nature of the issues and the implications of the issues. You will need to do some research or have done some research in order to answer this type of question properly.

Outline/summarise: Give the main points in relation to the issue raised in the question, without getting stuck in the detail of the issue. This is similar to providing an overview.

For the most part, all of the instructions set out above are asking you to do some research or reading on the topic in the question, or to have done some before entering the exam room, and to apply your knowledge to the question to provide a considered response. An essay may be set to assess your ability to conduct research as well as to assess your understanding and your written skills. If this is the case then leave plenty of time within which to complete the research stage before you begin the writing stage. Chapter 5 considers how to carry out library-based research and how to use your research findings in your writing.

An essay may also have been set to assess your ability to write under timed conditions. If this is the case then you may be expected to carry out research on a given topic prior to the timed essay, to include relevant research findings in a notebook and then to use your research findings under timed conditions to answer a question on the given topic. This type of assessment requires you to conduct your research in detail and to organise your research evidence into a notebook in advance of the day of the timed essay. You may be able to write a good essay under timed conditions, but without the research to back up your points you will not do as well as you would have hoped. You will be expected to provide more evidence in support of your arguments if you are permitted to take materials into an exam room or to write your coursework with access to your notes.

THE PURPOSE OF A PROBLEM ANSWER

A problem question is a scenario that sets out the facts of a given situation.

The facts are there to prompt the writer (acting as a barrister) to give a legal opinion to the party or parties, to assist them in deciding what legal action they should take on the basis of the barrister's legal opinion.

A problem question tests your ability to analyse the facts in the scenario and to work out which ones are agreed or accepted by all the parties (different sides) in the scenario, which ones are disputed and must be discussed and which facts are not discussed but may have a bearing on the outcome of the case. Those facts that are important but are not present in the problem question should be mentioned in the answer so that the solicitor, the person to whom you are writing your opinion, may investigate those facts further before proceeding with the case.

A problem question also tests your ability to diagnose the legal issues that are relevant to the parties and to provide a considered response on the likely outcome of each point of law, if they were to be argued in court on the basis of the facts as presented. This is done by arguing the competing precedents and statutory points that relate to the facts in the question. You will need to display your understanding of the law in the area by referring to cases and to statutes

and other legislation to back up the general principles of law that you explain to the solicitor representing the party to be advised.

Your final role in the answer is to explain what the likely outcome of the case would be if it were to proceed to court (or in some instances to another dispute resolution mechanism) and the remedies that the client could hope to obtain, before suggesting what the client should do in respect of the case – take it to court, settle it out of court or drop the case altogether.

A typical, if complicated, public law problem question would look something like this:

Parliament has introduced a new licensing scheme to make sure that all individuals who want to work as art dealers must hold a licence. Parliament passes the Art Dealers' Licensing Act 2004 and the Act states that the new Licensing Authority is responsible for administering the art dealers' licensing scheme. Section 2 states that: 'The Licensing Authority may issue a licence to an individual to act as an art dealer if the individual has not been convicted of a serious criminal offence and if the individual has a recognised qualification in an art related subject.' The Act further states that a degree in art or art history from a UK university will automatically be recognised for the purposes of the Act. Interim arrangements exist which require current art dealers to apply for a licence within six months of entry into force of the Act.

The following events occur:

Ruth works for an art dealer in London. Ruth is not sure whether she needs a licence as she currently does not sell art, she only values it. She has no criminal convictions and has a degree in art history from a UK university. She applies to the Licensing Authority for a licence just in case she needs to have one. Her application is refused. The authority writes to tell her that she must stop her work immediately as she does not have the required qualification and she is not a fit and proper person to be an art dealer. In the letter the authority tells her that the decision is final and cannot be challenged in any court whatsoever. Ruth telephones the Licensing Authority to see whether she really needs a licence and speaks to John, the decision-maker. He tells her that he considers that women do not make good art dealers or valuers. Ruth seeks legal advice from you.

The professional publication for art dealers runs an article in their journal about Ruth's situation. A reader of the publication, Phillip, hears of the problem and approaches Ruth to let her know that he would be willing to challenge the decision on her behalf.

Advise Ruth about her case and Phillip's suggestion to her about his role in bringing an action on her behalf.

The problem is typical in that it asks the student to advise some of the people, the parties or clients, in the scenario, in this instance Ruth and via Ruth also Phillip. It also gives the student most of the information needed to provide an assessment of the likely chances of success or failure in a legal action.

The student's role is that of a barrister, who is providing a legal opinion, pre-trial to the party's solicitor, which the solicitor may share with the client. The opinion should provide the solicitor and client with the information that is needed in order to make a decision on whether they should pursue the action (through negotiation, through mediation, through arbitration or through the courts, as appropriate) or whether they should drop the case as it is unlikely to

succeed. The student is not acting as an advocate for the purposes of this exercise. This is very important. If the student were acting as an advocate, as in a moot exchange, for example, then he or she would be trying to make the best case possible for Ruth to the judge. The student would be down playing the legal points and the evidence that the other side were bringing forward. In this instance, the student provides an unvarnished account to allow the client to decide what steps to take next. It is important to present the information for and against Ruth's case, to permit her to make an informed choice.

Chapter 3 will provide a structure you may follow to assist you in answering problem questions. It will take you through the process step-by-step and suggest ways in which you may phrase your answer.

THE PURPOSE OF A DISSERTATION

A dissertation is an extended piece of writing that is the culmination of in-depth research.

It is usual for the student to set the question, rather than to research and write a dissertation to a preset question.

The dissertation takes the reader through the relevant issues, providing research evidence to back up competing view-points and providing a final answer to the question.

It is similar to an essay in nature, but usually requires more detailed research and a longer discussion of the issues.

A dissertation is an extended piece of writing, often 8,000–10,000 words long at undergraduate level, 10,000 words or more at postgraduate level, which allows a student to explore an area of interest to him or her and to write an answer to a question that the student has posed. It is not a collection of information on a topic, but it is a form of extended essay. Many books have been written on how to research and write dissertations and you may wish to refer to some of these if you are engaged in dissertation research. Chapter 4 considers how to approach, structure and write a dissertation but does not consider the research process in any detail. A dissertation will require far more in-depth research of the topic that is the subject of enquiry and a student should still follow the writing and referencing conventions for other forms of legal writing. In addition, dissertation students tend to be more focused in their writing if they have set themselves a question prior to carrying out the main phase of their research. This is discussed further in Chapter 4.

Hopefully you now understand the purpose of essays, problem question answers and dissertations. The next stage is to understand how you will be marked for them. The next chapter will explain the criteria that may be used to assess and grade your work.

CHAPTER 1

LEGAL WRITING AND ASSESSMENTS

Students tend to focus on assessments rather than on the extent to which they are developing their knowledge of law and their ability to communicate that knowledge in writing (and orally). This tends to frustrate academics, who do not feel that assessments are the 'be all and end all' of the learning experience at university. However, the student's preoccupation with assessments is understandable, as it is the assessments that determine the degree classification you will achieve, and once out of university an employer may ask first what grades you got before discussing the skills and attributes you have as a person. By looking at the way you will be assessed by your lecturer, you should be able to improve your performance and concentrate a little more on what you are learning rather than on how you are being tested. It is less of a mystery than you think. This chapter will take you through an example of assessment and grading criteria that may be similar to the ones that will be used to assess your work, to help you to understand what lecturers are looking for.

STARTING OUT WITH A CLEAR IDEA

To maximise your chances of achieving a good mark in an assessed piece of work, you should have:

- an understanding of the specific task that has been set (from the question and/or instructions for the assessment);
- an understanding of how the written work will be assessed (assessment criteria); and
- an understanding of how the written work will be graded (grading criteria).

This chapter will take you through these stages – the way in which you are likely to be assessed and how to maximise your chances of achieving good marks at this stage of writing your answer. It may be helpful to think of it in these terms: if you were an advocate and you were about to go into court to represent a client in a serious criminal case, you would want to know a little about the way in which the court process will work and the way that the judge and the jury will decide upon your client's fate, in order to know how best to prepare your case. You would not go into court without an understanding of how the case will be decided and how your presentation is likely to be judged. Similarly, you would not embark upon an assessment without understanding how you were to be assessed.

HOW YOU WILL BE ASSESSED IS A CLUE TO HOW TO ANSWER THE ESSAY OR PROBLEM QUESTION

Most courses have published assessment criteria and, if they are not in your course or module handbook, then try to get hold of a copy of them from your lecturer. The criteria are really the key to understanding how you need to approach the task set. An example of assessment criteria at level 4 (first year undergraduate level) is as follows.¹

ASSESSMENT CRITERIA FOR COURSEWORK ASSESSED BY ESSAY

In this assessment the student should write an essay plan and an essay in answer to the question.

In the essay students should:

- address the question asked;
- identify the relevant areas with precision;
- demonstrate a thorough knowledge and understanding of the relevant principles including an analysis of them;
- show evidence of research and reading;
- present a coherent argument for the position taken;
- present work that is well written and structured;
- correctly reference others' work where used.

In the essay plan students should:

- show evidence of having dissected the question;
- show evidence of having identified relevant issues;
- provide headings to indicate the content of each paragraph;
- indicate relevant material under paragraph headings;
- provide a structure for the essay.

The assessment criteria make it clear that for this assessment there are two parts to the written phase of this assessment – an essay plan and an essay, and that both parts have their own assessment criteria. The criteria demonstrate that the marker is looking for different things for the two parts. It is important that the criteria are met for each. To achieve a good mark in this assessment a student would have to write an essay plan that is split into sections indicating the content of each paragraph. The plan should show that the student has read the question and dissected it so that he or she can understand and answer it. The essay is a continuation of the plan; in other words it follows the plan but is written in full sentences and paragraphs rather than in note form. The essay

¹ These are generic assessment criteria adapted from those used by the University of Westminster LLB for public law level 4 assessments (first year undergraduate).

should address the question asked; it should demonstrate that the student has understood the principles relevant to the question and has constructed arguments and cited evidence to back up arguments relevant to answering the question. This evidence is a product of research carried out by the student prior to writing the essay.

The assessment criteria for the exam assessment are slightly different again. In this example students must answer three questions from a paper containing six questions made up of a mix of essay questions and problem questions. Students are assessed against the following.

ASSESSMENT CRITERIA FOR EXAM WRITTEN ANSWERS²

A student should:

- identify relevant issues and principles in respect of the question;
- demonstrate knowledge of the relevant principles and give examples where appropriate;
- attempt to apply the principles in their answer;
- demonstrate an understanding of and answer the question;
- apply statutory and judicial material in any hypothetical factual situations;
- demonstrate an ability to answer questions in exam conditions with appropriate regard to timing;
- communicate in good English.

The criteria are similar to the coursework criteria. However, they are set slightly differently, as the essays and problem questions written in closed book exams (exams in which you are not permitted to refer to any materials in the exam room) are a test of knowledge and the ability to apply that knowledge to answer the question, rather than such a test of a student's research ability. Students need to be clear about the general principles of law in a given area and the evidence that supports those general principles prior to entering the exam. Once in the exam a student would need to dissect the question, plan an answer and apply the general principles. Exam technique is discussed in more detail in Chapter 8; however, the important point here is to be sure about how you will be assessed prior to embarking upon the assessed task.

Your essay or problem question answer, or plan, will be read in the light of the criteria and how you do will depend on how far you have met the criteria. Many courses also have grading criteria, which the marker will use in conjunction with the assessment criteria to work out your mark. Grading criteria do vary, so be sure to check the grading criteria that are used in your law school. An example of level 4 grading criteria is set out below:

² Once again, these criteria are adapted from those used in LLB public law level 4 exams at the University of Westminster.

3RD (40–49%)³

A student should:

- correctly identify the subject area and main issues raised the by question;
- apply some relevant material to the question;
- use adequate presentation skills;
- demonstrate a familiarity with the subject area.

A student will achieve a mark of 40–49% if he or she identifies the subject area that the question addresses and writes something that is relevant to the question, if the essay is presented adequately and the essay demonstrates that the student is familiar with the subject area. A student who achieves a third class mark has not addressed the question other than to identify the subject matter and to write about it. This would be similar to being an advocate for the defence in a murder case, to stand before the jury and to explain a little bit about the history of the law of murder, before sitting back down again. The jury would be none the wiser about whether or not the defendant had anything to do with the murder and the barrister would not have presented evidence to them to help them to make up their own minds. An essay along these lines would be fairly basic and would benefit from a clearer understanding of what the question was asking. A student with a mark at this level should concentrate on the first essay writing stage set out in the next chapter – considering the nature of the question, before starting the research and writing phases.

2:2 (50–59%)⁴

A student should:

- correctly identify the subject area, the main issues raised by the question and some other issues;
- cite some relevant material (eg, cases and statutes);
- provide evidence of research/reading;
- demonstrate a reasonable application of materials to the question/facts;
- provide a reasoned argument on the facts;
- use a reasonable standard of presentation skills;
- demonstrate an adequate understanding of the subject area.

3 Adapted from University of Westminster generic LLB level 4 grading criteria.

4 *Ibid.*

A student will achieve a mark of 50–59% if he or she correctly identifies the subject area of the question (as for an essay of 40–49%) but then goes on to discuss the main issues raised in the question as well as some related issues along with some relevant cases, statutes or academic opinion. The cases, statutes or academic opinion (which shows some evidence of reading or research) will have been applied to the question or the facts of the problem question in some way. A student will have constructed an argument and shown an adequate understanding of the subject area. Students who achieve a mark of 50–59% should concentrate on identifying the issues relevant to the question and using their research findings to construct an argument to answer the question. This is discussed further in the next chapter.

2:1 (60–69%)⁵

A student should:

- correctly identify the subject area and most of the issues relevant to the question;
- cite most of the relevant material;
- demonstrate a good application of materials to the question/facts;
- provide a reasoned argument on facts and a reasoned judgment on competing view-points;
- use a good standard of presentation skills;
- demonstrate a good understanding of the subject area.

A student who achieves a mark of 60–69% has correctly identified the subject of the question and has also identified most of the relevant issues. In addition, he or she has also cited most of the relevant material that is the subject of the question, having constructed arguments and provided a judgment on differing view-points. A student who has achieved a mark in this classification will have demonstrated a good understanding of the subject area. A student who wishes to improve should concentrate on developing his or her analysis of each issue by adding a sentence at the end of each paragraph stating why and how the issue is relevant to the question as well as deepening his or her understanding of the subject area by undertaking further reading. This is discussed in more detail in the forthcoming chapters.

1ST (70%+)⁶

A student should:

- correctly identify all or most of the issues raised by the question including the main issue;
- apply all or most of the material relevant to the topic;
- provide a synthesis of knowledge and facts;
- demonstrate a reasoned argument on the facts and a reasoned judgment on competing view-points;
- cite sources fully and accurately;
- use a high level of presentation skills;
- demonstrate a firm grasp of the fundamental principles;
- demonstrate an exceptional command of the subject area;
- demonstrate evidence of independent research.

As shown above, a first class answer has to demonstrate a very high level of knowledge and skill, but it is possible to achieve if a student really understands a topic, has conducted research on the topic and has properly dissected the question and answered it. The criteria indicate that a student is not expected to come up with a new legal theory or to find a completely different way of looking at the law. However, the essay does need to be focused to answer the question, with evidence to back up the points being made within it.

Not all criteria will necessary apply equally in every type of coursework or examination or with equal weight; for example, in a written examination the evidence of independent research required may be less than in coursework. Your course will have slightly different criteria and you should check what these are, if you are unsure of how you will be graded or if you do not understand why you have received the mark you have been given for an assessed essay or problem question answer. Students should attempt to aim as high as possible, rather than aiming at a bare pass. It sounds obvious, but it is surprising how many first year students aim at the pass rather than at the higher end of the marking spectrum!

As you will have seen from the criteria, the next important stage in the writing process is to dissect the question or problem question scenario to make sure that you have identified the task that has been set for you. If you are writing a dissertation and must formulate a question of your own, follow this stage once you have developed your question with the help of your supervisor. More information is given on formulating questions for dissertations in Chapter 4. The research phase, including reading your lecture and tutorial notes, should focus on the question rather than the topic in general terms. By focusing on the question you give yourself the best chance of achieving the highest mark possible. This is discussed further in the next chapter.

6 *Ibid.*

EXERCISE 1: APPLY YOUR KNOWLEDGE OF ASSESSMENT CRITERIA

Read through the brief essay below and consider what mark you would give to it, based on the limitation that the essay should be about 500 words in length. Refer back to the assessment criteria and then set out your reasons for giving the mark you have awarded. Check the mark you have awarded and your reasons for the mark against the ones given in the answers section towards the back of the book.

Question

‘The British Parliament was once supreme.’ Discuss with reference to Britain’s membership of the EU and its obligations in relation to the European Convention on Human Rights.

Answer

This issue of parliamentary sovereignty has been that Parliament has been sovereign throughout centuries until the UK joined the European Community, but the European Communities Act 1972. Theorists such as Dicey have argued that Parliament is so powerful and so totally sovereign that it is allowed to do anything that it wishes, even to order that smoking on the streets of Paris could be outlawed by the UK Parliament. However, there are those who disagree with this and the essay will consider opinions for and against whether Parliament is supreme or not.

It may be considered the sovereignty has been lost from Parliament. This is because Britain joined Europe and Europe’s power overtook the power of the British Parliament. This was done through the enactment of the ECA 1972. Many are of the belief that the Act is now entrenched, that Parliament cannot repeal it. There was a recent case about this where a man wanted to weigh his fruit and vegetables in pounds and was told he could not because Europe says that we must all use kilogrammes and grammes. This shows that Parliament is no longer supreme.

However, there is a dispute about this point. The case of *British Railways Board v Pickin* demonstrates that no Act of Parliament can be held to be invalid. This suggests that the courts must apply a British Act of Parliament and that Parliament can enact any law that it wishes, as long as the Act is passed it will become law in this country.

However, the *Factortame* case in the 1990s shows another side to this situation as the British courts did not apply the British Act of Parliament, the Merchant Shipping Act, but they applied the European law instead as they had been told they must by the European Court of Justice.

Theorists such as Dicey consider Parliament to be supreme. The European Convention on Human Rights now means that Parliament cannot pass any law that is against the Human Rights Act and so this means that Parliament is no

longer supreme. However, Parliament was the body that enacted the Human Rights Act and it can repeal the Act and so Parliament is still supreme in the sense that has only temporarily limited its power.

In conclusion, parliamentary sovereignty may exist as Parliament can repeal the ECA 1972 and the HRA 1998, but the power of Parliament to legislate has been limited by joining Europe and the ECHR and therefore Dicey's theory of sovereignty is not totally correct.

SUMMARY

CHAPTER 1

To maximise your chances of achieving a good mark in an assessed piece of work, you should:

Have an understanding of the specific task that has been set (from the question and/or instructions for the assessment).

Have read through the instructions given with the assessment and be clear on them.

Have made sure you have all the information you need about the assessment format, regulations and deadlines.

Have an understanding of how the written work will be assessed, having read through the assessment criteria.

Have an understanding of how the written work will be graded, having read through the grading criteria.

Once you are clear on the task that has been set you may move onto the next phase, as set out in Chapters 2, 3 and 4.

