

UNSW
Law Society

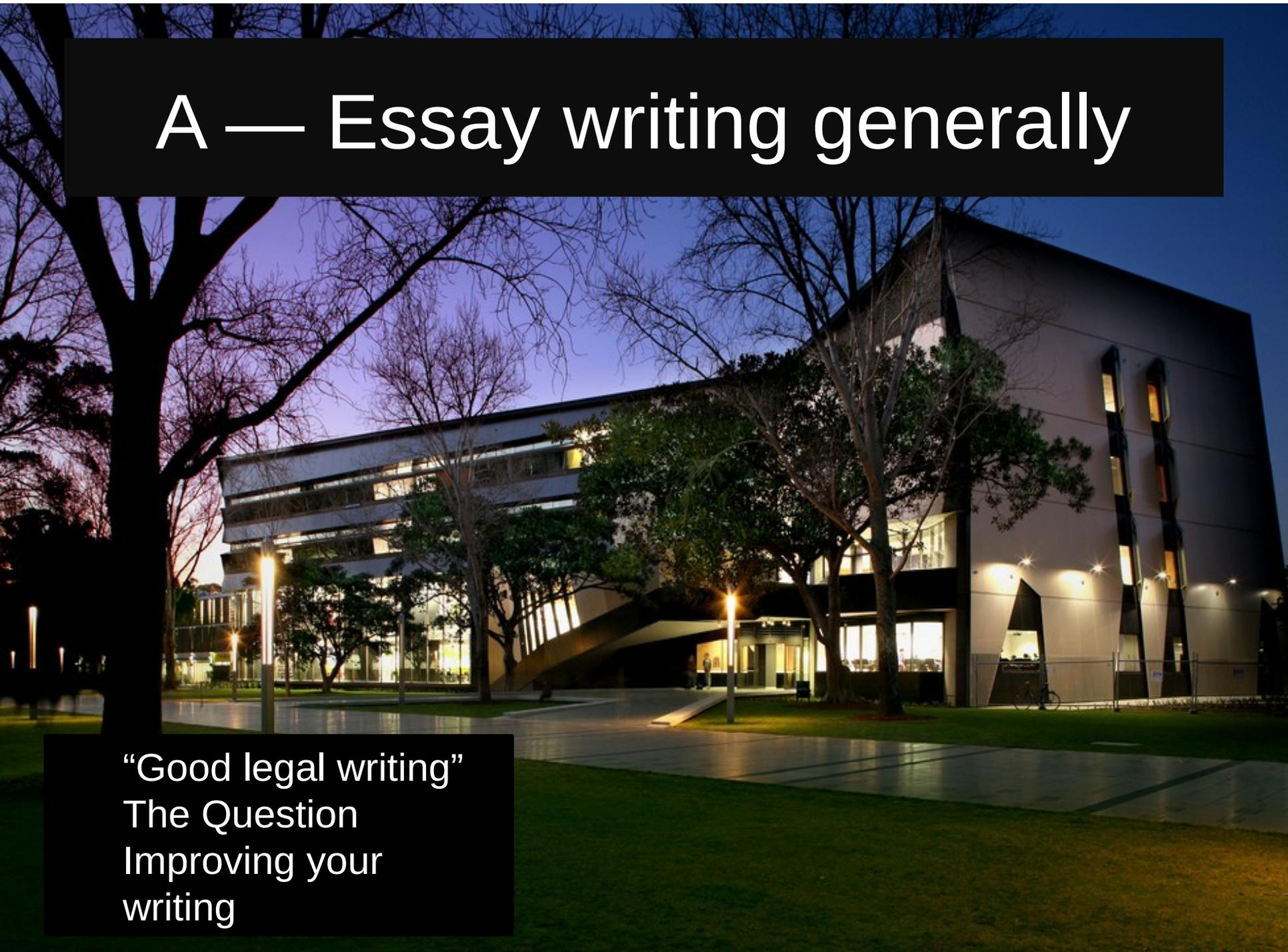


Essay Writing Workshop

Presented by Lachlan Peake — 4 October 2016

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A — Essay writing generally

A photograph of a modern university building at dusk. The building has a white facade with large windows and a prominent staircase. The sky is a deep blue, and the building's interior lights are on, illuminating the scene. In the foreground, there are several trees and a paved plaza. The overall atmosphere is calm and academic.

“Good legal writing”
The Question
Improving your
writing

I What does “good legal writing” even mean

Aa

Simple, but not simplistic



Active, rather than passive, voice



Less “discursive”



Supplies authority



Jargon and stylistic norms

II The Question



The question really is King/Queen



Read all of it



Read it multiple times

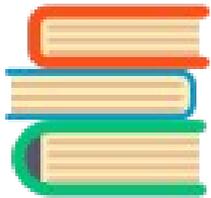


Imagine the paths of analysis — range of potential responses

III Improving your writing



Written expression is a **skill** — can be learned/refined



Seek out models of good writing from a variety of sources (but **not** judgments)

What do you like to read and why?

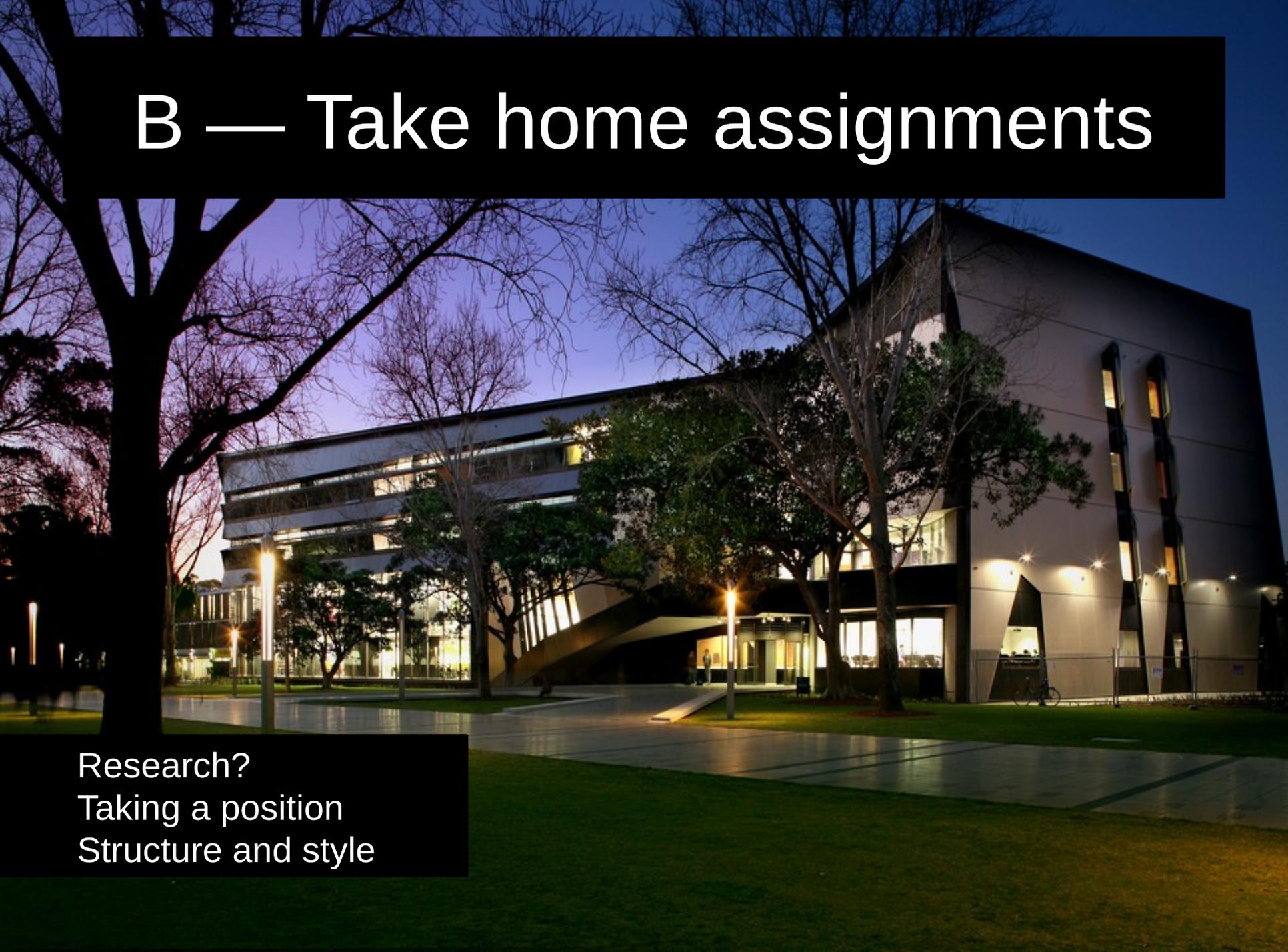


Good academic writing is **drafted**

‘It is perfectly okay to write garbage—as long as you edit brilliantly.’

– *C. J. Cherryh*

B — Take home assignments

A photograph of a modern university building at dusk. The building has a white facade with large windows and a prominent staircase. The scene is illuminated by streetlights and the building's interior lights, creating a warm glow against the dark blue twilight sky. Large trees are scattered throughout the scene, some in the foreground and some framing the building. A paved plaza and a grassy area are visible in the foreground.

Research?
Taking a position
Structure and style

I Research?



Most, though not all, take home essays are research assignments — what type of essay are you writing?



Plan your research

- Consider types of sources
- Keep a research log
- Critique the relevance of sources quickly

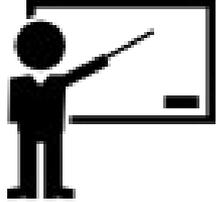


How much research should you do?

I hate saying this but **it really depends**. This is part of the reason you plan. The main question you need to ask is how much research will enable you to take and defend a position and to compose a response that is rigorous and nuanced.

See David Yang's slides on the Lawsoc website

II Taking a position



Identify the range/spectrum of available positions



Position= An instinct? A research outcome? A distillation of other viewpoints?



Position must be:

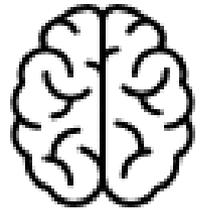
- Capable of clear expression (thesis statement)
- Firm and defensible but nuanced
- Aware of and responsive to alternative viewpoints

III Structure and Style

Introductions

Answer the question

- Identify the tension
- Locate your proposition within the area of tension



Roadmap is crucial

- Use ‘first’, ‘secondly’, ‘thirdly’



‘This essay argues...’

- Avoid calling it a ‘paper’
- ‘I’ is acceptable but changes the tone
- Avoid ‘this essay will argue’ or ‘this essay seeks to argue’
- A good essay **does** argue



Examples

Policy is a necessary and inevitable aspect of administrative law. Administrative decision-making is complex in contemporary bureaucracies, and while parliament bestows discretionary power it cannot be expected to legislate in precise detail the manner of its exercise. This essay argues that the guidance and structure which policy brings to the exercise of a statutory discretion is beneficial and essential. Where the pursuit or application of policy would eliminate a discretion, or work a serious injustice, there is adequate scope for adjudicative bodies to avoid or remedy such an outcome. **This essay has three parts.** The first argues that the formula in *Drake (No 2)* is a functional and appropriate way for merits review tribunals to engage with executive policy. Secondly, the essay contends that policy produces better administrative decision-making over time. Lastly, it rebuts the concern that policy tilts the scales of administrative decision-making too far in favour of the state. The quotes from Gleeson CJ and Reid LJ will be considered throughout. It does not, in fact, appear that their Honours substantially diverge. However, Gleeson CJ outlines the legal parameters in which policy may influence the exercise of a statutory discretion, while Lord Reid is mainly concerned with authorities failing to hear reasons urging a departure from policy. **Importantly, both judges accept that policy has a role to play in decision-making, and I argue this role is positive and necessary.**

Examples

Public trust in the criminal justice system is encouraged when participants feel as though the procedures are fair and open. Court processes that involve emotionally intelligent behaviour and meaningful dialogue promote this procedural fairness more substantially than judicial outcomes. However, the normative pressure for a detached judicial demeanour alongside ritualistic elements of court procedure limit the capacity for participative dialogue and therapeutic justice. This report will argue that lower courts are better placed to sustain procedural fairness due to their more accessible processes. This will be achieved through comparative analysis of the Sydney Supreme Court, Downing Centre and Manly Local Court.

IV Body paragraphs



Topic sentence

- Argument
- Resist the temptation to start with a quote. The reader is more interested in what **you** think

One paragraph = one big point

Length 250-350 words or thereabouts

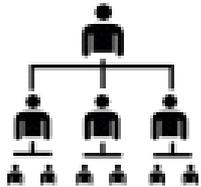
Most important points first

Paraphrasing or short quotes are optimal

The analysis should be nuanced

- Puts forward contrasting/alternative points of view
- Locates the argument within the tension

Concluding sentence — link back to the thesis



Example

Although the Australian High Court is notionally an instrument of judicial review, its capacity to create accountability for rights infringement is limited by the prevailing supremacy of parliament. In Westminster constitutionalism, judicial review is antithetical to the supremacy of parliament. **By contrast**, a written constitution such as the USA's allows the transgression of fundamental rights to be legally disputable and is invoked to invalidate Congressional Laws, thus enforcing accountability through legal constitutionalism. Despite the Australian constitutions' negligible attention to individual rights, the High Court employs the common law principle of legality, where it is presumed that an Act will not impinge on fundamental rights. **Meagher claims** that cases such as *Coco v The Queen* reflect a growing trend for judges to prevent politicians from impinging on fundamental human rights 'whenever interpretatively possible'. **However**, the ambit of the High Court to invalidate a law is restricted to the absence of unambiguous statutory language indicating an intention to abrogate a certain right or freedom. To that extent, the functional limitation on a politicians' power to abuse fundamental rights is political backlash and electoral failure. **Consequently, it is evident that rights abuses are held accountable and primarily mitigated by the Westminster principle of ministerial responsibility.**

V Conclusion

Aa

Equivalent or greater length to intro



Should evince some *development* of, rather than a mere restatement of, the thesis



Insight? Unanswered questions?

Speculation about future developments?

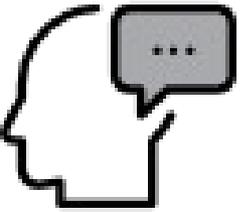
Recommendations?

Precise content varies, but these are among the substantive elements of a good conclusion

Examples

There are two main risks associated with executive policy: it may lead a decision-maker to misconceive their jurisdiction, or to apply it incorrectly. Both of these outcomes are remediable via recourse to merits review tribunals and the courts. Gleeson CJ's observation that there is nothing 'inherently wrong' in a decision-maker pursuing a policy is correct, however, this essay has gone further. I have argued that policy has an essential role to play in good decision-making because of the limited ability of parliament and judges to grapple with the complexity of the modern bureaucratic landscape. It is better that a device like executive policy be utilised to structure and guide statutory discretions than decision-making become inconsistent and idiosyncratic. However, from Lord Reid and Gleeson CJ, important qualifications to that view become clear – namely, that decision-makers must always be responsive to reasons urging a departure from policy, must not allow a statutory discretion to be eliminated, and must not apply policy blindly without due consideration of the relevant factors in each case. Thus, so long as there remain independent avenues of review available to the citizen, the benefits of policy in administrative law outweigh its disadvantages.

VI Headings and format



Use headings and sub-headings

- These should be phrased as *legal* points, rather than just catchy or provocative by-lines

THE CALCULUS OF NEGLIGENCE

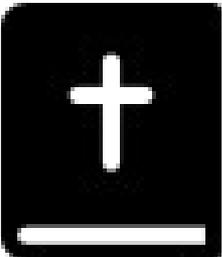
Magnitude of the risk

Probability of harm

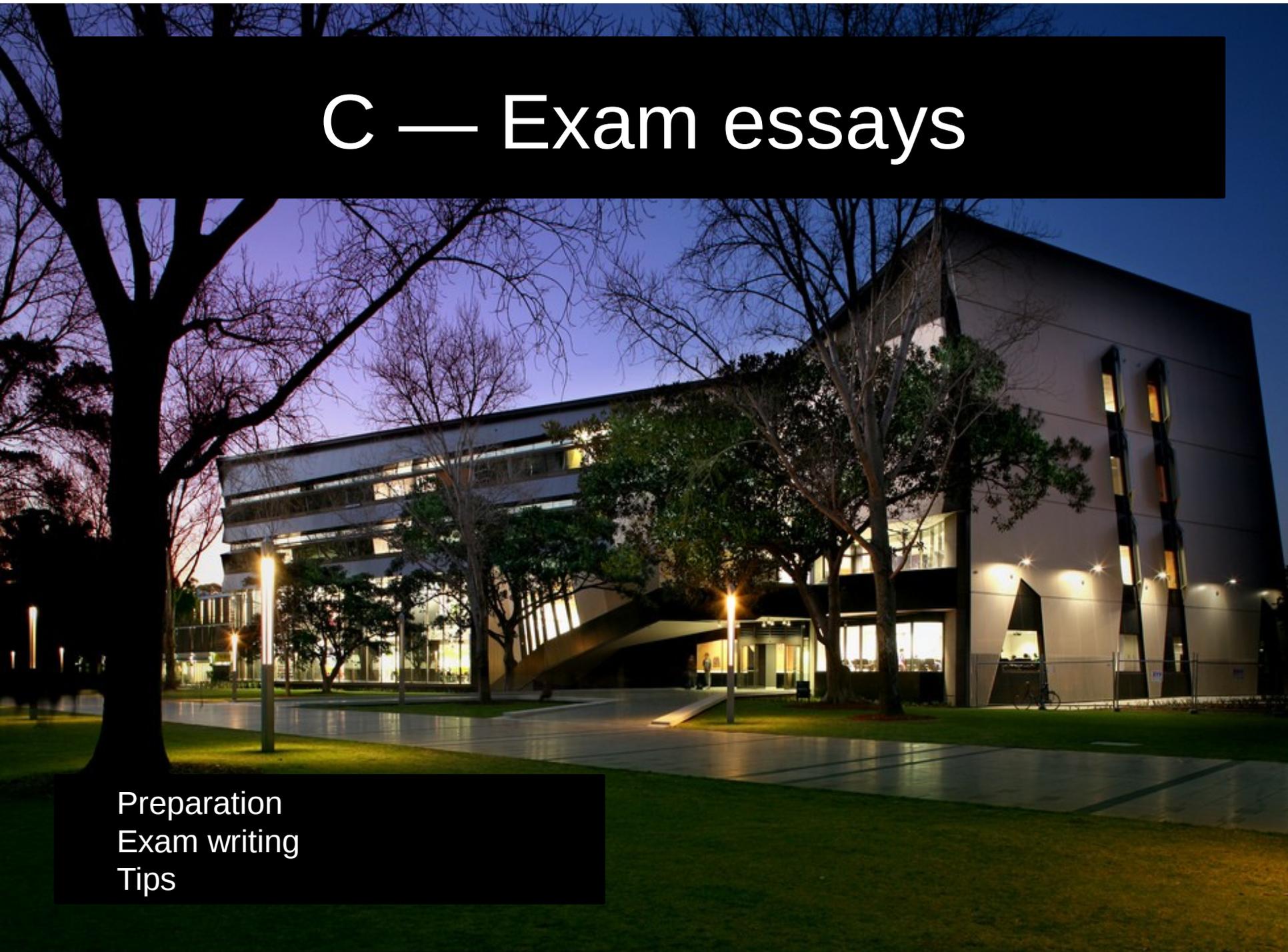
Burden and expense of alleviating action

Function= to organise

Follow the format in the AGLC



C — Exam essays



Preparation
Exam writing
Tips

I Preparation



What kind of notes to have and how to arrange them?

- Depends on: (a) the course and (b) your [good] study habits
- If there is a problem question and an essay component to the exam, it is good to have distinct arrangements of notes for each.
- The following slide has an example of useful note structure for an essay component.



Practice essays – draw them from past papers

Do not try and **guess** the essay question(s)



Making essay **threads/plans**, rather than full essays, is a good way to cover more of the course in your study

- If you are doing an open book exam, take these in to the exam with you!

REFORM PROPOSALS

2013 NSWLRC changes recommended to mental illness defence

Mental Health Act should be amended to provide that the defence of mental health or impairment may be raised at any time during trial by defence or if 'interests of justice' require it

Amended to provide that if prosec and defence agree evidence established defence: then court must enter a verdict of not criminally responsible by reason of mental health or cognitive impairment if satisfied that the defence is established on the evidence

Verdict of 'not guilty by reason of mental illness' **should be replaced with a verdict of not criminally responsible** by reason of mental health or cognitive impairment

+ **Updating arcane language** of 'defect of reason' and 'disease of the mind' + extending the defence to cognitive impairment

Defence should be available not only where accused didn't know their action was wrong but also when they were 'unable to control the conduct' → i.e. when jurisdictions allow the defence in cases of 'irresistible impulse': although not readily accommodated by *M'Naghten* rules, though would fit in with defence of substantial impairment

Recommended the removal of exec discretion

Ian Leader-Elliott has criticised **Hawkins policy approach of admitting medical evidence on the issue of specific intent but not on issue of voluntariness**: where the lesser offences of violence do not require proof of intention of recklessness → common law states do not distinguish between offences of specific and basic intent when intoxication is an issue

Distinguishing insanity from automatism

Loughnan: 'cleaving apart of insanity and what would come to be called automatism' began in the early 19th C → explains that the motivation was 'concern with dangerousness' = pragmatism and public policy rather than medical criteria or logic = distinction b/w mental illness and sane automatism → courts preference acquittal by reason of mental illness to acquittals on basis of involuntary conduct → fear that the latter fails to protect society adequately

Reform or repeal? → substantial impairment

Defence = long subject of scrutiny: whether the defence should be repealed and evidence of mental disorder left to be considered by judge on sentencing for murder: endorsed in Model Criminal Code report: public confidence in the defence and law is damaged by view that it operates to excuse people based on the deplorable way they kill: must just be considered in sentencing

However no evidence that killings under diminished responsibility were more 'deplorable' than others → manner of killing has no legal significance in any of the defences

II During the exam

Plan your response **thoroughly**



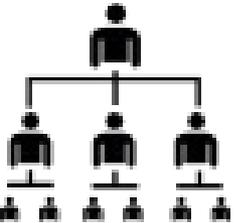
4 pages max (if double spacing then more is ok)

Introduction:

- No need to orientate discursively. Two parts to the intro only: answer the question, and outline your roadmap.

Body paragraphs

- Straight to the point
- **Only** important information (but still consider a hierarchy of points- lead with your strongest)



Exam tips

1. Where there is a choice of questions, pick the one you know most about
2. Keep an eye on the time, but always allow time to plan
3. Headings are still your best friend
4. The AGLC is no longer your best friend
5. Exam questions tend to focus on:
 - Trends in the law
 - Issues on the periphery
 - The scope or extent of legal principles
 - Unresolved questions of law in theory and practice



During the exam

Planning your response:

- Even though you have very limited time, always allow at least 10 minutes to plan.
- What does this mean?
 - Read the question carefully, more than once; what is the tension which the question wants an answer to? Trends in an area of law? The scope of a legal principle? The implications of a particular case or statutory reform?
 - What are the **range** of possible responses to the question? (you really can help yourself out by working through these options)
 - Come up with a **direct** response in one or two sentences which expresses your **position (thesis)** ... Write it down (in full)
 - Next, think about the two or three **big points** you wish to make in support of your thesis, these will form the basis of your paragraphs.
 - Arrange the law and theory you wish to discuss under these two or three big points/paragraphs.
 - Now consider: having organised my thoughts with respect to the law and theory, is the thesis I came up with as cogent and persuasive as it could be? Does it need to be modified?
 - Once any modifications have been made, or if you remain happy with the thesis you worked out, you can commence writing

Planning example

Identifying the range of potential positions/answers

- Take the following question:
 - ‘the heart of negligence lies in breach of duty. It is the most important part of the cause of action because it points to what the person should have done.’
- Potential responses:
 - Agree: B.O.D is the heart of negligence for the reason stated
 - Agree: B.O.D is the heart of negligence for some other reason
 - Disagree: some other element of negligence is the ‘heart’ of negligence. Possibly the **existence** of the duty (as per the Atkinian formulation in *Donoghue*)
 - Disagree: there is no ‘heart’ of negligence
 - ??Agree/disagree for some other reason??
- **Once you have mapped out the range of answers, you can then confidently position your own answer**

During the exam

- Writing

- The marker is looking for an **answer**, not a flowery exposition of the law in a particular area
- Using the active voice and getting to the point is even more critical in the exam room
 - “concise and precise” is the mantra
- Ensure each topic sentence: (a) directly responds to the question and (b) clearly introduces the “big point” being made about the question in the particular paragraph.
- The function of a good topic sentence is twofold: it both **orientates** the marker with respect to the paragraph’s main point and it **persuades** the marker about the cogency of your thesis statement
 - Preferably keep topic sentences short
- **If you get stuck, don’t panic**
 - Go back to your plan (that’s why you did it) and to the question- nothing is supposed to trip you up.
 - Think: ‘what is the simplest way to express what I want to say next’... Then write that.

D — Electronic Exams, the final frontier



Discussion (5 mins):

Has anyone done an electronic exam?

What are the challenges it presents in terms of essay writing under exam conditions?

To what extent should we modify our strategy to meet these challenges?

How?

Electronic exams

These will become universal eventually



Main point of concern for the essayist will be occupying the headspace of a take home and not of an exam scenario while composing a longer response

- There is no drafting! Editing of course, but not drafting
- Conciseness will be **harder** (typing invites over-indulging)
- From now on, start treating take home assignments as opportunities to become a concise writer when armed with a screen and a keypad, rather than a sloppy writer who is a savage editor

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Good luck!