# WHAT COUNTS AS LEGAL WRITING?

# AN ANALYSIS OF WHAT IT MEANS TO WRITE IN LAW, WITH REFERENCE TO BOTH LEGAL ACADEMICS AND PRACTITIONERS IN SOUTH AFRICA

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A thesis submitted to the Wits School of Education, Faculty of Humanities, University of the Witwatersrand in fulfilment of the requirements for the degree of Doctorate in Education

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## DECLARATION

I declare that this thesis is my own unaided work. It is being submitted for the degree of Doctorate of Education by thesis at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other university. An earlier version of this work was submitted for examination for the degree of Master of Education by dissertation at the University of the Witwatersrand in 2018; examiners recommended reworking, expanding, and resubmitting the research as a doctoral thesis.

Jean Moore

3rd day of November, in the year 2022.

# ABSTRACT

Although writing is important in most disciplines in higher education, it is particularly important in law, as written language does not merely communicate the law, it constitutes it. Despite this centrality of writing in law, conceptions of legal writing are under-researched for South African contexts. Of particular importance, given ongoing contestations about legal education and legal knowledge, is that there is little known about the relationship between conceptions of legal writing and conceptions of legal education and legal knowledge. This thesis seeks to understand what it means to write in law, particularly in the legal education context. More specifically, it explores the possible links between beliefs about legal education, legal knowledge, and legal writing. Concepts from the sociology of knowledge are used to re-examine some of the dichotomies in legal scholarship and to create a conceptual framework that is novel for legal education in South Africa, for understanding existing knowledge and writing claims. Drawing on data generated through ten in-depth, semi-structured interviews with legal academics, and legal practitioners involved in vocational training of candidate legal practitioners, this thesis shows that there are multiple understandings of the term "legal writing" and that these understandings can be linked to conceptions of legal knowledge, especially, and to conceptions of legal education, particularly amongst legal academics. It argues that, at university, beliefs about clarity concerning knowledge boundaries appear to link to beliefs about clarity about what "counts" as good legal writing, and vice versa. It identifies epistemic views on writing that value quality of evidence, reasoning and argument over traditional views that focus on textual accuracy, although practitioners hold views that are slightly more traditional and that privilege language criteria somewhat more than academic participants. It shows that apparent agreement regarding some common writing criteria, such as coherence, precision, and structure, may be misleading as these criteria are understood and used in different ways, and that practitioners draw on some criteria for good legal writing that are not used by academics. These findings both confirm Quinot and Greenbaum's (2015) claim that writing development contributes significantly to knowledge construction in the discipline of law and offer a slightly different understanding of the relationship: not only does writing development play a role in knowledge construction, but constructions of legal knowledge play an important role in writing development.

## Keywords:

Legal education; Legal writing; Writing development in higher education; Academic literacies; Social realism; Knowledge boundaries; Assessment

This thesis is dedicated to my family:

– to my partner, Derek whose patience, love, support, and wit are unwavering;

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# CHAPTER 1: INTRODUCTION

## 1.1 Title

What counts as legal writing? An analysis of what it means to write in law, with reference to both legal academics and practitioners in South Africa.

## 1.2 Background

### 1.2.1 Background to the researcher as an "insider-outsider"

I am a writing lecturer at a South African law school. The plaque on my office door says that I am a "writing expert". Although I am not entirely comfortable with this title, it may be worth explaining briefly how I came to acquire it. I trained and worked as an English teacher, specialising in the teaching of English as an additional language. I studied further in educational linguistics, and began to work in the higher education sector, across different disciplines and institutions, primarily to develop students' reading and writing capacities. In my current position, I am one of two academics who runs a discipline-specific writing centre and drives the development of student writing in the School of Law. In our work, we draw on Jacobs' (2005, 2007, 2013) concept of "insider-outsider" partnerships to facilitate epistemologically authentic writing development. This is an approach to writing development that Jacobs describes as

> an integrated approach, which understands the central role that language plays in how disciplines structure their knowledge bases and how they produce text. This is different across different disciplines, and therefore the approach to teaching students to be literate in their disciplines should be the result of a collaborative effort between academic literacy practitioners and lecturers. (Jacobs, 2007, p. 874)

Part of my "outsider" role is to work as an academic literacies practitioner, with legal academics, to make the writing demands in the discipline explicit. However, the contours of my "outsider" status are increasingly blurred. I have worked with the discipline of law for more than ten years. This experience places me in an unusual position: although I am an "outsider" to the discipline of law, this extended period of working within the discipline has allowed me to become, in some ways, an "insider" to the debates in law and legal writing that

I have been able to both observe and participate in over time. In the next section, I set out some of the dimensions of the problem of writing in law that I have observed.

### 1.2.2 Insider-outsider observations on the problem of writing in law

Although writing and language are important in most higher education and professional contexts, they are particularly important in law. Rideout and Ramsfield (1994) observe that, "in law, language is not mere style; it is itself the law" (p. 43). By this they mean that, in a Western legal tradition, written language is how law is set out, maintained, developed, and critiqued. Similarly, Bhatia (1987) notes that "the relationship between the language used in law and its content is exceptionally close" (p. 231). Precision is paramount; a poorly paraphrased idea or a misplaced word or punctuation mark can change legal meaning. Law students are told very early on in their degrees how important good writing is for their chosen profession. It can be argued that this focus on writing is a result of the colonial roots of South African law and ignores the orality of other legal traditions (Nunn, 1997). However, it is inescapable that writing proficiency contributes to success in the discipline and the profession.

Student writing in law in South Africa is viewed as a significant problem. In the Council on Higher Education's (CHE) Report on the National Review of Bachelor of Laws (LLB) Programmes in South Africa, it was noted that "without exception, panels visiting each of the faculties/schools were confronted with the lament (from staff and often enough from students and alumni) that students' writing and research skills were sub-par" (CHE, 2018, p. 56).

The claim that student writing in law is a problem is not new. Legal academics Dhlamini (1992) and Motala (1996) describe law students' struggles with legal writing more than twenty-five years ago. In the decade that followed, a range of legal academics, such as Greenbaum and Mbali (2002) and McQuoid-Mason (2006), amongst others, articulated concerns about students' legal writing. This concern continues to date, with an increasing number of journal articles written on how different law faculties in South Africa are tackling the problem of student writing (for example, Swanepoel & Snyman-van Deventer, 2012; Broodryk, 2014, 2015; Crocker, 2018; Gottlieb & Greenbaum, 2018; Snyman-van Deventer & van Niekerk, 2018; Bangeni & Greenbaum, 2019; and Crocker, 2020, 2021).

The legal profession, arguably, has been even more vociferous in its criticism of law graduates' writing. Articles such as "Law graduates barely able to read" (Ndlovu, 2010) and

"LLB summit: Legal education in crisis?" (Sedutla, 2013) reflect this sense of alarm. Members of the various bar councils (Dicker, 2013) and the judiciary (O'Regan, 2002) similarly lament the state of legal graduates' writing.

Although I realised early on in my engagement with the discipline of law that student writing is viewed as inadequate, it took me longer to realise that the term "legal writing" seems to mean quite different things to different people. Some use the term to refer to the ability to argue or reason in law. Others use it to refer to a particular type of clarity and precision in style. Many have grammatical correctness or referencing in mind when they use the term. The term "legal writing" is both loaded with multiple understandings and underpinned by the misplaced assumption that we are all talking about the same thing. To illustrate: at a gathering of legal academics from a range of South African universities, when I raised the possibility of pausing to clarify what we meant by "legal writing", someone politely suggested that this was not necessary, and would waste time. A guest scholar from the United States later commented that she found this puzzling, as she too had the sense that people in the room were talking about different things.

Essentially, people are clear that legal writing is a problem for students and graduates in South Africa but less clear about what counts as good legal writing. Faced with this ambiguity concerning what it means to write well in law, I turned to the literature on legal writing, hoping to gain some clarity. This generated more questions than answers. Much has been written about legal writing, particularly in a North American context. (See, for example, Pollman, 2001; Lysaught & Lockwood, 2004; Schiess, 2009). However, what I read again reflected different understandings of what it means to write in law, and focuses on very specific types of legal genres, such as drafting memoranda (Oates, Enquist & Kunsch, 2002; Oates, 2014). Moreover, the focus of much of this literature is the pedagogy of legal writing, based on the assumption that there is agreement about what it is.

The South African literature, although it has grown in recent years, is also relatively thin – with a few notable exceptions. Greenbaum (2004) offers the clearest attempt to define legal writing but suggests that traditional views on writing, which focus on basic literacy and surface level concerns, prevail in South African law faculties (Greenbaum, 2004, p. 11). She argues for a more discourse-specific and critical orientation to legal writing; a call that has been taken up by other South African researchers into legal writing. These include Quinot (2012) who incorporates legal writing into his conception of transformative legal education (see also Quinot & Greenbaum, 2015) and Broodryk (2014, 2015) who explores the indivisibility of writing and thinking in law. These scholars all argue for change or transformation in legal writing and legal pedagogy in South African legal education. However, it is not always clearly articulated what legal writing was, or what it should be transformed into being, within the broader conversation about legal education. This suggests that it may be important to try to understand what is meant by legal writing within the broader context of what is meant by legal education.

A further dimension to the problem emerges in the works of scholars such as van Marle and Modiri (2012); Modiri (2013, 2014, 2016); Campbell (2014); and Heyns (2014). They, amongst others, explore debates about legal knowledge: whether law is, or should be, primarily academic or professional; scientific or philosophical; normative or critical. This raises a further question about legal writing: if understandings of legal knowledge are so different, could this account for some of the differences in understandings of legal writing?

These observations have informed the aim of this thesis: to investigate and articulate i) some of the ways in which legal writing is understood, practised, valued, and critiqued in a South African higher education context; ii) how these understandings might be influenced by conceptions of legal education and legal knowledge; and iii) how similar or different these views are from those of legal practitioners. Legal writing is not generally researched or framed within the broader debates about legal education or legal knowledge, but it seemed important, for this research, to attempt to do so.

The question of what it means to write in law is situated within layers of context that are complex, contested and changing. The rest of this chapter therefore provides an overview of the following layers of context for this research: the context of South African higher education; the legal academic context; and the legal practice context. This preliminary literature review is necessary at this point, to set up a sufficiently nuanced framework for the problem statement. The chapter then sets out the problem and purpose statements; the research questions; the rationale; and the order of chapters for the thesis.

## 1.3 Preliminary Literature Review: Contexts of Complexity, Contestation and Change

### 1.3.1 South African Higher Education Context

To be a legal practitioner in South Africa, you need to obtain an accredited university degree, before undergoing vocational training (s 26 (1), Legal Practice Act 28 of 2014). It is important, therefore, to articulate something of the context of higher education, particularly in South Africa.

Across the world, the 20th and 21st centuries have seen significant changes in higher education. Reflecting on higher education globally, Mbembe (2016) asserts that "there is hardly any agreement as to the meaning, and even less so the future, of what goes by the name 'the university' in our world today" (p. 32). He argues that one of the reasons for this uncertainty is that the restructuring of higher education is being dictated by the requirements of global capitalism; that global market demands inform university reforms (Mbembe, 2016, pp. 37, 39). All aspects of higher education are seen in economic terms: students are seen as human capital; knowledge is a commodity; and institutions of higher learning are run as businesses. Harley (2017) echoes this and claims that, in the past thirty years, "higher education has been profoundly affected by neoliberal capitalism" (p. 1). Lynch (2014), arguing that "new managerialism represents the organisational arm of neoliberalism" (p. 1), claims that new managerialism has led to productivity and efficiency being prioritised over historical values such as the intrinsic value of learning, and the value of reflection and criticality. Academics become workers to be managed; students become consumers. A major, related, change is the huge growth in the number of students in higher education worldwide (Mbembe, 2016, p. 38). Differences in responses to these changes may affect how legal education, knowledge and writing are understood. For example, an academic or practitioner who accepts as a given that legal education's main purpose is to equip students to be an efficient legal practitioner in a competitive job market may have markedly different understandings from an academic or practitioner who views a university education as a public good for developing human, intellectual and critical capacity.

In South Africa, a major convulsion in higher education was the transition to democracy from apartheid, in 1994, and the resultant constitutional turn. The enactment of the Constitution of the Republic of South Africa, 1996 established an entirely different normative framework for higher and legal education. Under apartheid, race, class, and gender-based discrimination characterised South African higher education, resulting in deliberate exclusion of marginalised groups (Badat, 2009, p. 457). Part of the constitutional turn was the imperative to transform and improve access to higher education, as initially envisaged in the Freedom Charter (Alliance, S. A. C., 1955). Section 29(1) b of the Constitution (RSA, 1996) states that "[everyone has the right] to further education, which the state, through reasonable measures, must make progressively available and accessible". This right was given further attention in the 1997 White Paper on Higher Education (Department of Education, 1997), which Boughey and McKenna (2021) suggest is the most important policy, in relation to higher education in the post-apartheid period. This Paper was intended to be a "framework for transformation" (Department of Education, 1997). The purpose of higher education, as articulated in this Paper, is to be both a "private good" and a "public good" (Boughey & Mkenna, 2021, p. 41).

Despite these legislative and policy provisions, twenty-five years later, racial, gender, class, cultural and spatial divisions are still observable in higher education in South Africa – a legacy of South Africa's colonial and apartheid past. This much was acknowledged in a discussion document prepared for The Higher Education (HE) Transformation Summit, held in October 2015. In the document, it is observed that the logic of the higher education system under apartheid was "almost diametrically opposed to the central tenets of the Constitution" (Universities SA, 2015, p. 1). It goes on to define higher education transformation as follows:

> a comprehensive, deep-rooted and ongoing social process seeking to achieve a fundamental reconstitution and development of our universities to reflect and promote the vision of a democratic South Africa. This entails a simultaneous process of eradicating all forms of unfair discrimination and creating a HE sector that gives full expression to the talents of all South Africans, particularly the marginalised and the poor… [which involves] the active removal of any institutional, social, material and intellectual barriers in the way of creating a more equal, inclusive and socially just HE education system. (Universities SA, 2015, p. 2)

This discussion document problematises "narrow" or "one-dimensional" interpretations of higher education transformation, arguing that single factors like the racial profile of staff are essential, but not sufficient, markers of transformation. Structures through which race, gender, class, or disability relations are mediated – like curricula, pedagogy, research, student access, and leadership – are all dimensions of the higher education system that should be included in any transformation agenda (Universities SA, 2015, p. 3). Different understandings of what it means to transform these dimensions may lead to different understandings of legal education, knowledge and writing in universities.

What it means to be a transformed university in 21st century South Africa remains fiercely contested (Badat, 2009). He goes on to suggest that transformation "usually has the intent of the dissolution of existing social relations and institutions, policies and practices, and their recreation and consolidation into something substantially new" (Badat, 2009, p. 456). Differences in the understanding of what these "substantially new" practices should look like may account for differences in conceptions of what counts as legal education, knowledge and writing in law faculties.

Decolonisation is sometimes discussed as if it is synonymous with transformation, but it may be more useful to view it as related to, but distinct from, and perhaps more radical than, transformation (Gibson, 2015, p. 199). Many conversations about decolonisation are framed in terms of race and class. A central claim is that poor, Black students are marginalised by the academy due to its neo-colonial nature, and that the academy must take steps to decolonise (Booysen, 2016). Decolonisation is not always precisely defined, but is sometimes synonymous with Africanisation, not just of knowledge or content taught, but of pedagogy and relationships within the university. Biko (1978) conceives of decolonisation occurring through the "evolution of our genuine culture" so that "our identity can be fully rediscovered" (p. 77). This could imply all or some of the following in the university context: a rejection of Western knowledge in favour of indigenous knowledge; a rejection of hierarchical, top-down pedagogies in favour of more horizontal or constructivist ones; and more egalitarian, Ubuntu-driven relationships within the university.

Mbembe (2016), drawing on Fanon, identifies some pitfalls in regarding Africanisation and decolonisation as being synonymous, largely due to the xenophobia and continued oppression of the poor that this can mask. Interestingly, however, the CHE's 2018 report on the national review of the LLB curriculum – discussed later in this chapter – equates decolonisation with Africanisation (CHE, 2018, p. 54). Mbembe, on the other hand, argues persuasively for the necessity of recognising that decolonisation occurs in a globalised and increasingly bureaucratic context in which knowledge has become a commodity and higher education has become a marketable product (contextual issues briefly explored earlier in this section). Mbembe contends that – amongst other understandings – “to decolonise means to reverse this tide of bureaucratisation” (Mbembe, 2016, p. 31).

The call to transform and decolonise higher education in South Africa intensified in 2015, with nationwide student protests calling for “quality, free decolonised education for all, now” (Wits FeesMustFall Movement demand, 2016). Student movements like #FeesMustFall and #RhodesMustFall became powerful social forces for challenging ongoing, if not deepening, structural inequality. Although their immediate demands were for higher education to be free and decolonised, they also raised awareness about existing conversations in the academy about transformation and decolonisation of both curricula and institutional culture. It is necessary to acknowledge the importance of calls for transformation and decolonisation and to be mindful of their possible impact on conceptions of legal education, legal knowledge, and legal writing. It may be that differing interpretations of the imperative to transform and decolonise the university could lead to different conceptions of legal education, knowledge, and writing.

Student exclusion and alienation is a strong theme underpinning the calls for decolonisation of the university. Some students’ experience of exclusion and alienation at university is due to ongoing inequality in Basic Education in South Africa, where access to quality education remains skewed along class and racial lines (Chetty & Knaus, 2016). Educational philosopher Wally Morrow’s (2009) seminal distinction between formal and epistemological access (EA) to education has relevance here. He observes that “formal access to institutions that distribute knowledge is different from, and not a sufficient condition for, epistemological access” (Morrow, 2009, p. 77). Morrow goes on to argue that things like learning materials, educational programmes and teachers can do no more than facilitate, but never guarantee, epistemological access (p. 78). EA involves learning how to participate successfully in an academic practice, and it remains evident that many students continue to struggle to engage in such participation. When it comes to the discipline of law, students’ EA is influenced not only by the institutional culture of the academy but also by the institutional culture of the legal profession. Learning to write in law therefore requires learning how to participate successfully in both academic and professional legal writing practices. This double demand is especially challenging for students who are under-prepared.

Cliff, in Joseph (2016) points out that only one third of school leavers in South Africa who qualify for higher education are adequately prepared for a university's literacy requirements; although they have formal access to institutions of higher learning, many remain unable to participate in their chosen academic disciplines fully and successfully. In other words, South African students' academic literacy practices frequently do not articulate with the ways of thinking and practising (Ashwin et al., 2015) of their chosen academic disciplines. This articulation gap (Bitzer, 2009) can, in part, be attributed to inadequacies in the secondary education system; the challenges of studying in an additional language as most South African students do; and entrenched structural inequality in South African society. All these factors contribute to understanding conversations about why students struggle to write.

The Covid-19 pandemic that emerged in late 2019 will likely have a profound and lasting effect on the higher education landscape. Huang (2020) succinctly observes:

> Although it is impossible to forecast the future of higher education in the post COVID-19 age with any accuracy, there is little doubt that the pandemic's impact on higher education worldwide will be significant. (Huang, 2020, para. 1)

Huang (2020) posits that some of the likely impacts will include a significant fall in the number of international students; a related significant impact on university funding; budget cuts; an even stronger emphasis on STEM subjects (with a related negative impact on the Social Sciences and Humanities); and a longer-term increase in the use of online teaching technologies (paras. 4–15).

Albeit brief, and perhaps neglectful of some aspects of recent changes in the higher education landscape in South Africa, it should be clear from this section that higher education in South Africa is characterised by several inter-related challenges and changes. It is within this complex context that legal education in South Africa is located. I now turn, therefore, to the context of legal education more specifically.

### 1.3.2 Context of Legal Education

Since 1997, most law faculties in South Africa have offered the four-year undergraduate LLB degree (Greenbaum, 2004). In the decades leading up to South Africa's transition to democracy, three types of legal qualifications were offered. The LLB degree was a two or three-year graduate entry degree, undertaken after an initial three-year degree, which qualified graduates to undertake vocational training as either an attorney or an advocate. The B-Proc was a four-year undergraduate degree that qualified graduates to work as attorneys; and the three-year B-Juris degree qualified graduates to work only in the lower courts, as prosecutors and magistrates (Greenbaum, 2014, p. 3). Historically White universities (HWUs) tended to offer only the LLB degree, whilst historically Black universities (HBUs) tended to offer the shorter qualifications that led to careers that were more limited in law.

Greenbaum (2014) eloquently points out how this deeply divided system of legal education was in particular need of reform:

> The all-pervasive exclusion, on a systemic basis, of black South Africans from superior quality legal education and the upper reaches of the legal system served to provoke resistance and protest, as well as a burning urgency to ameliorate the inequalities. (Greenbaum, 2014, p. 4)

Thus, the four-year undergraduate LLB was developed in an attempt to address these inequalities and to ensure that all students had access to the same, single qualification. The four-year LLB is, however, the subject of much debate and criticism (O'Regan, 2002; McQuoid-Mason, 2006; Greenbaum, 2009, 2010, 2012; Dicker, 2013). Core criticisms are that it is too narrowly legal in nature, and that the curriculum is too vast to be explored in sufficient depth in the time, resulting in graduates who are ill equipped for the profession. These criticisms culminated in the LLB summit of 2013, in which members of the profession and legal academics gathered to air their concerns and to find a way forward (Dicker, 2013; Sedutla, 2013). The summit, in turn, led to a review of the LLB degree by the CHE (CHE, 2018). The final CHE report recommended that the degree be extended to five years, to address some of the criticisms outlined above and so that more non-legal subjects can be included in the degree (CHE, 2018, p. 51). The final report also affirms the "centrality of research and writing skills to the practice of law" and urges law faculties to "do everything in their power to significantly improve the writing and research competences of their students" (CHE, 2018, p. 56). However, although it recommends that "the development of research and writing skills must be fundamental to teaching and learning throughout the curriculum" (CHE, 2018, p. 56), the CHE report does not attempt to define or explain just what these writing skills and competences are.

The CHE review is just one indicator of the ongoing conversations about what the university curriculum should include, how many years a law degree should take, and whether the degree should be a first or second degree. In contrast to South Africa, many international law programmes, such as in Canada and the United States, offer post-graduate law degrees which are law and skills-focussed, based on the assumption that students will have received their broader, more philosophical education in their undergraduate degrees (Zhou, 2015). These post-graduate programmes generally include a legal writing course, which focuses specifically on the types of writing that a lawyer needs to be able to produce (Oates, 2014). Underpinning these curricula is the assumption that proficiency in more general academic writing will have been gained in the undergraduate degree. Although some South African law faculties have some students completing the LLB in two or three years, as a second, graduate-entry degree, the bulk of students enter the four-year degree without a prior degree and so proficiency in general academic writing cannot be assumed (CHE, 2018).

This is not a challenge unique to South Africa – several other countries, like Kenya, also offer a four-year undergraduate LLB degree followed by vocational training (Muchiri, 2020). However, how legal writing is understood in these four-year undergraduate LLBs is less clear than in many post-graduate law faculties, as legal writing teachers cannot assume that proficiency in other forms of academic writing has been developed before students begin their legal education. That said, Bangeni and Greenbaum (2019) point out that even this assumption may be flawed. They draw on a 1994 study in the United States which showed that "novices in most law schools in the United States experience significant challenges with literacy practices in their first years despite having obtained the mandatory undergraduate degree which is a prerequisite for legal studies" (Bangeni & Greenbaum, 2019, p. 2).

The contestations around legal qualifications and curricula in South Africa are located in broader debates about legal education itself. The traditional debate about what a good legal education should include is captured in a seminal journal "Pericles and the Plumber" (Twining, 1967). Twining sums up two very differing views on legal education: a broad, holistic programme that encourages philosophical, ethical, and critical thought vs legal skills training in which students learn the law, how to read and write it, and how to apply it. This argument continues, in various forms, to date. Importantly, however, this dichotomous view has been challenged by a range of scholars. Gravett (2018) for example asserts that "this so-called antithesis is false, because it assumes that a vocational approach is necessarily incompatible with such values as free inquiry, intellectual rigour, independence of thought, and breadth of perspective" (Gravett, 2018, p. 1). He goes on to insist that "university law schools do not have to choose between teaching law as an intellectual discipline and teaching skills. We can do both, and each can enrich the other" (Gravett, 2018, p. 16). An especially animated strand of the conversation regarding legal education is regarding what it means to "think like a lawyer". Much of the literature on legal education explores the importance of teaching students to "think like lawyers" – not only inducting them into valued ways of reasoning in law but also developing a legal professional identity (Sullivan, Colby, Wegner, Bond & Shulman, 2007). Gravett (2018) criticises the approach that most South African law schools have taken in this regard. He argues that "what legal academics usually mean by the phrase 'to think like a lawyer' – the development of analytical ability in examining mostly upper court opinions, distinguishing cases, and construing or criticising legal doctrine – only develops a narrow intellectual quality" (Gravett, 2018, pp. 14-15). He further asserts:

> University law schools focus almost exclusively on a limited subset of the skills that are of crucial importance in practising law: one fundamental cognitive skill – analysis – and one fundamental applied skill – legal research. We are not preparing our students for other, equally crucial lawyering tasks – negotiating, client counselling, witness interviewing and trial advocacy. (Gravett, 2018, p. 15)

Ultimately, legal academics are likely to have very different understandings – even amongst themselves – of what "thinking like lawyers" and therefore what "writing like lawyers" entails (Campbell, 2014). These differences are likely to be more pronounced, depending on the philosophical or ideological underpinnings of one's views.

Klare's (1998) seminal concept of transformative constitutionalism is one of these underpinnings that shapes conversations about legal education in South Africa. He describes transformative constitutionalism as being a commitment to "transforming a country's political and social institutions, and power relationships, in a democratic, participatory and egalitarian direction" (Klare, 1998, p. 6). Transformative constitutionalism holds weight in the South African legal academy and profession, and one's position in relation to the notion of transformative constitutionalism is likely to affect one's position on both legal education and legal writing. Davis and Klare (2010) draw on this notion to express the concern that traditional South African legal culture has the potential to constrain the transformative project and suggest that transformation of what they term "traditional legal culture" (p. 403) is paramount. By this they mean "characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place" (Davis & Klare, 2010, p. 406).

Of particular interest for this thesis is the “manners of expression” in the above quotation. This suggests that traditional forms of legal writing may be undergoing – or should be undergoing – change. It may be that differences between those wishing to uphold traditional legal culture, and those attempting to embrace or facilitate a transformative legal culture and education, may lead to differences in how legal education and legal writing more specifically are understood and valued. The CHE National Report on the LLB notes that “to teach and to study law ‘constitutionally’, means a completely different way of teaching and studying law than previously” (CHE, 2018, p.18). However, this report has, as its first finding, that most universities have embedded transformative constitutionalism only “to some extent” and that several have not done so adequately.

Drawing on the concept of transformative constitutionalism, Quinot (2012) proposes a theoretical framework for legal education in South Africa that he calls “transformative legal education”. This framework is developed in a later paper by Quinot and Greenbaum (2015) and is explored in more detail in chapter two. However, scholars such as Modiri (2016) explicitly “strongly distance” themselves from these views on legal education reform, and align themselves with a more critical, decolonial position, drawing on scholars such as Freire (1970) and Mbembe (2012). Modiri (2016) makes the case for a “critical legal education” which draws on a profoundly different philosophy of legal education. Gravett (2018), cited above, in turn strongly distances himself from Modiri and others’ critical stance, claiming that its philosophical and theoretical emphasis does not serve the legal profession or legal education. These very heated debates are not just about what counts as a good legal education. Underlying them seems to be utterly different conceptions of what counts as legal knowledge. This made me wonder about the likely effects of these profoundly differing conceptions on what counts as good legal writing.

The idea of a critical legal education relates to the decolonial turn, introduced in the previous section. The imperative to transform and decolonise higher education applies equally to legal education. The emphasis on writing in law can be said to be firmly rooted in a colonial and western understanding of what law means and how it is developed and upheld (Nunn, 1997). This emphasis could thus be resisted by anyone embracing the imperative to decolonise law. However, given that writing has such materiality in any 21st century practising of law, it could be argued that it may be more transformative to teach powerful forms of legal writing, at the same time as critiquing them, to ensure that all students have genuine access to these forms, rather than dismissing them entirely. The basis of this argument, put forward by academic literacies scholars such as Lea and Street, 1998; Lillis and Scott, 2007; and Jacobs, 2007, 2013) is explored in more detail in chapter two. Different understandings of decolonisation and transformation, and one's position in these debates, may affect one's understanding of what it means to write in law.

National contestations about transformation, institutional culture, curriculum, and the role of education, discussed in the section above, are reflected at the law school where I work. The School is simultaneously lauded for its commitment to social justice, particularly evident in the work of its associated institutions, and criticised for placing too much value on commercial and private law subjects, and hence arguably being part of upholding conservative, untransformed legal institutions. However, interestingly, the recent CHE review suggested that the School placed too strong an emphasis on public law – which refutes this latter perception (Final HEQC Report, The National Review of LLB Programmes, 2016 – 2017, p. 5).

These tensions are also observable in relation to legal writing. On the one hand, much time is spent, in many courses, trying to teach students how to "write like a lawyer". My own appointment, and the development of a dedicated writing centre for law students, reflects the institutional recognition that writing is important in law, and that students need help in becoming legal writers. On the other hand, there is growing critique by some of socialising students into dominant forms of legal thinking and writing, and some experimentation with alternate writing forms, which could contribute to the multiple understandings of what it means to write in law in South Africa at this time.

Having considered the complex and inter-related contexts of higher education and legal education in South Africa, it is necessary to describe briefly the legal practice and vocational training contexts into which legal graduates enter. These, too, are complex and changing.

### 1.3.3 Legal practice and vocational training context

It is beyond the scope of this research to attempt to describe the complexities – either historical or current – of the legal profession in South Africa. Rather, this section attempts to provide a snapshot of some of the contours of the legal profession that are relevant to this research.

The legal profession in South Africa is characterised as a "divided legal profession". Literally, this refers to the recognition – both in practice and by statute – of two main types of legal professionals: advocates and attorneys (Wildenboer, 2010, p. 199). Until very recently, the two parts of the profession were governed by different legislation, belonged to different professional bodies, and carried out different kinds of legal work.

Godfrey (2009) notes however that this characterisation of the legal profession is the "narrow" definition and goes on to describe both the narrow and broad definitions of the profession in this way:

> The narrow definition includes, in the private sector, attorneys and advocates, and in the public sector, prosecutors, state attorneys, state advocates, magistrates and judges. The key elements in this definition are the requirement to have a legal qualification and the ability to appear on behalf of a client (including the state) in a court or to sit in judgement in a court. The wider definition of the legal profession includes legal advisers. In the private sector, most legal advisers are employed by large corporations. In the public sector, legal advisers are employed in national government departments, especially the Department of Justice and Constitutional Development (DoJ), as well as at the provincial and municipal levels. (Godfrey, 2009, p. 92)

It seems that the profession is divided in more ways than one: between public and private lawyers; between those regulated by professional bodies and those not; by those working in legal firms or groups and those working as advisors to the State or commercial companies. These different social locations in society may influence conceptions of legal writing. Although the formal requirements for legal writing are governed centrally by the dictates of the Uniform Rules of Court and the practice directives of the divisions of the High Court, these do not address the kinds of writing that the wider definition of the legal professional may be expected to do.

The adjective "divided" may also apply to the legal profession in more subtle and problematic ways. Historically, the legal profession can be said to have been at the centre of South African politics (Klaaren, 2020, p. 15) – both in its role in challenging Apartheid and in its role in upholding its unjust laws. Ex-Deputy Chief Justice, Dikgang Moseneke succinctly describes this in his judicial memoir:

> Apartheid was a living example of how the law may be harnessed to entrench colonial power relations and in the process do evil; and produce poverty, inequality and injustice. For me it went past personal validation. I practised law to advance the struggle for freedom, equality and justice. (Moseneke, 2020, pp. 11-12)

In his earlier personal memoir, Moseneke writes movingly about his struggles, as a Black man, to be admitted as an attorney, then as an advocate, during the height of Apartheid. Regarding his arrival at the Johannesburg Bar, in 1982, he notes how few Black and women advocates there were and how it remained, essentially, an "old boys' club" for White men (Moseneke, 2018, p. 226). These divisions, almost forty years later, seem to remain, and are described in uncannily similar language: "National Association of Democratic Lawyers (NADEL) spokesperson Nokukhanya Jele concurred… noting that an old boys club' within law firms and at the Bar still clung to unreconstructed notions of race, gender and ability" (Klaaren, 2015, p. 179). In a later study, Klaaren (2020) draws on Law Society data from 2017 to show that "whites were still 58 per cent of practising attorneys and 63 per cent of advocates" (p. 1). Klaaren (2020) draws on further data to show that, even four decades after Moseneke's experience "the legal profession faces an urgent challenge to transform its race and gender composition" (p. 4). There is a range of research, such as Pruitt's 2002 study of large commercial law firms, and the Centre for Applied Legal Studies' 2014 study of transformation of the legal profession more broadly, that confirms anecdotal accounts of ongoing sexism and racism in a range of legal professional contexts. The Pan African Bar Association of South Africa (PABASA) is a newly formed alternative Bar whose stated main purpose is to "provide an environment in which Black advocates, in particular, can grow and thrive" (PABASA website, 2019).

It is against this background that the introduction and enactment of the Legal Practice Act No. 28 of 2014 (LPA) must be understood. The LPA is intended to be a legislative tool for the transformation of both the legal professional and vocational training. Its outcomes include the establishment of the South African Legal Practice Council (LPC), which now regulates all legal practitioners, and – of interest for this study – the practical vocational training requirements for candidate legal practitioners (Media Research & Liaison, DoJ, 2015).

Until the enactment of the LPA, attorneys had to possess a recognised law degree, complete articles of clerkship after graduation, and pass the attorneys' admission examinations set by the Law Society of South Africa (LSSA) and belong to a recognised Law Society (Godfrey, 2009, p. 94). As part of their articles of clerkship they could, but did not have to, participate in practical legal training courses offered by the Legal Education and Development (LEAD) arm of LSSA, or enrol in one of LEAD's Schools for Legal Practice (Godfrey, 2009, p. 94). Advocates, to become a member of a Bar Council, had to possess a LLB degree, complete pupillage and pass examinations set by the General Council of the Bar. Notably, however, their belonging to a Bar Council was voluntary, so – if they chose not to join the Bar – they were only accountable to the High Court and only required a LLB degree to practise as an independent advocate (Godfrey, 2009, p. 94).

The LPA creates a single category – that of "legal practitioner" – and all those aspiring to join the profession are called "candidate legal practitioners" (s 1, LPA, 2014) who must complete "practical vocational training" (s 27(1), LPA, 2014). The new requirements for such training are set out in rules 21-27 of the South African Legal Practice Council Rules (DoJ notice 401 of 2018, pp. 37-53). However, at the time of phase two of this research, these changes had largely not been effected and there was a great deal of uncertainty about how the respective vocational training programmes might change. Hence, it is important to simply note that vocational training landscapes – just like the other contexts described earlier in this chapter – are in flux.

The legal profession faces further, broader changes and challenges, reflecting international trends. One of these is the changing nature of the profession itself. Susskind and Susskind (2015) claim that:

> we are on the brink of a period of fundamental and irreversible change in the way that the expertise of specialists is made available in society. Technology will be the main driver of this change. And, in the long run, we will neither need nor want professionals to work in the way that they did in the twentieth century and before. (Susskind & Susskind, 2015, p. 1)

They go on to argue that this claim is particularly true of the legal profession (Susskind & Susskind, 2015, p. 66) and describe a range of ways in which technology is changing the way that law is practised, how law firms are structured, and – importantly for this study – how the law is researched and written about (Susskind & Susskind, 2015, pp. 66-69). For example, they illustrate how much of the legal research and document review traditionally done by junior legal practitioners can now be carried out by online search systems and how document assembly systems can generate legal documents (Susskind & Susskind, 2015, p. 69). These changes in the context of practice are thus another pressure point in the debates about legal education, knowledge, and writing.

In sum, understandings of legal writing are situated in underlying, unresolved debates about the nature and purpose of higher and legal education; the boundaries and nature of legal knowledge; and the complex and changing nature of the legal profession, including vocational training, in South Africa at this time. Diagram1, below, attempts to summarise these layers of context, which may affect how legal writing is understood and practised.

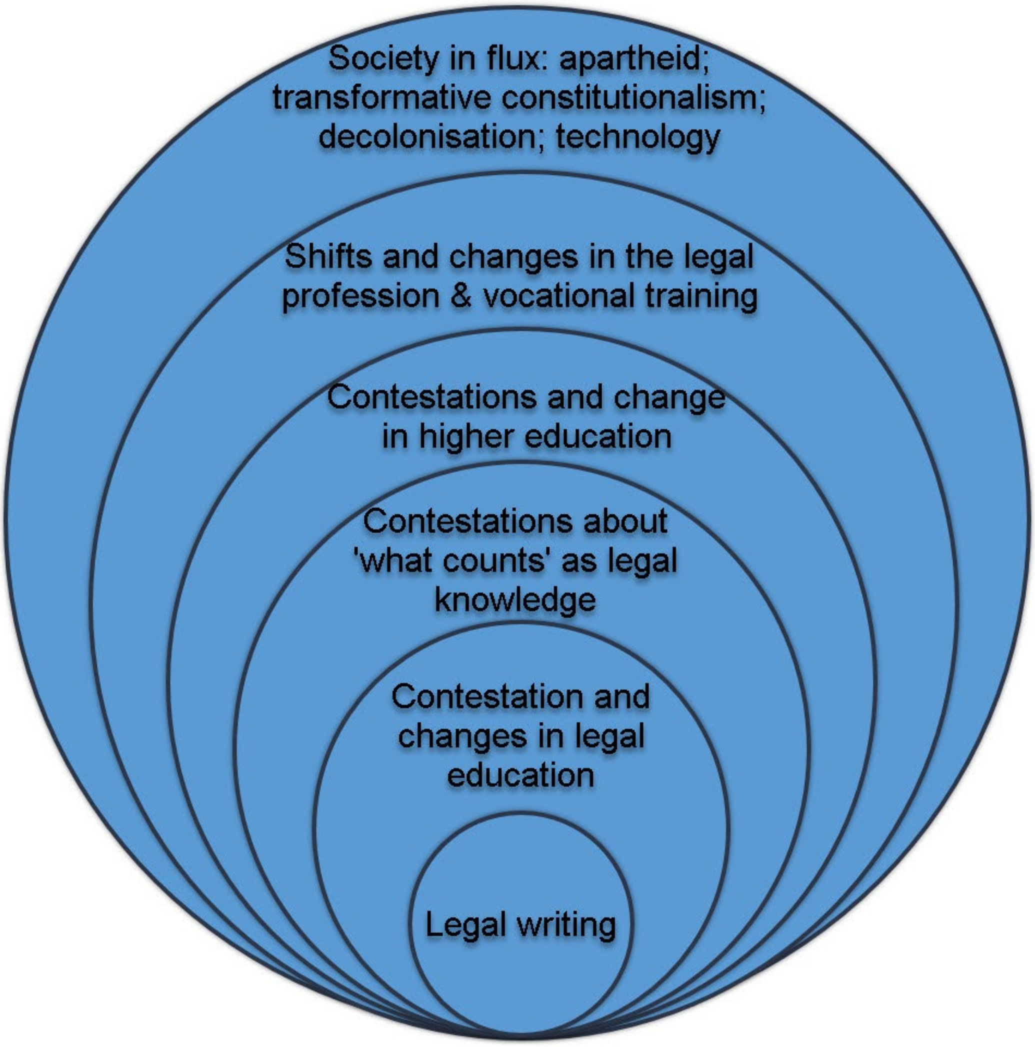



**Diagram 1: Contexts for legal writing**

This leads me to the statement of the problem.

## 1.4 Problem Statement

There are arguments that an unrelenting focus on the written nature of the law is problematically Eurocentric (Nunn, 1997). However, it is inescapable that there is a pragmatic dimension to legal writing: written law is the way in which legal rights and obligations are communicated and upheld in contemporary society. James Boyd White (1985) explains this as the constitutive nature of legal language; that legal writing is not just how law is written, but how it is maintained, developed, and protected.

Despite this centrality of writing in Western legal traditions, legal writing is under-theorised for South African contexts. There is only a small and fairly recent body of literature on legal writing in South Africa. In this literature, the term "legal writing" seems to be understood in different ways, and writers draw on different bodies of knowledge to theorise it. Some work draws largely on the pedagogies of North American law schools (Venter, 2006; Broodryk, 2014, 2015), which conceptualise writing as thinking, whilst others draw more on the fields of socio- linguistics and discourse (Greenbaum, 2004, 2009, 2012, 2014) which take a more critical, process-approach to understanding writing.

In South Africa, however, there are not just different conceptions of legal writing. There are also debates about legal education, about what constitutes legal knowledge, and emerging critique of the accepted "manner of expression" (Davis & Klare, 2010) in law. There is apparently broad consensus that there is a "crisis" in legal education in South Africa (Dicker, 2013) and that law students and law graduates do not meet the writing expectations of the academy and the profession. However, the relationship between legal education, legal knowledge, and legal writing – and the contestations around each – has not been explored sufficiently.

At the heart of the problem is this relationship between legal education, legal knowledge, and legal writing: if what constitutes legal education and legal knowledge is contested, it follows that related understandings of what constitutes legal writing will also be contested.

## 1.5 Purpose Statement

This research explores this lack of a coherently theorised and explicated understanding of what legal writing is – and postulates that these differences may articulate with conceptions of legal education and legal knowledge. Moreover, it suggests that while it may be impossible to define legal writing, it may be useful, both theoretically and pedagogically, to attempt to explicate the multiple understandings of legal writing, as well as attempt to understand their relationship to legal education and legal knowledge.

This thesis therefore seeks to understand what it means to write in law, by canvassing the views of a small group of legal academics and legal practitioners. More specifically, it seeks to explore participants' orientations to writing in law and the possible links between beliefs about legal education, legal knowledge, and legal writing. The purpose of this work is to understand the bases for the claim that law students and law graduates cannot write and, perhaps more importantly, to theorise a more nuanced and coherent understanding of what it means to write in law, both at university and in the profession, at this point in South Africa's history.

## 1.6 Research Questions

The main research question is:

1. **What do legal academics and legal practitioners mean by the term "legal writing"?**

This question is further divided into the following sub-questions:

- **1.1 What do legal academics and practitioners value and what do they critique, in student and graduate writing, respectively?**
- **1.2 How do legal academics' and practitioners' conceptions of legal education and knowledge intersect – if at all – with their conceptions of legal writing?**
- **1.3 How similar or different are legal academics' and legal practitioners' conceptions of legal writing?**

These research questions were investigated by way of a small-scale, qualitative study. The data was collected through in-depth, semi-structured interviews with ten participants: five lecturers at one South African School of Law and five practitioners who were involved in the training of candidate legal practitioners (CLPs). Stimulated by the Pericles vs Plumber debate on the nature of legal education and legal knowledge (Twining, 1967), I wondered whether different academic subjects might embody different positions on the spectrum of what constitutes legal education, legal knowledge, and legal writing. For example, it seemed likely that a subject like Jurisprudence might embody the Pericles end of the debate whilst a procedural subject like Criminal or Civil Procedure might be more skills-driven. The choice of academic participants was thus subject-driven, rather than lecturer-driven. Regarding the practitioner-participants, it seemed important to canvas a range of perspectives, not just those representing the big commercial law firms. For this reason, an attempt was made to interview advocates and attorneys who were involved with formal vocational training for the Bar and at LEAD, but also those who were involved in vocational training (or proposed training) in other contexts.

The interview questions were designed to investigate participants' orientations to legal writing. Some questions were also designed to explore participants' conceptions of legal education and legal knowledge, and how these intersect, if at all, with their conceptions of legal writing. The sample size is deliberately small, to allow for in-depth analysis of conceptions rather than a broader, more shallow approach. As a result, the research is exploratory rather than conclusive in nature (Stebbins, 2001). A more detailed account of the data collection and research methodology is found in chapter three.

The main objective of this study, therefore, is to try and understand more clearly, within broader conceptual frames, what is meant by "legal writing" at a university in South Africa, using one School of Law as an instrumental case study (Merriam, 2009). The secondary objective of the study is to compare these understandings with those of practitioners, to identify any patterns of convergence or divergence that could be further investigated in more detail in a future study.

## 1.7 Rationale

Calls for legal educational reform generally include calls to improve legal writing (O'Regan, 2002; Greenbaum, 2004; Dicker, 2013; CHE, 2018). However, this thesis argues that, until it is clearer what exactly is meant by this term, or until the multiple understandings are more clearly understood, it will be difficult to address the concerns that underlie the call.

Greenbaum (2004) is one of the few South African legal academics who has worked to define what legal writing is. Drawing on Rideout and Ramsfield's (1994) definition, she begins her exploration of a definition by stating that:

> the term 'legal writing' implies that such writing should not only display the general elements of (grammatical) literacy, but should also demonstrate that the legal writer

> has an awareness of rhetorical sensitivity (to audience, purpose, context) and can use technical vocabulary appropriately. (Greenbaum, 2004, p. 6)

This definition, apart from identifying the need to use technical legal terms correctly, does not clarify how legal writing is different from any other good writing that is constructed with audience, purpose, and context in mind, and is grammatically correct. It could apply to a very broad range of writing types. Greenbaum continues, however, to explore and expand the definition, drawing on a range of academic fields, including English for special purposes, discourse theory, and the academic literacies approach to understanding writing. She observes that this orientation to legal writing "regards it as a context-based, social act, in which there are a specific set of communicative practices, shared by the legal discourse community" (Greenbaum, 2004, p. 6).

However, this thesis questions whether the South African legal discourse community agrees about these supposedly shared communicative practices. It attempts to develop a more detailed understanding of what these communicative practices might be, and the extent to which they are shared. Building on Greenbaum's work, this research intends to develop a foundation for further investigation into whether situating legal writing research within broader debates about legal education and legal knowledge is useful for developing a more coherent, or at least conceptually explicit, understanding of how legal writing is understood within the academic legal community in South Africa, primarily, as well as within the diverse community of legal practitioners.

By analysing lecturers' beliefs about legal education, legal knowledge and legal writing, and their responses to samples of student writing, drawing on five areas of law with different knowledge bases, I hope to discover a nuanced range of conceptions of legal writing; to explore possible links between legal education, legal knowledge, and legal writing; and to provide an account of what is valued by these legal academics. By asking similar questions of legal practitioners, and identifying similarities and differences in views, I hope to build knowledge about legal writing across the academia-practice divide. The combination of conceptual and empirical data should contribute to a more nuanced understanding of what it means to write in law in South African contexts, which may be of use to teachers of legal writing, and anyone interested in legal education, more broadly.

## 1.8 Order of Chapters

The chapters that follow are organised in this way:

Chapter two builds on the literature review begun in this chapter and presents the conceptual framework for this study. I draw on four main bodies of literature, so this chapter is divided into the following sections: a section on how legal writing is understood; perspectives on legal writing development; the possible drivers of definitional difference, with particular reference to legal education and legal knowledge; and literature on social realism, which is used to develop the conceptual framework.

Chapter three sets out the methodology of the research as well as the analytical framework. This includes an account of how the categories for analysis were developed.

Chapters four and five present the data analysis and findings for the interviews with legal academics. Chapter four presents an overview of each of the participant's responses. Chapter five presents the main findings that emerge from the data analysis in chapter four.

Chapters six and seven present the data analysis and findings for the interviews with legal practitioners. Chapter six presents an overview of each practitioner's responses. Chapter seven presents the main findings that emerge from the data analysis in chapter six.

Chapter eight presents the discussion of findings in relation to the literature review and attempts to answer the research questions.

Chapter nine presents the conclusion and recommendations.

# CHAPTER 2: LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

This chapter builds on the literature review begun in chapter one, and is divided into four main parts, as this research draws on diverse bodies of knowledge. As I reviewed the literature, I looked for ideas, contrasts, and questions that I could use to develop the conceptual framework. As I did this, I began to identify analytical distinctions to compare the two groups of participants: legal educators who are academics and legal educators who are practitioners. These distinctions are used to investigate views within each group and to compare between the two groups. Ideas from the literature inform aspects of the methodology of the research (presented in chapter three).

Part 1 sets out some perspectives on legal writing and how it is understood by different scholars. Part 2 explores the literature on tertiary writing development, with a particular focus on the development of legal writing at universities. Part 3 outlines the literature detailing possible drivers of differences in conceptions of legal writing. Two of these drivers, legal education, and legal knowledge, are particularly significant for this study and so are explored in more detail. In Part 3, there is a sub-section on the notion of skills, framed using literature on professional knowledge. This is necessary at this point, as "skill" is a frequently and imprecisely used term in legal education literature. Thereafter, the last possible driver of definitional difference, legal knowledge, is briefly surveyed.

Parts 1 to 3 foreground a set of problematic and related dichotomies in the literature on legal education and knowledge. Regarding legal education, the dichotomy is between the broader, academic/philosophical view of legal education vs the more narrow, practical/professional view (although this dichotomy is contested, even within the legal education literature). Regarding legal knowledge, scholars are positioned (or position themselves) in one of two camps: a critical/interpretivist camp vs a traditional/positivist camp. This dichotomy appears to be generally accepted by most legal scholars.

Part 4, in turn, draws on concepts from social realism developed in the sociology of educational knowledge. These include the social realist conception of knowledge; Young and Muller's (2013, 2019) concept of powerful knowledge; and Bernstein's (1999a, 2000) concept of grammar. I use these concepts to critique some of the assumptions underlying the dichotomies in the legal education and legal knowledge literature. I use social realist theory, in response to the legal knowledge dichotomy, to develop a "third lens" through which some of the debates in the legal literature can be reframed. The chapter concludes with an overview of the conceptual framework that has been built for this study.

## 2.1 Perspectives on Legal Writing, with particular reference to South Africa

Swanepoel and Snyman-Van Deventer (2012) observe that legal writing, as a subject, remains largely absent from the LLB degree, although it is a core module in vocational training programmes. It may be this absence that has contributed to minimal or conflicting explanations for what legal writing means in a South African tertiary context. This section of the literature review examines some of the ways in which legal writing is understood in the academy, both internationally and locally.

Laurel Oates is one of the most respected teachers and researchers of legal writing in North America. In the preface to the third edition of her widely used book "The Legal Writing Handbook: Analysis, Research and Writing" she and her co-authors set out a detailed explanation of legal writing. Although long, it is worth setting it out in full here, as the nuances reflect many of the tensions and differences that arise in discussions concerning legal writing in South Africa today:

> Legal writing is both simple and complex. On the one hand, it is simply a matter of organising information into well-established formats and following well-established patterns of analysis. It is being methodical about research and correct about citation, grammar and punctuation when the document is written. That much is a big job, but a fairly simple job.
>
> On the other hand, legal writing is complex. Part of the complexity is keeping all those simple tasks organized. Beyond that, however, legal writing is complex because it requires creativity, insight, and judgment. Within the parameters of accepted formats and types of argumentation, for example, legal writers must create an organisation where one did not previously exist and create arguments that, at least in some cases, have not been made before.
>
> But that is not all. In addition, legal writers must have the insight and ability to cut to the heart of the matter. They must be able to see what is really at stake in a case; they

> must be able to look at the big picture and know where to focus their and their readers' attention.
>
> And that is still not all. At all times, legal writers must exercise judgment: They must know what matters most and what matters least, what is effective, what is persuasive, what is extraneous and what is just plain irrelevant. (Oates, Enquist & Kunsch, 2002, p. xxxiii of the Preface)

This explanation of legal writing helpfully peels away the layers of complexity in legal writing and shows how apparently simple "legal writing skills" are, in reality, not simple at all. The issues that Oates et al. identify as most complex – exercising judgment; cutting through information to the core legal issue; evaluating information for relevance; seeing the big picture; creativity and making new arguments – are probably the most difficult to teach and thus may be ignored in favour of the apparently simple task of learning formats and patterns of analysis. A focus on these formats and patterns, at the expense of the complexities, would thus not facilitate a nuanced understanding of what legal writing entails. As Oates et al.'s explanation moves from the simplest to the most complex aspects of legal writing, it also takes the reader from the generic to the legal; moving, as they do, from an explanation that could apply to any good academic writing in the first paragraph, towards the attributes that are particular to writing in Law.

It must be borne in mind that Oates et al. write from the perspective of North American legal education, where legal writing is taught to post-graduate students. Furthermore, there are at least two other complicating factors for their definition in South Africa. Firstly, in North America, the legal writing taught in graduate law schools comprises genres that are used in practice (Oates, 2014) whereas, as indicated in my problem statement, it is less clear what the term "legal writing" means in the South African academy. Secondly, as mentioned in chapter one of this thesis, the "well-established formats" described by Oates et al. (2002) above, may be more contested – at least in an academic context – in South Africa, given the contestations about the purpose of legal education, and the impact of transformative constitutionalism (Davis & Klare, 2010) and transformative legal education (Quinot, 2012); factors that are explored later in this literature review. It thus may be useful to explore whether these "well-established formats" are as widely accepted by South African academics as they are elsewhere, and whether this has an impact on how legal writing is understood. It will also be important to canvas the views of legal practitioners on this question.

One such "format" is a type of writing variously named by the acronym IPAC, FIPAC, FIRAC, IRAC or ILAC. In this kind of writing, students are given a set of facts (F) and are required to assess which facts are legally relevant; to identify the legal issue or issues (I); to identify and apply (A) the relevant legal principles or rules (P/R) to reach a conclusion (C) (Maisel & Greenbaum, 2002). This type of writing is variously known as legal problem solving; writing a legal memorandum; setting out legal advice; and writing a legal opinion. Candlin, Bhatia, Jensen and Langton (2002) describe this method as a "widely recognised approach to legal analysis in many contexts, both academic and professional" whilst cautioning "its value lies in its usefulness as an analytical and organisational tool that can be applied in a variety of legal writing" (p. 303). Zhou (2015) similarly recognises the usefulness of the IPAC structure in providing a framework for organising thoughts and writing but warns, "it does not function as a set of four drawers in which you can compartmentalise your ideas" (p. 77). Although this structure is used to teach students a form of legal reasoning, in my experience some academics share Zhou's concerns about compartmentalising. They view this format as overly simplistic or formulaic, seeing it at best as a tool that is useful to introduce first year students to legal problem solving, and are reluctant to encourage students to use this method as a template to structure legal advice.

Another common format or type of writing found in South African law schools is the legal academic essay. A description of such legal academic writing can be found in Broodryk (2015) in which he quotes Quinot's (2011) unpublished Evaluation Plan for their institution's Writing Skills Programme:

> Academic writing skills in the Law context place additional emphasis on conciseness, precision and clarity and specifically include: arguing critically and persuasively, stating claims, hedging, logical flow, using formal register, and grammatical command. (Broodryk, 2015, p. 616)

Many of these "skills" apply to academic essays more generally, but the requirements of precision and clarity may apply to Law more than some other subjects (Bangeni & Greenbaum, 2013).

Other common formats are those sometimes grouped as "practical legal writing" such as case summaries, heads of argument, pleadings, and contracts (Greenbaum, 2014).

Some scholars focus less on format and foreground the importance of legal English or grammatically correct language in legal writing (van der Walt & Nienaber, 1996; Greenbaum & Mbali, 2002; Ngwenya, 2006) whilst others view the grammatical component as a sub-set of a broader conception of legal writing. Ngwenya (2006) contends that teaching and awareness of vocabulary are essential when teaching legal writing, as familiar words take on particular meanings in Law. He goes on to argue that

> written legal English, while seeming to employ the rules of standard grammar actually purposefully often utilises them in a unique style. Therefore, one of the competencies students need for them to work successfully with legal texts is grammatical competence, especially with regard to how syntax is used in legal language. (Ngwenya, 2006, p. 24)

Ngwenya further argues that legal writing should incorporate elements of critical language awareness, so that students learn to critique how language is used in legal writing, and not simply replicate accepted forms. This need for criticality is echoed by several other scholars (Clarence, Albertus & Mwambene, 2014; Heyns, 2014; Quinot & Greenbaum, 2015).

Research conducted by Bangeni and Greenbaum (2013) shows that students' difficulties with legal writing "manifest at the levels of content, concept and lexico-grammar" (p. 72). Of particular interest for this study are two of the issues that they identify as "content" issues – struggles with precision and failing to understand what is regarded as tacit knowledge – and the struggle to engage with legal concepts. Regarding precision, Bangeni and Greenbaum (2013) note that "instead of presenting concise statements, the students tended to express a single point through a detailed narrative" (p. 77). Regarding tacit knowledge, they highlight students' "lack of an appreciation of what constitutes tacit knowledge within the discipline, resulting in students stating what a legal reader would consider trite or obvious" (Bangeni & Greenbaum, 2013, p. 78). For example, they describe how a student spent time and words in explaining that a judge was "powerful" and "not elected by the people", as well as defining the word "constrained" – information that a legal reader would regard as superfluous.

In a later paper, Bangeni and Greenbaum (2019) confirm their earlier findings and add that struggles with reading and challenges faced by students for whom English is an additional language contribute to novice legal writers' struggles to become proficient at legal writing.

Greenbaum is probably the most influential contemporary thinker about legal writing in South Africa. She draws on Mitchell and Benson's work to offer a definition of legal writing that goes beyond a focus on structure or language, in that it draws on elements from cognitive psychology, genre theory and discourse:

> Legal writing implies an awareness by the writer of analytical schemata, an understanding of rhetorical structure and certain stylistic conventions, and an appropriate use of legal terminology within a range of fairly well-defined genres of legal texts, such as judgments, legal opinions, heads of argument and formal communications between members of the discourse community, as well as written communications to non-members, that is clients. (Greenbaum, 2004, p. 6)

Here, Greenbaum identifies a range of recognisable legal genres, and claims – likes Oates – that they are "fairly well-defined." This definition also considers structure, style, and the centrality of analysis in legal writing. However, this definition may apply to the more practical types of legal writing and does not seem to include extended academic legal writing. It also does not consider the impact that contestations about legal knowledge may have on whether traditionally defined genres are accepted.

Greenbaum (2004) further extends her exploration towards a definition by drawing on Gee's notions of discourse communities and describes legal writing as a "context-based, social act, in which there are a specific set of communicative practices, shared by the legal discourse community" (p. 17). Clarence et al. also draw on Gee's notion of discourse communities and caution that

> it is necessary to acknowledge that when we talk about legal writing, we are referring to much more than simply mastering legal English, or writing in certain formats. We are referring to training future lawyers how to read, think and write in ways that are valued and recognised by their discourse community. (Clarence et al., 2014, p. 842)

This recognition that legal writing practices are shaped by both context and discourse is an important one, although Greenbaum (2004) acknowledges that many legal academics and practitioners may not be aware of or share such views.

Schiess (2009) defines legal writing as a particular form of expository writing. He observes:

> legal writing is not self-expression, and it is another step beyond knowledge telling. One scholar has referred to the skill of analytical legal writing as "knowledge transforming." Thus, legal writing is a form of expository writing in which the focus should be on the reader's ability to understand. This is in contrast to self-expression writing, where clearly and effectively conveying information to the reader is secondary to expressing one's self the way one desires. And it is in contrast to knowledge telling, in which the primary purpose is conveying information, not analyzing a problem. (Schiess, 2009, p. 2)

Schiess (2009) conceives of legal writing as something that goes beyond both the narrative and the factual, to something that transforms knowledge through analysis and application; a process that requires, as both Oates et al., and Greenbaum observe, careful organisation and analytical thinking. Quinot and Greenbaum (2015) also emphasise this generative nature of legal writing and note that "writing development plays an important role in knowledge construction within the discipline" (p. 40).

Although Schiess' conception of legal writing applies to most academic writing, and thus sheds little light on what makes it distinct, it does avoid the false dichotomy that continues in many law schools (Campbell, 2014), between "practical" types of legal writing and "academic" legal writing, acknowledging that both types of legal writing require critical thought and analysis. For example, a legal practitioner setting out a legal opinion for a client must critically apply the law to the facts of the client's situation, to set out probable and possible legal remedies. Equally, if students are required to critically discuss a recent judgment or the development of a legal principle, in the form of a legal essay, they must go beyond story or knowledge telling, and use their own critical thinking abilities, to analyse the judgment or developments, to form a well-reasoned argument. However, as with Greenbaum's definitions, this understanding may not be shared by legal academics in general, or by legal practitioners, either because they draw on traditional views of writing, or because they have differing views on legal education and legal knowledge.

It is notable that all these definitions could, largely, apply to any body of academic knowledge, and do not clarify what is unique – if anything – about writing in law. However, this literature does offer some fruitful ideas to explore in this research: In which ways, respectively and if at all, do academic and practitioner participants distinguish between practical and academic legal writing? Do they value well-established formats; is legal writing viewed as mastering such formats or is it concerned with issues of precision, clarity and good judgment regarding what remains tacit and what must be explicated? Are IPAC and legal essays viewed as distinct types of writing (and are legal essays viewed as legal writing at all?) Is writing viewed primarily as a set of literacy skills or as the kind of reading, analysis, judgment, and persuasion expected in law? Is mastering grammatically correct English in general, and legal English more specifically, viewed as an important part of legal writing? Further questions that this literature generates is whether the academic and practitioner participants have similar or different views on the importance of rhetorical structure, stylistic conventions, and the role of persuasion in legal writing, as well as its role in knowledge construction. Finally, a question that this literature generates is whether either or both groups of participants will identify speaking English as an additional language as a factor that affects students' and graduates' legal writing.

As part of his reflection on the challenges of teaching legal writing, Pollman (2002) observes that "the slow acceptance of legal writing as a discipline deserving of study and respect has hindered the development of a language the legal profession could share to talk about writing" (p. 914) – an observation that certainly applies to the South African context. This lack of a common language could well underlie some of the confusion about what South African academics and practitioners mean when they talk about legal writing. What does exist, though, is literature that describes different approaches to writing development in the academy, both more broadly and concerning legal writing development. Understanding these approaches may be useful to categorise the above disparate understandings of legal writing more systematically. This is explored in the next section.

## 2.2 Approaches to Tertiary Writing Development, with particular reference to Legal Writing Development

Emerging from the previous section is the need to try to categorise the above ideas about legal writing into some sort of structure. This section of the literature review presents a range of approaches to writing development. It begins with an overview of approaches to legal writing development in North America, articulated by Rideout and Ramsfield (1994). It goes on to identify the two main South African approaches to university writing development more broadly, best summed up by Boughey and McKenna (2021) and how these intersect with the above. It then explores some of the South African literature that describes views on and programmes for legal writing development, and how these map with the approaches articulated earlier in the section. This section concludes with a summary that classifies this range of ideas, from both sections, into three main perspectives.

Rideout and Ramsfield (1994) offer a useful summary of views of legal writing development in the academy, albeit from a North American perspective. Broadly, they critique what they term "traditional views"; suggest that these views need to be revised; and then offer three perspectives that fall within a "revised view". Some of the traditional views that they identify can equally be found in South African Higher Education contexts. For example, there is the "writing is writing" view that suggests that good writing is a universal skill so that legal writing development becomes remediation of generic writing skills (Rideout & Ramsfield, 1994, p. 42). There is also the view that "legal writing is a talent; you either have it or you don't", which implies that it cannot be taught (Rideout & Ramsfield, 1994, p. 43). A third view they identify is that legal writing is something separate from and less important than the real law (Rideout & Ramsfield, 1994, p. 44), and thus can be taught as a separate, bolt-on "skill". I have heard all these views expressed in South African contexts. The other two views that Rideout and Ramsfield (1994) describe – that legal writing is legal drafting and should thus be taught by legal practitioners not academics, and that it is anti-intellectual and therefore has no place in the academy – do not seem, in my experience, to be as widely shared here, and I have not found any local literature that echoes such views.

Greenbaum (2004) observes that most South African law schools, at the time of her writing, adopted a "remedial outsourcing approach" (p. 5) to writing development – employing English teachers or ex-Latin teachers to remediate students' writing – that falls firmly within the traditional "writing is writing" camp. She refers to a 2001 survey on legal writing that she conducted across South African Law Schools. The replies from twelve law schools not only confirm that legal academics perceived law students' writing to be weak, but that concerns about legal writing focused "mainly on basic literacy and surface-level grammatical skills as well as an understanding of 'writing' as grammatical proficiency" (Greenbaum, 2004, p. 9). One of the questions that this thesis seeks to answer (Question 1.1) is whether this view is as strongly held two decades later.

Rideout and Ramsfield (1994) further contrast what they term the formalist and the process perspectives on legal writing, and finally offer a social perspective that incorporates elements of, as well as being radically different from, the formalist and process perspectives. The formalist perspective underlies a traditional view of legal writing, they argue, and is characterised by a focus on text production, clarity, and accuracy; a focus on the final product; and the notion that language is a neutral medium for communicating meaning (Rideout & Ramsfield, 1994, p. 49). This perspective has been shared, historically, by most South African Law Schools (Greenbaum, 2004, 2012). The process perspective, on the other hand, shifts the focus from the text to the processes by which the writer produces the text (Rideout & Ramsfield, 1994, p. 50). This perspective draws strongly on the work of cognitive psychologists and implies the epistemic view: that writing is a mode of thinking and that "writing is used not only to communicate knowledge but also to generate knowledge" (Rideout & Ramsfield, 1994, p. 54). From this perspective, writing is an act of construction and language has a more dynamic, generative function. In South Africa, the work of Quinot (2012); Broodryk (2014, 2015); and Quinot and Greenbaum (2015) reflects this perspective.

The social perspective extends the process perspective "beyond a focus on the individual writer to acknowledge the social contexts within which writing takes place" (Rideout & Ramsfield, 1994, p. 57). They argue that

> this broader perspective is especially important for a field like legal writing, which takes place within a discourse that is complex and highly conventionalized and which is also closely constrained by the institutional characteristics of law – the roles of lawyers, the organization of law practice, the purposes of law as a social and economic institution, and the underlying ideology of the law. (Rideout & Ramsfield, 1994, p. 57)

This description of legal writing, as being constrained by the highly conventionalised and institutional nature of legal discourse, offers some insight into the claim that legal writing is unique and different. Furthermore, this understanding of legal writing development – as part of being inducted into what it means to be a lawyer, part of a particular discourse community – reflects what is known in general writing development circles as the "academic literacies" approach to writing development (Lea & Street, 1998; Lillis & Scott, 2007; Boughey & McKenna, 2016, 2021). Broadly, the academic literacies approach to writing development views writing as an embedded social practice that can only be learned as part of the specific discipline, rather than a set of general, individual skills that can be taught generically, outside the discipline (Archer & Richards, 2011, pp. 10-11). This approach reflects current research and best practice more than the more old-fashioned "skills" or "language deficit" models (what Rideout and Ramsfield term "traditional views") that characterised many earlier attempts at writing support in South Africa and internationally. Boughey and McKenna (2016) argue that "literacy practices that are valued in the university emerge from specific disciplinary histories, yet students are often expected to master these as if they were common sense and natural" (Boughey & McKenna, 2016, p.1). They go on to caution that "the autonomous model of literacy, which sees language use as the application of a set of neutral skills, continues to dominate in South African universities" (Boughey & McKenna, 2016, p. 1). However, a range of disciplinary-specific writing interventions in South African law schools does exist. Gottlieb and Greenbaum (2018), in their description and evaluation of an integrated first year writing programme, concur that "integration that is achieved through 'insider-outsider' collaboration between an academic literacy expert and a law academic may be most effective in achieving the desired outcomes" (Gottlieb & Greenbaum, 2018, p. 47).

The academic literacies approach also advocates that writing developers should go beyond socialising students into dominant forms of writing but incorporate elements of critique. Greenbaum (2004, 2009,2012, 2014) is one of the advocates of Rideout and Ramsfield's "social perspective" and, drawing on the work of Baker and Sossin, argues that critical literacy practices, in which legal writing assignments "facilitate both the assimilation and critique of legal discourse" (Greenbaum, 2004, p. 15) should be incorporated into the legal curriculum. Clarence et al.'s (2014) work with legal writing development in large class settings also draws on an academic literacies perspective. It should be noted that several other South African writers advocate for an embedded and critical approach to legal writing or legal language development, albeit not from an overtly academic literacies perspective. This can be seen as early as 1991, in the work of Bronstein and Hersch (1991); as well as in the work of van der Walt and Nienaber (1996); Greenbaum and Mbali (2002); Ngwenya (2006); Swanepoel and Snyman-Van Deventer (2012); and Bangeni and Greenbaum (2013, 2019). This approach is also congruent with critical perspectives, as reflected in Heyns:

> The need for structures of meaning or cultural codes (or certainty!) in any educational plan cannot be denied. If law students are, however, enabled to acknowledge the impact of these structures and question them, it may result in critical reflection on our limited experience of the law, alternate interpretations of the law and the impact on our experience of human rights and the institution of democracy. (Heyns, 2014, p. 90)

This has implications for this thesis, particularly regarding whether participants draw on a traditional "skills" conception of legal writing, or on a revised "academic literacies" view. Moreover, this literature generates the question: is criticality and questioning of conventions viewed as a valid or unwelcome element of legal writing?

The law school where I work has a "skills curriculum" that was implemented in 2012. It is underpinned by an "academic literacies" approach to, or "social perspective" on, writing development. Other South African law schools have also begun to grapple with a process approach to understanding legal writing, although this does not always extend to the social perspective. For example, Broodryk (2014, 2015) advocates for the *Writing Across the Curriculum* approach to teaching legal writing, which is congruent with the process perspective that views writing as a mode of thinking. He argues that students view the writing and critical-thinking processes as being mutually exclusive and so fail to see that writing is in fact the end-result of a process of argumentation or analysis (Broodryk, 2014, p. 454). This could be the result of formalist approaches to writing development that artificially separate form and content and treat writing as a set of "skills" that can be acquired generically.

*Writing Across the Curriculum* enjoyed some popularity in some North American law schools in the 1980s and 1990s (Lysaght & Lockwood, 2004) and reflects Rideout and Ramsfield's "process perspective". This approach to the development of writing frames writing as thinking, rather than as a discrete set of skills; it is thus underpinned by Rideout and Ramsfield's "epistemic view", as well as reflecting their "process perspective". Its proponents suggest that "writing serves learning uniquely because writing as process-and-product possesses a cluster of attributes that correspond uniquely to certain powerful learning strategies" (Emig, 1997, p. 122). This implies that the focus will be both on the final product of writing but also on the processes involved in constructing that product. Venter, director of the University of Notre Dame's School of Law Writing Programme, articulates some of these processes as follows:

> Refocusing attention on thinking as opposed to writing has a number of meaningful implications. It requires legal writing teachers to develop specific strategies to teach students to pay attention to their own thinking and identify where that might be breaking down. It also requires teachers to develop thoughtful, realistic assignments with specific learning goals in mind. Furthermore, teachers must respond differently to their students' papers. Instead of writing summative comments, teachers need to try

> and identify where their students' thought processes have broken down, and respond to those in a formative way. (Venter, 2006, p. 643)

Greenbaum, although not explicitly a proponent of *Writing Across the Curriculum*, also recognises the close link between thinking and writing. She notes:

> By ignoring studies that establish the centrality of language in the development of cognition within a specific field, and that show writing to be an integral part of cognitive development, legal educators are not appreciating the link between thinking and writing within a discourse community, and are not developing simultaneously students' analytical and writing skills. (Greenbaum, 2004, p. 28)

Taking this further, one of South Africa's eminent academic literacies researchers, Jacobs (2007) argues that discipline-specific academic literacies are not necessarily best taught by disciplinary specialists, as their knowledge is so tacit that they may struggle to teach this knowledge explicitly. Rather, she proposes "insider-outsider" collaborations between disciplinary and academic literacies specialists; a notion that she terms "collaborative pedagogy". This argument is echoed by Gottlieb and Greenbaum (2018) and is one on which my own pedagogy is based. This pedagogy offers an alternative to the dichotomies presented in some literature, particularly the *Writing Across the Curriculum* literature (between writing being taught as a generic skill, and disciplinary specialists being responsible for being writing teachers). This argument, in combination with my experience working with legal academics and practitioners to teach legal writing, made me wonder whether the participants in this study would struggle to articulate their deep, tacit knowledge about legal writing as explicit criteria.

Overall, these differing views fall into two main camps, albeit with layers of difference within each camp. Traditionalists view good writing as a skill or talent that either cannot be taught or can be taught through generic remediation. The focus is generally on the text, and grammatical accuracy. Revisionists, on the other hand, recognise that good legal writing can only be understood as part of the discourse and the thinking required by the discourse community, which implies that learning law and legal writing development cannot be separated. The views explored in this section, as well as in the previous section, are summarised in the table below. Although this is an imperfect summary, with some views and scholars overlapping categories, it offers some conceptual clarity with which to approach the research. Importantly, this literature is used to frame the main research question of the thesis.

**Table 1: Summary of views of writing and approaches to writing development.**

| | FORMALIST PERSPECTIVE underpins | PROCESS PERSPECTIVE underpins | SOCIAL PERSPECTIVE (incorporates and extends the process perspective and underpins) |
|---|---|---|---|
| | TRADITIONAL VIEWS | some REVISED VIEWS | some REVISED VIEWS |
| Writing as: | Product | Process | process AND critical literacy |
| Writing is: | generic skill | Thinking | Discourse |
| Writing model: | language deficit | Epistemic | academic literacies |
| Approach: | Remedial | writing across the curriculum | critical literacy |
| Focus: | text production, clarity, accuracy | writing as knowledge construction, socialisation | socialisation AND critique |
| Language: | is neutral | is generative | signals participation in discourse community |
| Legal writing terms: | literacy skills; good grammar; legal English; well-established formats; stylistic conventions | judgment; analysis; persuasion; knowledge construction | judgment; analysis; persuasion; knowledge construction; critique |
| Key scholars: | | Broodryk; Oates, Quinot, Quinot and Greenbaum, Schiess, Venter, Zhou | Bangeni, Boughey, Clarence, Gottlieb, Greenbaum, Jacobs, Mbali, Mckenna |

## 2.3 Possible Drivers of Definitional Difference

Having established, in the previous two sections, that there is a range of views on legal writing, as well as a range of perspectives on how best to develop such writing, this section seeks to explore why such different views on legal writing are held. I looked for factors, accounted for in the literature, which might influence legal academic or practitioner conceptions of legal writing. These allow me to categorise some possible drivers of difference in conceptions of legal writing, and to explore possible connections between conceptions of legal writing, and ideas about legal education and legal knowledge.

In this section, the literature is categorised as follows: Firstly, there is literature that explores how the nature of legal writing may be changing. Conceptions of legal writing may be influenced by whether one embraces or resists such changes. Secondly, there is literature that explores the professional and institutional identity of legal educators, particularly their orientation to the profession or academia, and the implications that this may have for conceptions of legal writing. Thirdly, literature on legal curriculum and pedagogy in South African universities is explored. The analysis of the potential implications of these for conceptions of legal writing is followed by some literature from the sociology of professional knowledge; necessary to theorise the notion of "skills" and "skills development" in a way not provided for in the legal education literature. Lastly, literature capturing some of the contours of the contestations about legal knowledge is explored. These contestations may have an impact on how legal writing is understood by academics and practitioners in South Africa at this time. Throughout this section, multiple and sometimes disparate layers of distinctions are identified, some of which are used to develop the analytical framework outlined in chapter three.

### 2.3.1 The Changing Nature of Legal Writing

One driver of definitional difference is that the nature of legal writing may be changing. This is due to the impact of technology as well as the "plain English" or "plain language" movement that advocates the use of clearer, more accessible language in legal writing (Tiersma & Solan, 2012).

Glenn (2010) observes that:

> The written word is also now acquiring new forms of physical support, and new forms of digital expression. It is a more inanimate form of retention or capture than through human speech, memory or writing; this may have important consequences for the search for law. (Glenn, 2010, p. 11)

Glenn's term "inanimate" offers interesting insight into the impact of technology on writing in Law, especially given that there are an increasing number of digitally available templates, or precedents, for legal practitioners to use when drafting documents. Although templates have always been used and may be necessary to save time and money in practice, Schiess (2009) claims that they are one of the contributors to poor legal writing because they can become "a quick, cheap substitute for knowledge and independent thinking" (p. 10). Legal academics – whether acting as gatekeepers to the profession or out of concern for the integrity of legal writing – may value originality, creativity, and critical engagement in legal writing rather than settling for the "inanimate" template. Templates are undeniably used in practice, but practitioners are likely to have differing views on their use. For example, Hussain SC (2019) in the introduction to his book on legal drafting, urges readers to "write clear, compelling pleadings without depending on precedents". On the other hand, templates offer essential guidance regarding which elements of an action must be pleaded for success in court, and thus may be valued for their structural-knowledge function, as much as for the language used.

In South Africa, Quinot (2012) similarly reflects on the impact of digital technologies on legal writing, although he refrains from judging whether this impact is likely to be positive or negative. He observes that "the differences between engaging with information in printed form and in digital form indeed seem profound" (p. 425). Here he refers particularly to digital texts such as web pages that incorporate hyper-links, sound, video, and other non-linear functions. He goes on to recognise that the digital shift away from linear text is likely to have a significant effect on how future legal practitioners understand and construct legal texts. Whether this is yet a factor affecting how legal writing is understood is unclear, although Susskind and Susskind (2015) – whose work is explored a little later in this section – suggest that this is a factor that operates in the present and not just in the future.

Another way in which legal writing is contested is that part of the discourse community advocates a move to simpler and clearer use of language, whilst others may remain wedded to elements of legalese. Schiess (2009) states that the following are some of the more common characteristics of legalese:

> Use of Latin where English would do; use of archaic words where modern words would do; use of elevated diction (ten-dollar words) where everyday English would do; overuse of the passive voice; overuse of nominalizations; excessive sentence length; use of insider vocabulary or jargon even when not addressing insiders. (Schiess, 2009, p. 17)

Since the 1970s, to counter the prevalence of legalese and thereby improve the readability and accessibility of legal texts, the "plain language" movement has gained support in its drive for simpler, clearer legal writing (Sobota, 2014). Tiersma (n.d.), a proponent of the movement, observes that today "plain English principles have been incorporated into the writing curriculum of most law schools" (p. 2). However, in her analysis of a range of legal documents, to investigate the acceptance and application of the plain language movement, Sobota (2014) suggests that "the plain writing style does not find much approval in the legal environment" (p. 26). Reasons given for this resistance show that some of this resistance is principled, rather than being simply reactionary. These reasons include that many legal texts cannot be self-explanatory; they exist as law, not to explain law, and thus can only be understood by those with legal expertise (Sobota, 2014, p. 28). Sobota, with Bhatia (2012) claims that plain language advocates have valued accessibility over precision and accuracy of meaning, which has lost them support from some legal writers.

The tension arises when some legal writers advocate a move away from the characteristics of traditional legal writing, whilst others continue to value them. In other words, a debate exists as to whether legal writing is, or should be, changing to plainer, more accessible language or not. Thus, different responses by legal academics and practitioners to the changing nature of legal writing may be one of the reasons why there are multiple understandings of the term "legal writing".

It is not just the nature of legal writing that is changing. There are some who suggest that the nature of the profession itself is undergoing – or will be undergoing in the near future – fundamental changes, largely due to the impact of technology (Susskind & Susskind, 2015). Some of these changes are identified in chapter one. Of particular relevance for this research, Susskind and Susskind (2015) describe how much of the legal research and writing currently or recently done by junior legal practitioners in firms can now be done electronically. They further explore how many of the templates previously only available to legal professionals are now available to the public through apps and legal charities' websites, whose goal it is to make legal documents more accessible and freely available to the public (Susskind & Susskind, 2015, pp. 68-71). Although speculation about the future of legal writing in South Africa cannot be a focus of this research, it is undeniable that these trends are likely to have an impact on how legal writing is understood and practised – if not now, then soon. I now turn to another potential driver of difference in understandings of legal writing: professional and institutional identity.

### 2.3.2 Questions of professional and institutional identity

Professional identity and institutional identity – whether current or historical – may play a role in how legal writing is defined and understood. Cownie (2004), in her work on professional identity amongst British legal academics, observes that most tend to identify primarily as lawyers, rather than teachers. Campbell (2014), writing about legal academia in South Africa, suggests that academics who have not undergone practical training and practised law themselves are likely to have a very different view of legal education from legal practitioners, or academics who have practised law. He notes:

> Law academics (and academic leaders) thus have a great deal of power to determine the shape of legal education, for a faculty dominated by practice orientated staff will offer a very different kind of LLB to a faculty staffed by academics who have never been in practice. (Campbell, 2014, p. 24)

It follows that a "very different kind of LLB" may include a very different kind of understanding of what legal writing is, depending on whether the staff is more practice-oriented or academia-oriented. Reference has already been made to the distinction between "practical legal writing" (such as heads of argument and pleadings) and "academic legal writing" (such as the academic legal essay). However, it cannot be assumed that a difference in professional identity will lead to the dichotomy of practitioners valuing genres used in practice and non-practitioners only valuing academic genres. It also cannot be assumed that there is a dichotomy between practical and academic legal writing. Dhlamini (1992) criticises legal education in South Africa for a tendency to "accentuate dichotomies that do not exist" (p. 602). Further, Woolman, Watson and Smith (1997) critique "the artificial disaggregation of the theoretical and the practical" (p. 49) observable in legal education at that time, which underlies the academic-practical distinction. This thesis seeks to explore whether these dichotomies continue and whether they affect how legal writing is understood by legal academics and practitioners involved in vocational training, respectively. However, Greenbaum (2012) cautions that the theory-practice divide is complex. She suggests that there is increasing agreement amongst both practitioners and legal academics that a law degree should prepare students for a range of career options, and not simply the legal profession (p. 23). If this is true, it follows that a range of writing types should be valued. Part of this research seeks to investigate whether academics' and practitioners' professional identity and experience affects how they understand legal writing.

Even if most legal academics identify themselves primarily as lawyers, law degrees are awarded by universities and not by the profession. Campbell (2014) states that there are two major stakeholders in legal education: the university and the legal profession. As legal practitioners must have a recognised university degree to practise law, legal education must prepare graduates for the profession. Simultaneously, though, Campbell (2014) points out that the "university has a vested interest and responsibility to ensure that its graduates receive a sound academic education that is worthy of a university degree" (p. 20). Arguably, this could affect how legal writing is understood, depending on the extent to which the legal academic or practitioner identifies with the goals of the academic project, or the needs of the legal profession. These, of course, are not necessarily incompatible. It may be, however, that Rideout and Ramsfield's (1994) traditional view of legal writing is associated more strongly with the needs of the legal profession, and the process perspective associated more strongly with the academic project, which could further contribute to different understandings of legal writing.

Campbell (2014) further identifies the two traditional curriculum models that South African law schools draw on:

> South African LLB degrees were historically modelled on two approaches to curricula: the English "liberal education" approach, which emphasised a broader education in other subjects before legal study; and the "UNISA model", which focused on law courses, with minimal subjects from other disciplines (which was predominant at historically Afrikaans and black universities). (Campbell, 2014, p.17)

Generally, in the first type of curriculum, the assumption is that students will learn to write academically in their other "liberal arts" courses; and transfer and adapt this type of general academic writing to their writing in Law. In the second type of so-called "UNISA model" curriculum, the focus is on the acquisition of legal knowledge, with the assumption being that students will learn how to write in Law implicitly, through the reading of legal texts, and perhaps through trial and error. These historical differences also reflect a tension in legal curriculum conversations: should the focus be an academic legal education (implying a view that requires students to situate legal knowledge within the broader disciplines of the Humanities or Social Sciences) or training for the profession (suggesting that learning and knowing the law – legal principles, rules and procedures – is valued more than how you write about it or how these rules articulate with broader society and knowledge). Although this academic education vs legal training distinction is contested (Greenbaum, 2004, 2012) and Campbell (2014) himself argues that these dual functions are not mutually exclusive, they may offer one way of understanding different conceptions of what it means to write in Law both within and between each group of participants. These debates help to frame Question 1.2 of this thesis.

Something not much discussed in the literature is that the broader "liberal education" view tends to be seen as superior to the narrower "law only" view. This is implicit in much of the critique of the four-year LLB that was introduced in the late 1990s. (These criticisms and the impact of the four-year LLB are explored in more detail in the last section on the legal curriculum). After the passing of the Qualification of Legal Practitioners Amendment Act of 1997 the four-year undergraduate LLB was adopted by all South African universities (Greenbaum, 2004). Although this was supposed to put an end to different and in many cases unequal legal curricula, the histories of the institutions offering the LLB continue to influence how legal education is understood, and so what is included in the LLB. Does this educational history also affect understandings of what legal writing is? Many HWUs place a greater emphasis on academic legal writing and research, whilst many "UNISA model" universities still focus more on legal knowledge acquisition, where students are given credit for knowing rules and principles, regardless of how well or badly they write about these (Campbell, 2014). Institutional culture and practices are difficult to shift and are likely to continue to affect how writing is valued and taught both on an institution-wide level and at law-school level.

It can be seen in this section that debates about professional and institutional identities are presented as a series of dichotomies: whether lecturers in law schools identify as academics or lawyers; practice-oriented staff vs staff who have never been in practice; institutions that offer a broadly academic legal education vs legal training. The divisions in the legal profession have already been well-established (Pruitt, 2002; Godfrey, 2009; Moseneke, 2018 & 2020; & Klaaren, 2020) and will not be repeated. It is worth noting, however, that each of these divisions – public vs private lawyers; attorneys vs advocates; attorneys from large commercial firms vs solo practitioners; traditional Bar advocates vs alternative Bar advocates – may reflect different professional identities. These divisions have relevance for Questions 1 and 1.2 in particular, as these identities may influence how legal writing is understood. However, these dichotomies are criticised by several scholars, and therefore will be used cautiously.

I now turn to the history and complexities of legal education in South Africa, as another possible driver of difference in understanding what it means to write well in law.

### 2.3.3 Questions of curriculum and pedagogy in SA legal education

This section briefly outlines the recent history of and contestations about South African legal education, to locate the debates and multiple understandings of legal writing, explored above, within the context of South African legal education.

One criticism of traditional legal education in both South Africa and in other Western jurisdictions is that it has tended to focus on so-called "black letter law" rather than developing a broader knowledge of law and legal systems (Motala, 1996; Adams & Brownsword, 2003). Another criticism is that it is taught in "silos" – as if separate subjects were discrete and distinct, rather than being part of a broader whole (Cassidy, 2012). Quinot and Greenbaum (2015) echo this critique in their call for integration; for law to be seen as a whole, rather than "an aggregate of distinct branches, fields and skills that can be mastered one after the other and in isolated bite-size chunks" (Quinot & Greenbaum, 2015, p. 38). This call, in turn, echoes Biggs' (2003) important concept of constructive alignment: "that all components in the teaching system – the curriculum and its intended outcomes, the teaching methods used, the assessment tasks – are aligned to each other" (p. 1). This lack of constructive alignment is a thread that runs through both pre- and post-apartheid legal education.

Chapter one of this thesis included Greenbaum's (2014) description of a deeply divided and unequal legal education system during Apartheid. Dhlamini (1992) describes the legal curriculum during this time as being "riddled with contradictions, anomalies, and inconsistencies. There are various ways whereby our legal education either bolstered apartheid or was influenced by it" (p. 598). For example, pre-1997 law curricula tended to place particular emphasis on commercial subjects and private law, reflecting the concerns of the economically dominant White population (McQuoid-Mason, 2004) and failed to consider social context, access to justice or to include customary law (Dhlamini, 1992, pp. 598-599). Furthermore, Dhlamini (1992) eloquently explores how traditional legal curricula took an "ostrich" approach to the unjust laws that held apartheid together, and describes how, rather than acknowledging the discriminatory nature of the laws, law schools took refuge in the apparently neutral approach to the interpretation of statutes (p. 601). Curriculum reform in legal education post-1994 was thus urgently needed.

The issues outlined by Dhlamini, McQuoid-Mason and Greenbaum, amongst others, fuelled the debates about what a revised, just and socially responsive curriculum might look like. A four-year undergraduate LLB degree was adopted by all South African law schools from 1997. All LLBs were required to include twenty-six core courses but the specifics of the curriculum were decided at each law school (Greenbaum, 2014). Both Woolman et al. (1997) and Greenbaum (2014) point out that there was no coherent theoretical or pedagogical soundness to the decision. The imperative to address apartheid inequalities and to create a single legal qualification – and one which would allow more previously disadvantaged students to graduate in a shorter time – drove the shift to the four-year, undergraduate degree

(Greenbaum, 2014). Furthermore, there were no guidelines for what critical tools might be employed to tackle the massive issues of race, gender, class, and structural inequality with which all lawyers in training would have to grapple.

This degree has been the subject of much criticism ever since. One of the main criticisms is that four years is too short, particularly for contexts where many students are not well prepared for university and who may need more time, not less, to successfully master their studies (Bitzer, 2009; Ashwin et al., 2015). Woolman et al., writing before the implementation of the four-year LLB, argued that "the proposed four-year curriculum shows scant appreciation for the enormity of the task of educating disadvantaged students in an even shorter period of time" and that

> the need to fit everything into four years will inevitably mean that we will have less time to devote to providing students with basic academic skills, less time to give students the kind of well-rounded education in the arts and the sciences that they need, and less time for the soft 'theoretical' courses currently required for the LLB. (Woolman et al., 1997, p. 56)

These concerns about duration, student access and success, and curriculum compromise have been repeatedly reiterated (Greenbaum, 2004; Mcquoid-Mason, 2004; Dicker, 2013) with concerns being raised that the content of the previous five-year curriculum was now simply being compressed into four years. However, given the impact of post-apartheid educational realities, van Niekerk (2013) suggests it would have been difficult even for a longer degree to produce the types of graduates that the legal profession envisages.

A related concern is that, because so much law must be covered in four years, all non-law subjects are squeezed out of the degree, with detrimental effects (van Niekerk, 2013). The findings of the national review of the LLB (CHE, 2018) confirms this. A further criticism of the degree is its status as an undergraduate degree, with many arguing that the "old" LLB, in which the LLB was a graduate-entry degree started after a general degree in the Arts, Commerce or Sciences, produced a much better graduate who was both well-rounded and well-versed in the law (Dicker, 2013).

Debates along the academic-legal continuum also continue to date. Gravett (2018) critiques Twining's (1967) "Pericles vs Plumber" dichotomy – described in chapter one – and argues that education and training are not mutually exclusive. He asserts that the primary focus of the LLB should be to prepare students for practice and should therefore include more practical skills courses. On the other hand, scholars such as Allais (2014) caution against an over-focus in curricula on preparing graduates for work to the detriment of a systematic and coherent teaching of knowledge.

The perception that there is a crisis in South African legal education is evidenced in the 2008 summit called by SALDA (South African Law Deans Association); ongoing consultations that emerged from this summit; a growing body of literature on the topic; the 2012 National Task Team that was set up to evaluate current modes of legal education; and the "Legal education in crisis?" summit held in May 2013. Contributing to this "crisis" is the well-documented reality, already referred to, that many first-year students do not enter university with the requisite reading, thinking, and writing skills that academics would like to assume that they should have (Pretorius, 2002; Morrow, 2009). This has led to a flurry of academic development and writing support interventions at the various law schools in the country (Greenbaum, 2004, 2012, 2014). There are also calls for transformation of the LLB. For example, Greenbaum (2009, 2012, 2014) draws attention to the lack of transformation of the LLB curriculum, and its failure, in some cases, to embrace the plurality of the new constitutional order.

In the keynote address at the 2013 Legal Education in Crisis Summit, Justice Bosielo outlined seven questions about the four-year LLB. These included whether it was appropriate to produce the kinds of legal practitioners currently needed; whether the content equipped students to play a meaningful role in society; whether an ethos of service was being developed; and whether enough was being done to teach and develop ethics and a spirit of Ubuntu, an understanding and appreciation of the Constitution, and to develop social awareness (Dicker, 2013, p. 15).

Interestingly, for the purposes of this thesis, none of Bosielo's questions refer to the writing or literacy abilities of law graduates, despite this being a concern that is frequently noted both by legal practitioners and academics (Greenbaum, 2004; Swanepoel & Snyman-Van Deventer, 2012).

The 2013 summit included a call for a national review of the LLB programme. A preliminary step to this review was the drawing up of clear qualification standards for the LLB. The document outlining the qualification standards for the LLB (CHE, 2015) draws on the questions that Bosielo set out at the summit and sets out the purpose of the LLB as follows:

"The LLB degree prepares students for entry into legal practice, into a wide range of other careers which require the application of law, and for post-graduate studies in law" (CHE, 2015, p. 8). The document goes on to claim that the purpose of the LLB is to offer a "broad education" that develops "well-rounded graduates" (CHE, 2015, p. 8) who are ethical, capable, can take context into account, who know and appreciate constitutional values and who have a critical understanding of legal knowledge, perspectives, and procedures (CHE, 2015, p. 8). One of the questions that this research asks (Question 1.2) is if such conceptions of the purpose of legal education are shared by legal academics and practitioners, and, if so, in what ways they affect conceptions of legal writing.

The LLB review was conducted by the CHE and completed in 2017. In April, an overview of the findings was released, and an updated short report was circulated in November. The final report on the national state of the LLB qualification was released in November 2018. It is beyond the scope of this research to report in any depth on the findings of this report. However, a few important points must be noted. Firstly, its overarching position agrees with many of the scholars cited thus far; it found that "it is doubtful whether the four-year first degree LLB programme is fit-for-purpose" (CHE, 2018, p. 50). Reasons given for this assessment include the amount and complexity of the work; the lack of curriculum space leading to over-focus on some areas of law at the expense of others and a lack of non-law courses; and the strong evidence that students who complete the LLB after another undergraduate degree are far more likely to pass than those who register for the four-year undergraduate LLB. It goes on to recommend that serious consideration be given to turning it back into a five-year degree: either a two-year LLB taught after a first undergraduate degree with some legal modules or a five-year undergraduate entry degree (CHE, 2018, p. 51). The report confirms the literature reviewed that asserts the centrality of writing for law and confirms the widely held perception that law students' and graduates' writing is a problem (CHE, 2018, p. 56). It recommends that writing development should be embedded as part of the curriculum in every year of study (CHE, 2018, p. 56).

Regarding knowledge, the review found that, in almost all law schools, "the degree provides sound and comprehensive knowledge of the South Africa legal system, its associated values and historical background" (CHE, 2018, p. 32). However, the report notes that all law schools should make clinical legal education compulsory (CHE, 2018, p. 55) – at present it is lacking or an elective in some law schools. Of interest is the observation that the CHE reviewing panels had felt that practical legal training was generally well addressed in the LLB, but that students and alumni viewed practical training as being insufficient. Other points of interest in the report are that it recommends that "transformative constitutionalism" needs to be better incorporated across the LLB curriculum (CHE, 2018, p. 52). The CHE review seems to regard decolonisation as an extension of such transformative constitutionalism and, as mentioned in chapter one, accepts it as being synonymous with Africanisation of the curriculum (CHE, 2018, p. 54). It recognises decolonisation as a "national imperative" but recommends that necessary Africanisation of the curriculum be balanced with the importance of maintaining a global perspective on both local and international law.

In recent years, there has been a growing body of critical South African literature that critiques the legal system in general and legal education, in particular (Madlingozi, 2006; van Marle & Modiri, 2012; Modiri, 2013, 2014, 2016; Heyns, 2014). This literature argues that legal education should not only reject the myth that law is neutral and apolitical, but that it must go beyond the orthodoxy of liberal constitutionalism and take a more critical stance in the attempt to explore what a truly transformed constitutional democracy might look like. This reflects the critical approach to the Constitution itself, outlined below in the section on legal knowledge. Heyns (2014), self-identifying her stance as radical and a challenge to the status quo, argues that "law students as an inoperative community can create human rights and democracy discourse to promote transformation" (p. 77). She explains the notion of an inoperative community as "a community that can never be, in the true sense of the word, but which is aware of this limitation" (p. 79). Although these views are not acknowledged in the CHE 2018 report, they may hold sway in the academy and/or the profession and, if so, may have an impact on how legal writing is understood, taught, and assessed, in contemporary South African law schools.

Quinot (2012) draws on Klare's (1998) critique of conservative legal culture to develop a theoretical framework for legal education, which he terms "transformative legal education (TLE)". Within this framework, he calls for three essential shifts in legal education: in the kind of reasoning taught (from formalistic to transformative); in pedagogy (where he advocates a social constructivist approach to learning); and in knowledge (from what he terms linear, to non-linear or relational) (Quinot, 2012, p. 411). He also outlines the impact of digital technologies on legal knowledge and argues that the digital revolution is bringing about "a fundamentally different notion of knowledge" (p. 432) facilitated by the shift from print dominance to digital immersion. Quinot and Greenbaum (2015) later draw on TLE to outline their vision for a suitable legal pedagogy, emphasising the need for a constructivist view and explicitly rejecting what they quote Shulman as describing as “signature pedagogy” in law. This pedagogy, which they view as being “no longer appropriate” for South Africa is characterised by an authoritative teacher who controls the dialogue; a structure that explicitly claims that what is being taught is the theory of the law and how to think like a lawyer; and an implicit structure that differentiates between moral judgment and legal reasoning (Quinot & Greenbaum, 2015, p. 30). Although Quinot (2012) claims that TLE helps us to see that changes in legal education do not imply what he terms “a slide to extreme relativism” (p. 431) it is difficult to avoid the inference that some kind of relativism is implied.

Much of the legal education literature appears to equate transforming legal curricula and pedagogy with social constructivism. I therefore include some education literature here that offers an empirically and theoretically grounded critique of these assumptions. For example, Kirschner, Sweller and Clark (2006) present a persuasive argument in favour of guided instruction, as opposed to constructivist pedagogies, based on a review of empirical studies conducted over the past fifty years. They argue that, although constructivist pedagogies are “popular and intuitively appealing”, they ignore the evidence that constructivism “is less effective and less efficient than instructional approaches that place strong emphasis on guidance of the student learning process” (p. 75). They explain this in the context of three factors: what is now known about human cognitive architecture (that was not known when constructivism first emerged as an instructional approach); expert-novice differences; and cognitive load. Cognitive load theory shows that “the free exploration of a highly complex environment may generate a heavy working memory load that is detrimental to learning” (p. 80). They go on to caution that what they term “novice” learners are less likely to learn from a constructivist approach than “expert” learners. An implication of these arguments is that a constructivist pedagogy, despite holding the common-sense appeal of being less authoritarian and therefore emancipatory, could, if inexpertly implemented, further marginalise learners who arrive at university with the greatest “articulation gap” (Bitzer, 2009).

Similarly, Hoadley (2011, 2017) cautions against the conflation of pedagogy and curriculum, drawing on the lessons learned from the curriculum changes in Basic Education in South Africa between 1994 and the present. She describes how, driven by the political imperative to move away from the oppressive pedagogies of apartheid-era education, the first post-apartheid “outcomes-based education” (OBE) curriculum effectively replaced knowledge with highly specified constructivist pedagogies. Two negative side-effects of this were, firstly, to alienate teachers from their own practice. Secondly, "everyday knowledge" (which, in pedagogy, can lead to specialised knowledge) effectively became the curriculum.

The constructivist approach to learning at Basic Education level has been criticised and, since 2013, the school curriculum has been replaced by CAPS (Curriculum and Policy Statement). This is characterised by a focus on knowledge (the what) rather than on competences and outcomes (such as problem solving). There are also stronger knowledge boundaries as opposed to the high levels of integration of OBE (Hoadley, 2017). This is contrary to views advocated by Motala (1996) and Quinot and Greenbaum (2015). Although beyond the focus of this thesis, these alternative views in the literature are a reminder that the virtuous imperative to transform teaching and learning in law should consider the range of research that exists concerning effective pedagogy and curriculum, and the important differences between the two.

What is seen in this section is that there are deep and ongoing contestations and concerns about both curriculum and pedagogy in legal education; the LLB degree in its current form; the preparedness of students for legal study and of graduates for the legal profession; what a good degree in law should include; and how it should be taught. Although constructivist pedagogies are presented by Quinot and Greenbaum (2015), amongst others, as a way to transform legal pedagogy, a brief, cautionary overview of some education literature shows how constructivism may not automatically facilitate improved access to knowledge for under-prepared students.

Positions in these debates may influence conceptions of legal writing, so this research will investigate the possible links between positions in the debates about legal education, and beliefs about legal writing (Question 1.2). Many, although not all, of these debates on legal curriculum and pedagogy – although occurring in different contexts and ostensibly from a range of perspectives – use the terms "skills" and "legal skills" to suggest a better preparation for work in the legal profession. The use of these terms is uncritical and – perhaps – imprecise. It therefore seemed necessary, before exploring the final driver of definitional difference, to find relevant theory to conceptualise the notion of "skills". This is explored in the following section.

### 2.3.4 Insights from professional knowledge on skills and skills development

The problems with the discourse of “skills” and “skills development” have already been explored, in relation to tertiary writing development and from an academic literacies perspective, in section 2.3. Essentially, these theorists argue that it is reductionist to view writing as a discrete “skill”; rather, it is a discipline-specific, embedded set of social practices (Archer & Richards, 2011; Boughey & McKenna, 2016, 2021). It is necessary here, however, to explore a little of the literature on skills from a professional knowledge perspective. Just as the term “legal writing” is used widely, the term “skills” or “legal skills” is similarly widely used, also without being well defined. There is a similar need to explore how the literature uses the term “skills”. I make two claims about skills in the following section: firstly, that the term is poorly defined, loosely used and contested in the legal education literature. Secondly, it is a problematised concept in professional knowledge literature.

**The problem of skills**

The complaint that legal education does not prepare students for the practice of law is common, and not limited to South Africa. (Nathanson, 1987; Boon, 1998; Dednam, 2012; Iyer, 2019). The standard response to this perceived failure is to introduce mandatory practical legal skills courses, either as part of the university degree or as part of vocational training, or both (Nathanson, 1987; Boon, 1998). Nathanson (1987) points out, however, that there is no consensus about what “practical” means in this context, arguing that some equate practical education with being taught specific legal transactions, whilst others equate it with generic skills that can be used in the practice of law, such as legal problem solving (Nathanson, 1987, p. 187). In his critique of the legal skills movement in the United Kingdom, Boon (1998) argues that the focus on compulsory legal skills modules has led to technically competent lawyers with significant gaps in content and methodology (p. 151). He also identifies different views on skills development in law, suggesting they fall on an atomistic – holistic continuum, and argues that much legal skills development, at least in the United Kingdom, tends to be atomised and “failed to harness coherent theories of lawyering” (Boon, 1998, p. 165). Boon (1998) has a further concern about the focus on skills; that it “ignores or obscures underlying values and focuses on professional conduct issues in order to support a conduct regime which is increasingly regulatory” (p. 167). His suggestion is that knowledge and skills teaching must be integrated to avoid a cynical or commodified approach to lawyering, and to develop the social justice dimension of the legal profession (Boon, 1998, p. 167).

In South Africa, Gravett (2018) – although an overall advocate for the teaching of practical legal skills – is critical of legal academics' understanding of skills and claims that most law schools teach only a "limited subset of the skills that are of crucial importance in practising law" (p. 1). He goes on to argue that courses in "professional competence", such as trial advocacy, would better equip students with the practical legal skills necessary for practice. Here, the concepts of skill and competence are conflated, as they are in other legal education literature, as will be shown below.

At the 2013 "LLB in Crisis?" summit, several participants spoke about the kinds of skills that a legal graduate should have, and that were lacking in recent law graduates. Representatives of both attorneys and advocates identified reading, writing, numeracy, and computer skills as key skills that they felt law graduates lacked (Dicker, 2013, p. 18). Furthermore,

> there was agreement among practitioners and academics that LLB graduates needed well-developed generic skills (such as the ability to analyse, investigate and solve problems; proficiency in reading, writing and speaking English; the ability to read and interpret statutes and legal documents; and the ability to construct and communicate an argument). (Dicker, 2013, p 16)

In the Standards for the LLB (CHE, 2015) that was developed out of the summit, and that was used as the basis for the LLB review (2018), standards are divided into three broad categories: knowledge standards; skills standards; and applied competences (CHE, 2015, pp. 8-11). The skills standards have only two sub-categories: critical thinking skills and research skills (although each of these sub-categories is further broken down into specific skills). The applied competencies category comprises several sub-categories, some of which might reasonably be expected to be found under the skills category, such as "communication skills and literacy" (p. 10). This conflation of, or confusion about, skills and competencies is also reflected in the LLB Review Report (CHE, 2018). For example, it similarly discusses "competencies" under the heading "Skills" and lists "communication skills" under the heading "Applied Competencies" (CHE, 2018, p. 31).

What is pertinent is that the term "skills" is used throughout these documents and literature, and throughout the review of the LLB, without any clear attempt at a definition. This warrants a brief turn to the professional knowledge literature on the concept of skills.

Winch (2010) draws extensively on Ryle's (1979) distinction between declarative or propositional knowledge ("knowledge that") and practical knowledge ("knowledge how") (Winch, 2010, p. 1) to describe professional knowledge. He points out that these have become almost common-sense distinctions in education conversations. For example, in law, it is easy to assume that so-called black letter law subjects, like Property law or Delict, teach propositional knowledge, while subjects like Civil Procedure, or Practical Legal Studies, teach practical knowledge. Another common assumption in critiques of legal education is that universities only focus on the "knowledge that" and that they need to include more of the "knowledge how", to better prepare students for the profession. For legal writing development, this could imply focussing on genres required for the profession. However, Winch is quick to caution that it is a mistake to think that practical knowledge and propositional knowledge are contrasting or mutually exclusive kinds of knowledge (Winch, 2010, p. 10). By contrast, he argues that the two are intimately intertwined and cannot really be understood except in terms of each other (Winch, 2010, p. 1). Similarly, it could be argued that practical and academic forms of legal writing are not mutually exclusive, and each enriches the other.

In the same book, Winch (2010) devotes a chapter to exploring the articulation between the notion of skill and the broader concept of practical knowledge. He observes that skill is a "culturally bound concept" and that the exercise of skill involves "intentionality within a normative context" (Winch, 2010, p. 39). This is important in that it helps to distinguish a skill from a disposition – which does not require intentionality – but also gives rise to the observation that there are more and less skilful ways in which a skill can be carried out, which is largely dependent on the professional norms for the exercise of that skill. Thus, the question is not just "has a skill been learned?" but "how skilfully is the skill carried out?" In this way, the idea of technique is a sub-set of skill (the way in which the skill is carried out) rather than a synonym (Winch, 2010, p. 41). Winch's (2010) exploration of the term leads him to assert that "skills development may well be a highly complex affair" (p. 44) that cannot be reduced to technique or performance of tasks and to observe that this complexity is frequently overlooked or underplayed in discussion of how to best develop skills. He calls this tendency "conceptual deflation" in which "key attributes of the concept of skill are stripped away to reveal a limited version of the original concept" (Winch, 2010, p. 45). This aligns with Gravett's (2018) critique of how legal skills are conceptualised in the legal academy, in which only a limited sub-set of the actual skills required in the profession are taught as "practical" or "professional" skills. Stand-alone legal writing courses that taught legal writing as a technical skill, which were common in the early 1990s and persist to some extent today, reflect similar conceptual deflation.

Winch (2010) concludes that the concept of skill is "of limited but essential use" and that

> *skill* is quite inadequate as a concept to provide us with a framework for thinking about practical knowledge or even *knowing how* in the broad sense that we need in order to understand professional and vocational practices. Skill, as we have seen, is not a general term for practice broadly conceived. (Winch, 2010, p. 54)

As well as this "conceptual deflation", Clarke and Winch (2004) argue that there has also been a conceptual conflation of the term 'skill' especially in English. They assert that it was originally a narrow term that has been progressively expanded and that the consequent problem of a lack of shared comprehension of the term is a result of this changing and broadening definition. In a later paper, they further observe, "different commentators attribute different, albeit related, meanings to the same term" (Clarke & Winch, 2006, p. 256). They contrast what they term the "core" usage of the term skill – which they describe as "manipulative ability" and "a narrow, performance-based conceptualisation of skill" (Clarke & Winch, 2006, p. 261) – with a "broader conception of practical knowledge" and reach a conclusion that the main characteristics of the concept of "skills", at least in an English context, are:

> it tends to be regarded as an individual attribute or property; it is associated with tasks and jobs rather than occupations set within an industrial context; it is associated with physical/manual mastery or ability; and it has no particular association with a knowledge base". (Clarke & Winch, 2006, p. 261)

Winch (2010) goes on to explore the "complexities of competence as a concept beyond skill" (p. 104). Although these complexities will not be explored further here, they have relevance for the way in which the word "skill" is used in the legal education literature. Very often such literature relies on the conceptual conflation described by Clarke and Winch (2006), resulting in broad and differing understanding of the term "skill". Furthermore, in some cases, legal education literature fails to distinguish between a skill and a competency, as shown in the examples above. The critique of skill has relevance to this research as legal writing is often, problematically, described as a skill and so these critical understandings of the notion of "skill" have application to understanding conceptions of legal writing. This application extends to how skills development in legal education is understood.

**The problem of skills development**

In discussing professional education (which she defines as higher education that prepares students for a particular profession, so arguably applicable to legal education) Allais (2015) critiques the widespread approach to skills development in higher education. In this approach, employers or the profession is asked to articulate the competences required by the profession, and universities respond by attempting to produce these competences in their students (Allais, 2015, p. 248). As this approach underpins recent reforms in legal education in South Africa, it is important to understand the basis for this critique. Several of the problems that Allais identifies in this approach may be applicable to legal education. Firstly, Allais points out that employers vary widely, and so there is no single employer view. She further points out that employers are generally not able to predict what skills will be needed in the profession in the future, which is congruent with Susskind and Susskind's (2015) perspectives, explored earlier in this chapter. Moreover, Allais (2015) argues that "employers frequently have unrealistic expectations about what education institutions can achieve, and, when asked for their requirements, provide long wish-lists, in many instances, of skills which would be better learnt in the workplace" (pp. 248-249). Importantly, she points out that two of the negative consequences of this approach are that it has often led to "narrow skills training" and fragmentation and "endless cycles of reform, trying in vain to get closer to an elusive idea of what employers *really* want in the workplace" (Allais, 2015, p. 249). This is true of legal education reform in South Africa and makes it important to investigate practitioners' perceptions in this research, as legal practitioners have tended to claim that they know what is needed in the profession, or what employers want (Dicker, 2013).

The literature in this sub-section critiques and theorises the notion of "skills" within the broader framework of professional knowledge. It also shows that the relationship between higher education and work in the legal profession is complex and probably not resolvable by a greater focus on "skills" in higher education, however conceptualised. Importantly, it suggests that differing conceptions of "skills" may be one of the drivers of differing conceptions of legal writing. I now turn to the final possible driver of definitional difference that will be explored: legal knowledge. The contours of the debates about legal knowledge, and whether these intersect with the debates about legal writing, are examined in the next section.

### 2.3.5 Legal Knowledge

The literature on legal knowledge, particularly the South African literature, reflects a further series of oppositions. Two major tensions are between positivist and interpretivist epistemologies, and between transformative constitutionalism, traditional legal culture, and critical readings of the constitutional project. There are also divisions based on the way that law has been traditionally organised, such as civil law traditions vs common law traditions, and public vs private law. These are all explored below. I am mindful of Dhlamini's (1992) observation, quoted earlier, that in legal education, dichotomies are created where none needs to exist. However, it remains important to identify the conceptions in existence, to investigate whether any of them have an effect on how legal writing is understood. Some of these distinctions are used to develop the analytical framework, presented in the next chapter.

#### Legal epistemology: contested boundaries

There are several debates about the nature and boundaries of legal knowledge. Although it is beyond the scope of this research to explore these debates fully, it is necessary to at least set out some of the categories here (with an acknowledgement that this is, of necessity, a mere glance at the literature).

At the one end of the spectrum, are the very old natural law theories, which operate from the position that law and morality cannot be separated (Humby, Kotze & du Plessis, 2012). Although encompassing a complex and diverse range of theories, a central proposition is that laws must meet certain standards of morality. In other words, if a law is unjust or immoral, this draws its legal validity into question (Meyerson, 2009). On the other end of the spectrum is legal positivism. A key theorist is Hart (1958) who describes the following as basic tenets of legal positivism: positivism rejects the indivisibility of law and morality. Law is distinct from the context in which it operates, a closed system of legal rules and legal concepts, with strong boundaries. Facts, evidence, and rational argument "count" in law whilst social or moral judgments cannot – because they cannot be proven by what counts.

Legal realism emerges as a challenge to legal positivism, particularly the tenets that law is objective, logical and politically neutral. One of the original legal realists, Holmes (1963), argues that law is more about experience than logic. The subjectivity of judges drives the law, rather than the internal logic of neutral rules. The critical social studies movement emerged from legal realism but was more radical: its position is that law is determined by power relationships in society and should be used to overthrow those power relations. These critical/radical positions have been termed, in some of the literature, as interpretivist. Van Blerk (1996) explains that this position emerged in opposition to legal positivism, which accepts the structure of both law and society and consider law to be coherent and objective. Interpretivists are particularly concerned with the ideological nature of the law and argue that it legitimates injustice and oppression (van Blerk, 1996, p. 87).

The tensions between these two main positions – interpretivist vs positivist – are explored in more detail below.

**A closer look at "Positivist" vs "Interpretivist" / "Traditional" vs "Critical"/ Restricted vs General Jurisprudence**

Much of the South African literature on legal knowledge draws on the dichotomy between "positivist" approaches to law and "interpretivist" approaches to law, although different terms are used to characterise these positions. Modiri (2013) claims that "central to positivism is the epistemological recasting of law as a science or as a 'pure' discipline, as well as the construction of a discursive opposition between the legal and the non-legal" (p. 6). The interpretivist view, on the other hand, holds that legal knowledge constitutes much more than knowing and applying a fixed set of neutral rules. Modiri (2013) takes the interpretivist view further and deconstructs, in detail, the positivist myth that law is neutral and apolitical. He draws on Douzinas and Geary's (2005) distinction between a "general jurisprudence" (which draws on the interpretivist view and in which legal philosophy is central) and a "restricted jurisprudence" (which draws on the positivist view and where rules and professional concerns are central) and suggests that contemporary legal education draws far too heavily on the "restricted jurisprudence". In other words, he argues that legal positivism continues to hold sway in the academy. He suggests that, instead

> legal education should infuse the teaching of positive law with the ability to identify the theoretical/ political/ philosophical position about law, politics, morality or society

that is invoked by any legal argument, judicial decision, or proposition – including those of lecturers and fellow students. (Modiri, 2013, p. 471)

Here, Modiri (2013) seems to suggest that understanding law not only requires a broader understanding of a range of political and philosophical theories, but also the ability to identify and critique the ideological or theoretical underpinnings of any form of legal knowledge, both written and spoken.

Modiri (2013) draws on the work of Hunt (1986) to argue that the traditional, positivist view of legal education portrays law as a stable and coherent body of legal rules. He argues that it is problematic to exclude theories developed in other fields, as this leads to a conception of legal knowledge that "portrays law as an autonomous, neutral and apolitical mediator of social conflict" (Modiri, 2013, p. 461). An example of the fiction that law is neutral and apolitical is the "reasonable person test". De Vos (2011) points out that

> the truth is that the reasonable person relied on by section 10 of the Equality Act (and in our common law rules and other legislation) is a fictitious person that is imbued with the values, assumptions, beliefs and ideologies of the judges who have to apply and develop this concept. (De Vos, 2011, para. 14)

Moreover, this fictitious person, while allowing some to rest assured in the neutrality of the law, is a person underpinned by gender-based and cultural assumptions about what is reasonable.

In a later article, Modiri (2014) extends his critique of traditional, positivist approaches to legal knowledge and suggests that the "crisis" in legal education is, firstly, plural and, moreover, that it has abandoned the principle of justice. This is a criticism that is not limited to South African legal education; the Carnegie Foundation's 2007 Report on North American legal education observes that "[in their all-consuming first year], students are told to set aside their desire for justice" (Sullivan et al., 2007, p. 6). This suggests that a positivist, traditionalist view of legal knowledge continues to have power in the academy.

Modiri's (2014) position offers another layer to the widely held view that the crisis (or crises) centres on law graduates' lack of preparedness to enter the profession. He notes:

> I conceive of the crises in legal education as mainly jurisprudential, as being rooted in the moral, political and ideological content of law and the conservative nature of the

> legal culture, and as having emanated from certain developments in modern legal theory that resulted in a technocratic and formalist approach to, and idea of law. (Modiri, 2014, p. 4)

Although this dichotomy is problematised in literature explored earlier in this chapter, and strongly resisted by other legal scholars such as Gravett (2018) who describes the dichotomy as a “red herring”, these arguments suggest that there is serious contestation between a positivist approach to legal knowledge and approaches rooted in critical or interpretivist understandings. It is possible that one’s position in this debate about legal knowledge would affect what one believes legal education is for: to prepare students for the profession, by following the formalist approach or to engage more critically in debates about what the law should and could be. Furthermore, this position is likely to influence how one understands and values legal writing.

**Transformative constitutionalism vs traditional legal culture**

The seminal concept of transformative constitutionalism (TC) contributes to the understanding of what counts as legal knowledge, and legal argument, in South Africa. Karl Klare (1998) defines TC as

> a long term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions in a democratic, participatory, and egalitarian direction. (Klare, 1998, p. 150)

However, he goes on to identify a “disconnect” between the kind of transformation that the Constitution aspires to, and what he terms “the conservative character” of South African legal culture and legal education (Klare, 1998, p. 151). He is quick to point out that this sense of conservatism is in no way related to political conservatism but rather refers to “cautious traditions of analysis”; reflecting a “relatively strong faith in the precision, determinacy and self-revealingness of words and texts” and leading to legal interpretation that tends to be “highly structured, technicist, literal and rule-bound” (Klare, 1998, p. 168).

Davis and Klare’s (2010) subsequent article on transformative constitutionalism and the common and customary law makes clearer links between TC and legal discourse. In this article, they argue that a significant impediment to achieving the kind of social and legal transformation envisaged in the Constitution is what they term “the lens of legal culture” (p. 403). They define this term as follows:

> By 'legal culture' or 'legal consciousness', we mean the characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place. A legal culture takes its shape from its lawyer-participants' shared experiences of training and socialisation, the basic concepts that organise their legal thinking and work, what they regard as appropriate methods of solving legal problems and generating legal knowledge, what counts for them as a persuasive legal argument, what recurring discursive strategies and argumentative techniques they deploy, what types of argument – possibly valid in other disciplines such as political philosophy – they deem *ultra vires.* (Davis & Klare, 2010, p. 406)

This definition suggests that the legal discourse into which law students are being socialised may be influenced by whether traditional or transformative traditions are drawn on and may be at odds with what is required in practice. It also links to the point made earlier about professional identity: what types of argument are accepted as legal writing will be influenced by if, when and where a legal academic or legal practitioner was socialised into legal culture. Davis and Klare (2010) suggest that the traditional types and styles of argument that are valued in South Africa are "surprisingly conventional" (p. 407) and that "as a matter of degree, South African lawyers are somewhat more confident than their American colleagues that words and texts have intrinsic, self-revealing meanings" (Davis & Klare, 2010, p. 408). Davis and Klare's (2010) observations suggest that the legal profession and legal academy's valued ways of reasoning and constructing an argument, and of relating to the written word, are not only contestable but may be actively limiting the transformative project, and hence may need to change. This may explain differences in academics' and practitioners' understanding of what constitutes good legal writing: are they drawing on traditional ways of arguing and reasoning, or do they draw on this revised understanding of transformative constitutionalism? In addition, can these differences be attributed at all to academics' primary professional identity?

**Recent critiques of the Constitution and of transformative constitutionalism**

A further layer of complexity emerges from criticism of the Constitution itself for its "exalted celebratory status" (Heyns, 2014, p. 78). Some critical voices dismiss the Constitution as a "negotiated revolution or historical compromise that merely represents the balance of interests at the time of the political transition" (p. 78) and thus dismiss both its transformative potential and the legal hierarchy of sources that accords it ultimate status. This position adds further complexity to the question of what is accepted as legal knowledge within the legal, and legal-academic, community: whether one accepts or dismisses the Constitution as supreme law is likely to affect what one accepts as valid legal knowledge.

Similarly, the concept of transformative constitutionalism has been critiqued (Modiri, 2016; Sibanda, 2011, 2020) for failing to be sufficiently emancipatory and for failing to deliver South African society from the ongoing destructive effects of apartheid. Scholars and teachers who explicitly reject transformative constitutionalism are likely to have markedly different conceptions of legal knowledge from those who embrace it.

**Legal Pluralism**

Legal pluralism underpins an understanding of law that extends beyond the laws and institutions of the State and that recognises that these "might be viewed as one amongst a plurality of legal orders which govern social groups" (Stychin & Mulcahy, 2003, p. 429). Thus, legal knowledge can be extended to include alternative dispute resolution, mediation, and law from particular social or religious groups in society. Understanding legal pluralism is fundamental to knowledge of post-constitutional South African law. Himonga (1997) offers the following nuanced definition of legal pluralism:

> Legal pluralism in a deep sense, encompasses a situation in which non-State legal orders or normative orders, sometimes referred to as semi-autonomous social fields, co-exist with State law (including indigenous laws which have been recognised by the State as part of State law). The various legal orders existing in a State polity, that is, State law, indigenous law, and other normative orders are not completely independent of each other; they interact in various ways and at various levels. (p. 78)

Understanding how these different legal and normative orders interact – both potentially and in fact – is thus an integral part of South African legal knowledge, particularly given that customary law is a recognised source of South African law. However, Dhlamini's (1992) criticism that legal education neglected customary law is, arguably, still relevant today, and has become part of the decolonisation conversation at many law schools in South Africa. An implication of this for legal writing could be that plural forms of writing are valued differently, or that oral forms of expression could be valued in some contexts more than others.

**Legal Tradition: an unconscious legacy?**

Looking much further back, Glenn (2010), in speaking of legal traditions, draws on the notion of "the changing presence of the past" (p. 1); that how we think about and communicate things in the present is influenced by how this was done historically, in a particular tradition. Understanding the concept of legal tradition may clarify its impact on how legal writing is studied and taught. In its broad sense, the notion of legal tradition can be defined as:

> A set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organisation and operation of a legal system and about *the way law is or should be made, applied, studied, perfected and taught.* (Merryman, 1985, p. 2, my emphasis)

The origins of South African law are historically described as hybrid or mixed: a combination of Roman-Dutch and English law. Thus, the tradition that it draws on is also mixed, as Roman-Dutch law originates from a civil law tradition whilst British law draws on a common law tradition (Oxford Libguides n.d.). This classification has been contested (Palmer, 2006) and, recently, there have been moves internationally to harmonise civil and common law traditions (Glenn, 2010). Nevertheless, the differences may be one of the drivers that contribute to differences in how legal writing is understood. However, given the mixed nature of South African law, in combination with its plurality, the possible role of legal tradition is unlikely to be a major driver of definitional difference between South African legal academics or practitioners, and the following thoughts are offered cautiously.

Civil tradition lawyers must apply legal principles from legislation. Glenn (2010) notes that writing played an important role in codifying the law: when the writing down of customs came to be called codes, the creative power of the writer, or legislature, became more evident (p. 146). Rationality was highly valued, although there remained many forms of expression of law in civil law (p. 147). The common law tradition emerged much later than the civil law tradition, out of the laws and legal institutions of medieval England. Its learning developed around the writs (royal instructions to an officer of the law), each of which gave rise to a particular procedure that should be followed for a particular legal dispute (Glenn, 2010, pp. 242-243).

Dainow (1966, p. 426) observes that common law has developed with the judge as the focal point, whereas in civil law traditions, legislation occupies the most hallowed place. He suggests, in attempting to understand these two traditions, that it is especially important to "identify and understand the fundamental differences in their structures, in their methods of thought and in their attitudes towards the law as a legal system" (p. 420). The differences in methods of thought are probably of greatest relevance to this study as these differences in thinking will likely result in differences in writing.

Moreover, these differences, Dainow (1966) suggests, led to the great writers in civil law being the professors, with the responsibility for training lawyers lying with these professors, whilst in common law, the great writers are the judges, with a related expectation that it is the responsibility of the Bar, or the profession, to train young lawyers, through pupillage. This goes some way to explain the ongoing debate in South African legal circles: whose responsibility is it to teach young lawyers how to write – the Bar or the universities? It also makes it important, for this research, to canvas and compare the views of both legal academics and legal practitioners. Some argue that it is the university's sole responsibility to teach knowledge, and that the profession is responsible for inducting graduates into more practical legal skills, including writing. Others suggest that – since writing is such an essential capacity in most legal contexts – universities must take responsibility for developing legal writing. It could also account for the very uneven way in which different universities take responsibility for developing their students' writing. If their underlying assumptions about legal education draw (however implicitly) on the common law tradition, they may be more inclined to leave writing development to the profession, whereas the converse may be true if they operate more from within a civil law tradition.

Referring particularly to the writing of judicial opinions and decisions, Dainow (1966) observes that the differences between the two traditions are "striking" (p. 432). Differences include the following: length and level of detail, structure, and the extent to which the writing is generalisable. Common law opinions tend to be much longer and more detailed, whereas civil law decisions are succinct: the higher the court, the shorter the judgment. Common law judgments may have broader application and implications, whilst civil law decisions relate strictly to a particular case and cannot be generalised. Common law opinions tend to begin with an organised exposition of facts, which are used as the basis for analysing the legal problem before the court. All previous similar cases are analysed and evaluated for relevance before a decision or legal opinion is decided on. Civil law opinions tend to merely outline the essential facts, briefly state the relevant legal principle or principles that apply to this case, and then set out a short conclusion (Dainow, 1966, pp. 432-433).

If what Dainow (1966) claims remains true, then what a legal practitioner or legal academic believes to be the “correct” way to set out a legal opinion is likely to differ, depending on which legal tradition his or her field draws on most strongly. This has implications for the teaching of legal opinion writing and for the assumption that legal opinion writing is a skill that is transferable across subjects and gives rise to Question 1.2 of this thesis.

**Private vs Public law**

Lastly, for this section, part of the debate on legal knowledge is the contested distinction between public and private law. This distinction exists in both civil law and common law traditions, but many commentators argue that this distinction fails as an organising concept (Rosenfeld, 2013, p. 125). Put simply, public law tends to be the area of law associated with the State, such as constitutional law, criminal law, public law, and administrative law. Private law traditionally includes areas of law such as property law, contract law and the law of delict (Rosenfield, 2013, p. 125). However, particularly in South Africa where all areas of the law are subject to constitutional supremacy, some commentators, such as Bhana and Pieterse (2005) argue that the private-public distinction is falling away, or should be, and can no longer usefully be used to categorise areas of law. Another contestation about legal knowledge is thus whether the private-public law distinction still holds. One’s position on this could have an impact on what counts as legal knowledge and thus, perhaps, what counts as legal writing. In other words, if one views private law as a distinct category, would one have a similarly distinct view on what legal writing should look like in one’s subject? This is part of what Question 1.2 of this research seeks to explore.

In sum, legal knowledge in South Africa is contested in several ways. Firstly, there is debate about its boundaries, and whether legal knowledge is purely the law itself, or whether legal knowledge includes the critique and social theory underlying and infusing the law. Moreover, there are tensions between “transformative” and “traditional” legal culture, which extend to recent critique of South African law’s foundational document, the Constitution and of the notion of transformative constitutionalism itself. These debates may affect how legal writing is understood, particularly what counts as valid evidence in legal writing. There are also debates about whether long-practised ways of organising itself are still valid (including the common-civil law distinction as well as the private-public law distinction). Again, one’s position in these debates may influence the criteria one uses to evaluate legal writing and the range of kinds of reasoning accepted as good legal writing. Question 1.2 of this thesis attempts, in part, to investigate whether these legal knowledge debates intersect with understandings of legal writing.

Overall, this section of the literature review has attempted to sketch some of the inter-connected drivers that may influence orientations to legal writing. It began by considering the changing nature of legal writing, due to the impact of the plain language movement, as well as the impact of technology and artificial intelligence. It briefly canvassed the possible impact of professional and institutional identities on orientations to writing, before exploring the impact of contested views on legal education: its purpose, curriculum, and pedagogy. The loose use of the term "skill" was considered as a possible driver before different approaches to legal knowledge were explored. The literature on legal education and legal knowledge reveals a set of dichotomies that go by different names: positivist vs interpretivist; general vs restricted jurisprudence; liberal vs critical approaches to the Constitution; and traditional vs transformative legal education. These are all, to some extent, underpinned by the positivist-interpretivist dichotomy. As mentioned earlier in this chapter, Dhlamini (1992) observes that legal education "tends to accentuate dichotomies where none exist" (p. 602). This made me wonder whether I should be questioning some of these dichotomies presented in the legal education and legal knowledge literature. This led me to the literature explored in the following section.

## 2.4 Social realism: a third theoretical lens:

Guided by Dhlamini's (1992) insight, I decided to return to scholarship in the field of the sociology of educational knowledge, to see if any of this literature could offer a theoretical lens through which I could interrogate these positions on legal education and legal knowledge. During this reading, I came across a different position, termed "social realist" developed by scholars such as Moore and Muller (1999, 2002), and Young and Muller (2007, 2010, 2013) and Muller and Young (2019). Allais (2014, 2015) and Hoadley (2011, 2017), whose ideas are drawn on in the previous section, also draw on a social realist perspective. These scholars, amongst others, draw on the work of Bernstein (1975, 1999a, 2000); Durkheim (1895) and Cassirer (1979) to develop an approach to knowledge that resists and challenges the positivist-interpretivist dichotomy. Social realism tries to mediate a third position, which takes points from both sides of the debate, so it seemed to offer a different way of conceptualising debates in legal education, knowledge, and writing.

This section of the literature review sets out some of the core ideas of the social realists and uses these as a lens through which claims from the earlier literature can be examined. As social realists draw strongly on concepts from Bernstein (1975, 1999a, 2000), some of these are explored first. The term "social realist" is then explored, with a focus on four concepts from the literature: "voice discourse"; "knowledge boundaries"; "powerful knowledge"; and "grammar". These concepts offer a theoretically persuasive basis from which to critique positivist-interpretivist epistemologies, particularly the assumption that interpretivism is automatically more transformative and emancipatory. Morrow's (2009) concept of epistemological access – introduced in chapter one – is revisited, particularly in relation to powerful knowledge.

### 2.4.1. A social realist approach to knowledge

#### Background: Bernstein's knowledge structures

Bernstein (1999a) identifies different types of knowledge and explains their capacity to develop generalisable and true claims. He suggests that there are two main types of knowledge discourses: horizontal (or everyday discourse) and vertical (or specialised discourse). Horizontal discourse is likely to be local and context-dependent; all potentially have access to it and the way it is realised is different in different cultures and social locations (Bernstein, 1999a, p. 159). Vertical, or specialised, discourse is characterised as taking a "coherent, explicit and systematically principled structure" (p. 159). This structure takes two forms: hierarchical (in which new concepts subsume/replace older ones, such as Physics) and horizontal (such as in the Humanities and Social Sciences, in which concepts and theories build on each other and branch out, or segment, by developing more theories) (p. 161). The horizontal "takes the form of a series of specialised languages with specialised modes of interrogation, and specialised criteria for the production and circulation of texts" (p. 161).

Breier (2003, 2004) is the only scholar, as far as I am aware, who has worked extensively with Bernstein's concepts in the discipline of law. She suggests that legal knowledge has a horizontal structure (Breier, 2003), which may account for the legal knowledge dichotomies identified earlier in this chapter and be significant in the search to understand what it means to write well in law. Whilst acknowledging that Bernstein did not explicitly discuss the structure of law in his work, she further suggests that he would likely categorise law – like other fields of professional education such as medicine or engineering – as a region (Breier, 2004). A region is different from a "pure" disciplinary singular in that it looks both inward, to the discipline, and outward, to the profession (Bernstein, 2000).

Breier (2004) argues that "the legislation and associated concepts and principles that are applied to particular ranges of everyday events in law could be seen as substitutes for the specialised languages associated with horizontal knowledge structures" (p. 227). Bernstein (1999a) explains the significance of these specialised languages:

> [t]he set of languages which constitute any one horizontal knowledge structure are not translatable, since they make different and often opposing assumptions, with each language having its own criteria for legitimate texts, what counts as evidence and what counts as legitimate questions… Indeed, the speakers of each language become as specialised and excluding as the language. Their capital is bound up with the language and, therefore, defence of and challenge of other languages, is intrinsic to a horizontal knowledge structure. (Bernstein, 1999a, p. 163)

If law is a region, and if different sets of languages are operational within the region of law, each with different criteria for legitimate texts and what counts as evidence for that language, this may account, to some extent, for the different understandings of what it means to write well in law.

Within horizontal knowledge structures, Bernstein (1999a) further distinguishes between strong and weak grammars (pp. 163-164). Some disciplines are such that the writer is in no doubt that they are writing "in the discipline" – such as Mathematics. These disciplines have strong grammars; their terms and concepts can refer to an empirical phenomenon with complete accuracy. Others, such as many social sciences, have a weaker grammar, so that the writer may be anxious about whether they are in fact writing the discipline and have multiple terms and concepts to refer to the same empirical phenomenon, which give rise to ambivalences and contestations about meanings (p. 164). Hordern (2017) emphasises Bernstein's (1999) observation that there is a connection between strong grammar and visibility: "an advantage of a strong grammar is that disciplinary processes and procedures are transparent and, arguably, readily accessible to novices coming to the discipline" (Hordern, 2017, p. 6). In disciplines with a strong grammar, the relatively strong agreement about how one makes a claim, and what constitutues valid evidence for that claim, makes it easier to learn how to think and write in that discipline. And conversely, in disciplines with a weak grammar, the rules are less visible, and it is therefore harder to learn to think and write in that discipline.

Legal knowledge does not seem to fit neatly into the strong and weak grammar distinction. It is tempting to assume that it has a strong grammar – for example, it uses specific terms and procedures to write a contract or test a crime. However, if law is understood as a region, and in terms of its horizontal knowledge structure, its grammar may be both multiple and weaker than assumed. Hordern (2017) argues that "the existence of multiple specialised languages suggests the possibility of multiple grammatical modalities existing within the same discipline. While one specialised language may have a relatively strong grammar, another may have a relatively weak one" (p. 4). In law, for example, in a Jurisprudence essay, the boundaries between law and political or social theory may be unclear, and its specialised language may thus have a weak grammar. Whereas the specialised language in a procedural or predominantly private law subject may have much stronger grammar.

This, in combination with other arguments about what constitutes legal knowledge (Modiri, 2013) and the epistemological rift between positivism and interpretivism could be one of the reasons why legal writing is understood in conflicting ways. Part of the problem may be law's (and legal writing's) identity crisis: is it a science, a social science, or part of the Humanities? Can one understand or research the nature of legal writing, without clarifying its knowledge structures? Put somewhat differently, the more precise legal terms are, the stronger the grammar, and the better they subsume legal phenomena; the more contestations there are within legal knowledge, the weaker the grammar, and the greater the proliferation of terms and ways of writing. These tensions may be manifested differently in different legal subjects, which may lead to different conceptions of writing in different areas of law. For example, what counts as legal knowledge in Constitutional Law, or Jurisprudence, may be quite different to what counts in Civil Procedure or the Law of Contract, possibly leading to related differences in their grammars and what counts as good legal writing in each.

**What is a social realist approach to knowledge?**

Developing out of Bernstein's analyses, Young and Muller (2010) explain that a social realist approach to knowledge recognises the following two equally important propositions:

> (a) the necessary objectivity of knowledge as a condition for any kind of enquiry or reliable prediction about the future and (b) that knowledge is emergent from and not reducible to the contexts in which it is produced and acquired. (Young & Muller, 2010, p. 14)

They distinguish between knowledge's historical origins and its strength or generalisability; in other words, whether it is objective and true. These two propositions – that knowledge is both objective *and* produced in a specific historical context – tend to be viewed as mutually exclusive by many other theorists, as is seen in the positivist-interpretivist positions explored in the section on legal knowledge. Young and Muller (2007, 2010) suggest that it is necessary to distinguish the social realist approach from what they term under-socialised approaches (such as logical positivism) which downplay context as well as over-socialised approaches (such as constructivism and other radical interpretivist approaches such as post-modernism) in which identity and context all but become knowledge. They go on to define the social realist approach as follows:

> In contrast, a social realist theory sees knowledge as involving sets of systematically related concepts and methods for their empirical exploration and the increasingly specialised and historically located 'communities of enquirers' (an idea first expressed by the American philosopher Charles S. Pierce) with their distinctive commitment to the search for truth and the social institutions in which they are located. (Young & Muller, 2010, p. 14)

Social realism thus avoids the dichotomy used in much of the legal knowledge and education literature between positivist and interpretivist; traditional and transformed, and offers a third way of understanding knowledge. Like positivism, social realism accepts strong knowledge boundaries (explored below). However, it is different from positivism in that it acknowledges that knowledge is developed in particular social and historical contexts. It is also different in that, while its criteria for what counts as legal knowledge are clear, such criteria do not treat knowledge as pure empirical facts devoid of theory. And unlike the interpretivist approach to knowledge, social realism accepts the possibility of the objectivity of knowledge and does not equate or reduce knowledge to experience or context. Several important concepts arise from this approach, which are relevant for building the analytical framework used in this research. These are explored below.

**A critique of "voice discourse"**

Moore and Muller (1999) critique the critical, interpretivist perspective; not on ideological grounds, but because they argue that it is conceptually flawed. The main reason for this flaw, they argue, is that interpretivist perspectives rely on a "simplistic and positivistic caricature of science that is seemingly unaware of significant debates in 'post-empiricist' philosophies of science" (Moore & Muller, 1999, p. 189). Moore and Muller (1999) argue that when popular (and/or populist) claims become received knowledge, the tendency exists to accord them the status of a theory or body of knowledge, without dealing with questions of objectivity and generalisability. This received knowledge is given as much credence, if not more, than so-called "traditional" ones, by virtue of its perceived social responsiveness. Moore and Muller (1999) offer a critique of what they term "voice discourse" which can be found in much, but not all, interpretivist literature. Such discourse tends to frame itself as progressive and "post" (post-modern, post-structuralist) and seeks to give "voice" to the socially marginalised (whether by race, gender, class, or sexuality). Moore and Muller (1999) argue that this approach to knowledge is not only untenable but that it cannot be viewed as a theoretically sustainable approach; that it is, rather, a "position taking strategy" (p. 190). This argument has relevance to some critical positions on legal knowledge, such as aspects of those articulated, inter alia, by van Marle and Modiri (2012), Modiri (2013, 2014, 2016) and Heyns (2014).

Three of Moore and Muller's (1999) claims for why "voice discourse" is conceptually flawed are particularly relevant to this thesis. Firstly, they argue that a basic move of voice discourse is to translate knowledge relations into social relations (Moore & Muller, 1999, p. 195). In other words, it reduces knowledge to experience of power and becomes more a sociology of knowers, and their relationships to each other, than of knowledge (p. 190). Quinot and Greenbaum's (2015) contours of a transformative legal pedagogy, discussed in 2.4.4 of this chapter, which foregrounds students' experiences and relationships in the classroom, may fall into this trap of privileging knowers over knowledge. Secondly, Moore and Muller (1999) are particularly critical of voice discourse's tendency to conflate science with positivism and absolutism. Not only does this conflation ignore several decades' worth of post-empiricist debate about the philosophy of science, they argue, voice discourse depends on this restricted view of science to sustain its existence (p. 203). Much of the literature on legal knowledge does this, equating a focus on "black letter law" or "traditional law" with such positivism and conservatism (See, for example, Modiri, 2013, 2014).

Moore and Muller's (1999) argument suggests that viewing legal knowledge through the lens of radical, critical theorists may be falling into that false dichotomy trap, in which traditional legal knowledge must be "positivist" and restricted in nature, whilst more recent, radical constructions of legal knowledge must be truer or more appropriate to current social conditions. Moreover, their argument suggests that to accept these as a valid form of knowledge is not theoretically sustainable. This has relevance for a range of the positions on legal education and legal knowledge, canvassed earlier in this chapter, if they become more about knowers rather than knowledge.

Moore and Muller describe voice discourse as establishing

> the political default settings whereby epistemologically grounded, knowledge-based forms of education are politically conservative, while 'integrated' (Bernstein, 1977) or 'hybrid' (Muller & Taylor, 1995) knowledge codes are progressive. On this basis, socially progressive causes are systematically detached from epistemologically powerful knowledge structures and from their procedures for generating and promoting truths of fact and value. (Moore & Muller, 1999, p. 191)

In other words, these positions give voice to contexts, interests and ideology, and doubt objectivity and truth. This has intuitive appeal but – if one accepts Moore and Muller's (1999) argument – these positions, whose intent is progressive and socially just, very often separate themselves and their vision for education from the knowledge structures that would give socially marginalised persons access to powerful knowledge and social power. For example, Quinot and Greenbaum's (2015) vision for transformative legal education, with its focus on a "constructivist teaching-learning philosophy" (p. 35) may, unintentionally, reduce access to powerful knowledge, rather than improve it. More broadly, this implies that calls for radical revisions of so-called traditional legal education or traditional legal writing, without considering the underlying knowledge structures, may have unintended consequences, and that attempts to transform a curriculum to facilitate social justice could end up facilitating the very opposite.

**Knowledge boundaries: necessary for acquiring powerful knowledge?**

Young and Muller (2010), as part of their exploration of a "social realist" approach to knowledge, re-examine the role of knowledge boundaries. They argue that boundaries emphasise the social differentiation of knowledge and institutions and suggest that boundaries are not always boundaries to be overcome; they can be conditions necessary for innovation, production, and acquisition of new knowledge. This approach gives priority to knowledge, as opposed to learners and their experiences, thus placing it in opposition to constructivist approaches. Drawing on Bernstein's (2000) analysis of knowledge discourse claims for a clear separation between everyday (horizontal) knowledge and formal (vertical) knowledge discourses, Young and Muller (2010) assert that "boundaries play an important role in creating learner identities and are thus the condition for acquiring powerful knowledge" (p. 6). They suggest that curricula in which boundaries between horizontal and vertical discourses are blurred or weakened makes "contours of knowledge and learning invisible" (p. 19). The invisibility does not mean, of course, that they are not there; it simply serves to obscure what is required, with the result that many students struggle and become disaffected. Young and Muller (2010) make the point that this "end of boundaries" scenario, in which experiential forms of knowledge are uncritically embraced, is

> unlikely to lead to access to specialist knowledge disappearing in the elite and private sectors and institutions. What is more likely is that public education will replace unequal access to knowledge by increasing access to qualifications leading to credential inflation as qualifications are competed for but have less and less worth. (Young & Muller, 2010, p. 19)

These insights are important for the debates on legal knowledge and legal education and raise questions about both formalist and interpretivist approaches to legal knowledge. Young and Muller's (2010) arguments suggest that boundaries, such as the boundary between law and political science or philosophy, may be epistemologically necessary rather than oppressive, and should thus not be viewed as a barrier to access to, or transformation of, legal education. To apply Moore and Muller's (2010) argument to the imperative to transform legal education, unequal access to legal knowledge could be replaced with greater access to less meaningful qualifications, ultimately entrenching and deepening inequality. Similarly, abandoning necessary boundaries or conventions in legal writing could also lead to inequitable access to powerful forms of legal writing, thus constraining rather than enhancing the transformative project. Here, a further concept from social realist theory is useful, that of powerful knowledge, which is explored below.

**Powerful knowledge and Epistemological access (EA)**

Young and Muller (2013) distinguish between powerful or specialised knowledge (PK) and everyday knowledge, but also distinguish it from knowledge of the powerful (KOTP). This offers a further dimension to positivist-interpretivist debates about legal knowledge that tend to collapse both sets of distinctions. Underlying the notion of PK is the assertion that knowledge is different from opinion and experience because it "recognises a relationship to reality that is independent of us" (Young & Muller, 2013, p. 2). An implication of this is that not all knowledge is the same; PK is specialised (although not all specialised knowledge is powerful). Powerful or specialised knowledge, Young and Muller (2013) suggest, has four properties that make it distinct from non-specialised knowledge. Two of these are of particular interest for this research. Firstly, they suggest that PK is "systematically revisable" (p. 10); that there are some generally agreed criteria for making judgments in the discipline. Secondly, they suggest that PK is "emergent" (p. 12). In other words, although knowledge is produced by social conditions and contexts, it cannot be reduced to these conditions and contexts; its value is independent of these.

In a later work on PK, Muller and Young (2019) claim that "potentially, everyone can have this power, it is infinitely transferable, hence the fundamental democracy of PK and its conceptual link to social justice" (p. 198). They contrast this with "knowledge of the powerful" which they describe the "capacity to restrict access to PK" (p. 198). This suggests that an authentically transformative legal education should focus on access to PK as a curriculum principle, and the dismantling of structures and systems that facilitate the restriction of such access.

An implication of the conception of PK echoes Young and Muller's (2010) earlier work on knowledge boundaries: that the easy association of strong knowledge boundaries with reactionary or conservative stances, and a lack of boundaries with educational and social progressiveness, is flawed. Young and Muller (2013) problematise the equation of interpretivist approaches with social justice or transformation and conclude their paper with the following:

> We too share that vision of freedom, but for us, as we hope to have shown, it is only through the boundaries of the disciplines that genuine freedom, unforeseen expanded possibilities, can be generated. In the meantime, we can but emphasise the importance

> of powerful specialised knowledge in its diverse forms as the best, and most just, basis for curricular decision-making. (Young & Muller, 2013, p. 27)

This work has implications for both Questions 1.1 and 1.2. It is important to analyse participants' approaches to what counts as legal knowledge, and in particular the ways they conceptualise knowledge boundaries, between different areas of legal knowledge, and between legal and everyday knowledge more broadly.

Lastly, and made stronger in relation to the notion of PK, Morrow's (2009) seminal term "epistemological access" is explained in chapter one, but is worth revisiting in more detail here, in relation to his understanding of disciplinary knowledge. Morrow (2009) suggests that academic disciplines are called that for a good reason: they have developed around the search for systematically articulated forms of knowledge and understanding. He goes on to identify four qualities intrinsic to academic disciplines: they have particular standards of achievement that are constitutive of these practices; they have histories (and not just pasts); they have developed over long periods of time to find out what is true; and they are essentially cooperative, depending for their continued flourishing on being maintained by communities of participants (pp. 76-77). This accords with Young and Muller's (2013) claim that disciplinary communities develop criteria over time for what is most true, in that discipline, at that time. They observe that

> even disciplinary communities that are characterised by sharp disagreements about the criteria for judging 'bestness' can still usually judge innovations in their disciplines with a considerable degree of agreement (Muller, 2010). This is a mark of all specialised forms of knowledge. (Young & Muller, 2013, p. 236)

Morrow (2009) terms the process of learning how to be a participant in these communities of academic practice, gaining "epistemological access" (EA) and identifies the characteristics of this process: one must learn the intrinsic disciplines and constitutive standards of the practice; one must recognise that this is a reasonably long-term project, involving systematic learning; and it may require the "sympathetic assistance of those who already understand the practice" (p. 77). He goes on to argue that, for EA to be possible, learners must have "a particular kind of self-understanding in relation to the practice in question" (p. 79) and that if they view themselves as consumers, or victims (instead of "novice participants") they will never achieve EA (p. 79).

This understanding of systemic disciplinary knowledge, and the related requirements for epistemological access, offers useful ways into understanding how to create EA to legal knowledge and legal writing. It also presents some challenges to the constructivist view (Quinot, 2012; Quinot & Greenbaum, 2015) as well as conceptions of community presented by Heyns (2014).

Luckett (2019) reflects on the implications of decolonisation for the concepts of EA to powerful knowledge. She acknowledges the problematic of the implied dualistic thinking, in that one part of the dichotomy (powerful knowledge) tends to get privileged as “good”; the other (knowers, or constructivist approaches to knowledge) as “bad” (Luckett, 2019, p. 50). She further acknowledges the implication that a social realist lens might use this dichotomy to critique the decolonial turn but goes on to argue that it is not a necessary implication of the social realist position. Rather, she is sympathetic to the call for decolonisation and advocates for a position that both acknowledges “that social identity is salient to epistemic judgment” and suggests it is necessary “to reject social identity on its own as sufficient grounds for making a knowledge claim” (Luckett, 2019, p. 55). Luckett’s nuanced argument avoids limited dichotomous thinking, and offers an approach to decolonisation of the curriculum that is compatible with the concept of powerful knowledge, in a way that might enhance EA.

To conclude this section, I hope I have shown how social realism forms an important part of the conceptual framework for this thesis. Social realism offers a third lens through which to view and categorise knowledge conceptions. It further offers a theoretically persuasive base from which to critique positions in the legal knowledge literature, particularly those which draw on “voice discourse”, as well as the assumption in some of the legal education literature that constructivist pedagogies are inherently transformative. I will use this literature to frame questions about how participants understand both the structure and boundaries of legal knowledge, and whether this maps with understandings of legal writing.

I now turn to the last section of this chapter, where I present an overview of the main claims and conceptual framework that arise from chapter two.

## 2.5 Claims Arising from the Literature Review and Conceptual Framework

There are several claims, and some questions, that arise from this literature review. My first claim, from the literature reviewed in chapter one, is that the contexts in which legal writing is learned, taught, and practised in South Africa are complex, contested and changing. Higher education and the legal profession are grappling with what it means to transform and/or decolonise; different interpretations could affect what it means to write well in law. The higher education landscape is also changing rapidly, due to increases in student numbers; the impact of technology; and increasing corporatisation. The profession, too, is affected by the impact of technology and the recent implementation of the LPA. These rapidly changing contexts may affect how legal writing is understood in South Africa at this historical juncture.

Secondly, there is no clear, shared definition of legal writing, especially for South Africa. This is an especially curious anomaly in law. A clear definition is fundamental, the starting point for any legal knowledge or argument. I suggest that this lack of a clear definition could be due to the recurring polarities in much of the literature. The different orientations to writing development that are drawn on to theorise it may contribute to the polarity. One of the polarities is the distinction between the traditional view, which regards writing as a generic, text-based skill with a focus on grammatical accuracy and general literacy, and the revisionist view, which regards writing as contextual, cognitive, and discourse-specific. Furthermore, understandings of legal writing may be affected by different understandings of the impact of technology; whether templates are valued or frowned upon; and whether plain language principles are embraced or rejected by legal writers. All these factors may contribute to the problem of what it means to write well in law.

Another factor that may contribute to this problem is the use of the terms “skill” and “skills development” in relation to legal writing. Although the notion of skill is challenged and problematised in some legal education literature, especially emanating from the United Kingdom, there is less of such critique in the South African legal education literature. The term “skill” is used frequently and loosely, sometimes interchangeably with the term “competence”, with little conceptual clarity. Insights from literature on professional knowledge that define, analyse, and critique the concepts of “skills” and “skills development” are important for this thesis. Imprecise and differing use of the term “skill”, in conversations about legal writing, may contribute to different understandings of what it means to write well in law.

A fourth claim, emerging from the literature reviewed, is that different views on legal education may affect orientations to legal writing. Here the main polarity is in views on the purpose of legal education: should it be broadly academic or to prepare students for legal practice? Emerging from this, should the legal curriculum be broad or narrow, with an academic or legal-practice focus? Finally, is legal education best served by a traditional, constructivist or critical pedagogy?

A fifth claim is that different approaches to legal knowledge may affect one's orientation to legal writing. Although multiple dichotomies are identified in the literature, these can broadly be categorised into the following polarity: does one's positivist or interpretivist, traditional or transformed approach to legal knowledge affect one's conceptions of legal writing? Underlying these dichotomies are questions about whether understandings of legal traditions, legal plurality, and what it means to transform or decolonise the law, affect what it means to write in law.

By attempting to understand these factors, particularly the recurring polarities in the literature on legal education and law in South Africa, I claim that this novel method, of analysing legal writing or writings within broader conversations about how legal education and legal knowledge are understood, may lead to better conceptualised understandings of legal writing.

Lastly, I find concepts from the social realist perspective invaluable in formulating a conceptually clearer framework for understanding conceptions of legal education and legal knowledge – and their possible relationship to legal writing. The social realist approach makes me cautious about accepting the dichotomies presented in positivist and interpretivist positions on legal knowledge. Moreover, social realism provides a theoretical framework for questioning the validity of these dichotomies, particularly the positivist-interpretivist dichotomy. "Social realist" becomes a helpful third category, in addition to the legal literature's categories of "positivist" and "interpretivist", to categorise approaches to legal knowledge. Terms such as "powerful knowledge" and "knowledge boundaries" will be used to develop the analytical framework in chapter three. My fifth claim is that concepts from social realist literature can shift the stalemate of the polarities in legal education literature and be used to reframe a more nuanced conception of legal education, legal knowledge, and legal writing.

I conclude this chapter with Diagram 2, below, which presents a summary of the conceptual framework developed in this chapter:

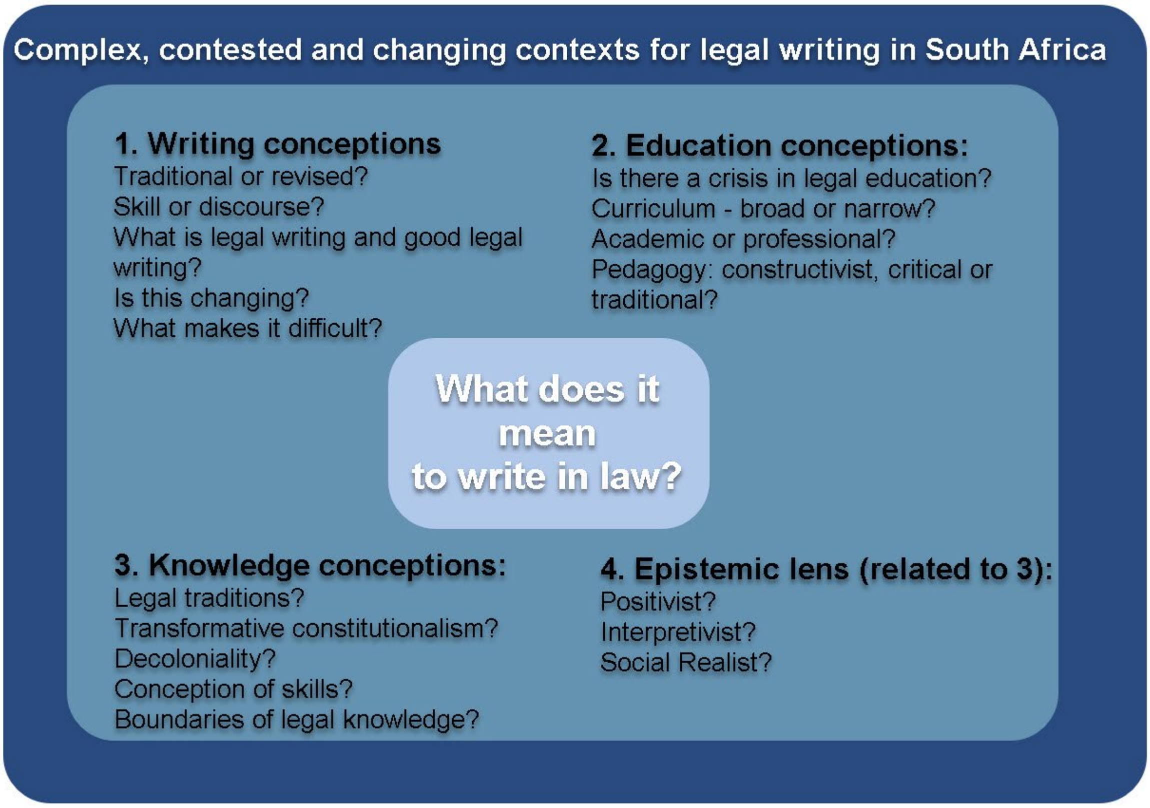



**Diagram 2: Conceptual framework**

# CHAPTER 3: RESEARCH DESIGN AND METHODOLOGY

As stated in chapter one, the aim of this thesis is to conduct exploratory research to investigate and articulate i) some of the ways in which legal writing is understood and practised in a South African higher education context; ii) how these understandings might be influenced by conceptions of legal education and legal knowledge and iii) how similarly or differently legal practitioners conceive of legal writing.

This chapter sets out the methodology used to meet the aim: the role of the researcher; the research design; sampling and data collection; the analytical framework; ethics; challenges to the research; time frames; and limitations of the study.

## 3.1 Overview

This research, in its attempt to develop a clearer understanding of what it means to write in law, has both conceptual and empirical elements. In chapter two, I developed the conceptual framework for this study from different bodies of literature. I further used some of the conceptual tools from the literature to develop the analytical framework (set out in section 3.5 of this chapter) and to create initial coding categories for the empirical data, making this research deductive, or "etic" (Henning, van Rensburg & Smit, 2004, p. 83). However, further coding categories were developed from the empirical data itself, giving the research an inductive (or emic) element. The empirical data derives from ten in-depth, semi-structured interviews with legal academics and legal practitioners. The empirical research was conducted in two phases: in phase one, data from interviews with five legal academics was coded, analysed, and discussed. Arising from questions generated during phase one, a further five interviews were conducted with legal practitioners involved in vocational training, both advocates and attorneys. These interviews were also coded, analysed, and discussed. Most coding categories were developed in phase one of the research, but some new ones emerged from the data in phase two (two for legal education and fourteen for legal writing). The findings from both phases are presented separately and then together, within the analytical framework developed from the conceptual framework in chapter two, so that the conceptual and empirical are drawn together to develop a response to the research questions.

## 3.2 Role of the researcher

In chapter one, I describe myself as an "insider-outsider" to the discipline of law. This has relevance to my role as researcher, particularly in phase one of the research. I work at the law school where the first phase of this research took place; a colleague who works with the academic participants to teach and develop legal writing. This raises the question of whether my role and position in the law school might influence the interviews, and perhaps yield different results than if the interviewer was a neutral "outsider". McMillan and Schumacher (2006) term this position "inside observer". They acknowledge the potentially problematic impact of being an "inside observer" and caution that "the dual role researcher must be exceedingly sensitive regarding which voice is represented in the study" (p. 345). I am mindful of the potential for my own voice to intrude, eclipse or influence the voices represented in the research, and of affecting the analysis of the data, so that findings reflect my own sense of what the answers to the research question should or could be.

This mindfulness is more commonly described as "researcher reflexivity" (McMillan & Schumacher, 2006). These scholars define researcher reflexivity as "the rigorous self-scrutiny by the researcher throughout the entire research process" (p. 327) and argue that, if maintained as intended, this should strengthen the validity of research findings. Conscious of this need to be consistently reflexive, I attempted to engage in the interviews in as objective a manner as possible, remaining aware of the possible effect of my "insider observer" status. I also emphasised the confidentiality of the interviews to participants, both in writing and in person.

Henning et al., (2004) comment on the difficulty of maintaining "the ambience of trust and accountability" (p. 75) in in-depth interviews. Paradoxically, a benefit of my "insider observer" status is that it may have been easier to maintain this trust and accountability as a colleague, in a way that an "outsider" might have found more difficult. The length of the interviews with the academic participants may attest to this: all of them took much longer than expected, because participants were so open and willing to elaborate in ways that I had not anticipated. A common sentiment shared by these participants after the interview was along the lines of "I usually hate interviews but that was an interesting discussion we had". I therefore contend that my dual role presents both challenges, which can be managed through researcher reflexivity, as well as opportunities for greater trust and engagement and hence, richer, more descriptive data. This "insider" status was less marked with the interviews with legal practitioners. Participants knew I was a teacher of legal writing, but not a practitioner, which may be a factor in the resultant somewhat thinner data generated in the practitioner interviews.

**A discourse of empowerment**

Henning et al. (2004) draw on Gubrium and Holstein's (2002) notion of a "discourse of empowerment" and describe it as a "valuable mind tool" (Henning et al., 2004, p. 69) in interview research. This was a key tool employed in this research. In essence, it shifts the understanding of the roles of interviewer and participant. Instead of interviewees being "vessels of information" they become "research partners"; the two work together to capture the essence of the unit of analysis (p. 68). It also disrupts the traditional interviewer-interviewee relationship (that the participant holds the knowledge, and the researcher holds the control). Most importantly, answers to questions are not meant to be conclusive but rather "serve to further the agenda for discussion" (p. 68). The researcher remains accountable, but open to allowing spaces for deeper exploration of ideas.

My role in the interviews was thus to record but also to probe participants' conceptions; to formulate good questions but also to modify or build on these questions; and to interpret and interrogate responses to these questions. My role in the research more broadly was to use this data to understand the relationship between writing, education, and knowledge in law better, and to discover whether such an understanding could contribute to a clearer understanding of legal writing or legal writings.

## 3.3 Research Design

This research is applied and qualitative in nature. Merriam (2009) outlines the following characteristics of qualitative research: it seeks to understand participants' perspectives, not the researcher's; the researcher is the primary instrument for data collection and analysis; the product is richly descriptive and sample selection is usually non-random, purposeful, and small. The design of this research meets all these criteria. It does not seek to analyse a broad range of student writing in law across a range of contexts, or to interview a fully representative range of academics and practitioners. Rather, by narrowing the research field to five purposefully chosen lecturers from one institution, teaching different courses; and five practitioners, attorneys and advocates, involved in practical vocational training, it attempts to understand the nuances and complexities of how a small group of academics and practitioners understand good legal writing and the ways in which this is influenced, if at all, by their conceptions of legal education and legal knowledge.

Corbin and Strauss (2008) suggest that the most important reason to do qualitative research is

> the desire to step beyond the known and enter into the world of participants, to see the world from their perspective and in doing so make discoveries that will contribute to the development of empirical knowledge. (Corbin & Strauss, 2008, p. 16)

They further identify the willingness to tolerate ambiguity as a necessary trait of a qualitative researcher. This research is intended to contribute to knowledge about legal writing and its development in South African contexts, but I am acutely aware that the findings are likely to be open to multiple interpretations and perhaps be particular to very specific contexts.

McMillan and Schumacher (2006) describe the purpose of this type of research as being "descriptive exploratory": to examine a little understood phenomenon; to discover themes in participant meanings; and to develop, in detail, a concept, model or hypothesis for further research (p. 317). This is precisely what I hope to do in this work: to examine the phenomenon of legal writing, in a tertiary context and in practical vocational training, and to develop a conceptual model for understanding the complexities of legal writing, based on the themes that emerge both from the literature and from the data. I do not pretend that the results will be conclusive, but rather that they will contribute to a framework for further research.

## 3.4 Research Sample, Data Collection and Analysis

### 3.4.1 Research Sample

**Purposeful Sampling**

The number of participants in this study is purposefully small. I am careful not to claim, therefore, that their views represent the perspectives of the legal academy or legal profession as a whole. Purposeful sampling involves selecting information-rich cases for study in-depth, "when one wants to study something about those cases without needing or desiring to generalize to all such cases" (McMillan & Schumacher, 2006, p. 319). Merriam (2009) describes purposeful sampling as being "based on the assumption that the investigator must select a sample from which the most can be learned" (p. 77). It is done to obtain maximally useful information from small samples. McMillan and Schumacher (2006) add "the power and logic of purposeful sampling is that a few cases studied in depth yield many insights about the topic" (p. 319). The purposeful sampling strategy that is used in this research is maximum variation, or quota, sampling. Maximum variation sampling is when participants are selected to "obtain maximum differences of perspectives about a topic among information-rich informants" (p. 320). This description accurately captures the value of interviewing a deliberately selected, small number of participants. In the first phase of the research, lecturers from five different courses were identified for interviews. These courses reflect a range of subject types in law, which are represented in the table below. By drawing on courses that reflect a range of types of legal subjects, I claim that trying to understand legal writing as part of its knowledge structure, rather than as a "stand-alone" skill, may lead to a stronger and more nuanced understanding of legal writing. Hypotheses about the conceptual strength, or grammaticality (Bernstein, 1999a) of the subjects contributed to this choice.

The details of the first phase sample group are summarised in the table below.

**Table 2: The sample group for Phase One.**

| Subject Type: | Example: | Rationale: |
|---|---|---|
| Older subject | Family Law | Historical common law knowledge base (modified by statute incorporating pluralist notions of law). Grammar assumed to be fairly strong. |
| Newer subject | Intellectual Property | More recent statutory knowledge base. Grammar assumed to be strong. |
| Foundational subject | Constitutional Law | Impact of transformative constitutionalism on writing? Grammar assumed to be contested. |
| Procedural subject | Civil Procedure | Procedural rather than substantive legal knowledge base. Grammar assumed to be strong. |
| Outlier | Jurisprudence | Draws on a broader, more philosophical knowledge base. Grammar assumed to be weak. |

In the second phase of the research, I wanted to find out how similar or different practitioners' conceptions of legal education, knowledge and writing would be. Participants are five legal practitioners who are involved in some way in practical vocational training. I was careful to ensure that both attorneys and advocates were interviewed, again in an attempt to elicit a range of conceptions. I also wanted to ensure that a range of voices were represented, not just voices from the dominant Bar and large commercial law firms. For maximum variation, I identified advocates from the traditional and alternate Bar, who help to prepare pupils for the Bar examinations, and attorneys from a firm, a legal NGO and one who is both at a firm and teaches at LEAD. The details of this group of participants is set out below:

**Table 3: The sample group for Phase Two:**

| Type: | Rationale: |
|---|---|
| Advocate who trains for Bar examinations | Should elicit views from the formal branch of the advocates' profession |
| Advocate who is involved in alternative Bar training | Should elicit further/alternative views from the advocates' profession |
| Advocate and attorney who trains practitioners through LEAD or other formal structures | Should elicit a range of views on legal education, knowledge and writing in the profession, beyond the views on candidate legal practitioners. |
| Attorney based at a firm who trains CLPs in-house and at LEAD. | Should provide insight into views pertaining to attorneys in training |
| Attorney based at a legal NGO, responsible for in-house training of CLPs. | Should elicit further/alternative views from the attorneys' profession. |

## Participant Identification

In phase one, once I had selected the subject types, I had to select participants to be interviewed from these five subjects. This was done partially purposively; partly ad-hoc. For example, in some cases the participant was chosen because they were the only teacher of that subject not on sabbatical at the time, or they were the only person from that subject willing to be interviewed. However, I did attempt to ensure that the group of participants comprised academics of different levels of seniority and years of teaching experience, and to ensure that some had some practical legal experience.

In phase two, selection was similarly part purposive; part ad-hoc. To some extent, the choice of participants was affected by who was willing to be interviewed (several potential participants declined to be interviewed or did not reply to requests for an interview).

However, I attempted to ensure that the sample remained purposeful by ensuring that the five participants represented a range of types of work in the legal profession and were of different ages and experiences.

I thought very carefully about whether to identify participants by race or gender. I am mindful of arguments about structural and systemic racism and sexism, and whether one can or should fail to acknowledge these as significant factors. I am also mindful of the imperative to transform and decolonise legal education, and the significance of race and gender in this. However, I decided that neither race nor gender, as categories, would contribute meaningfully to understanding this data and could, in fact, contribute unintentionally to inferences being made based on assumptions about gender or race. This is congruent with the social realist approach, explored in chapter two, that knowledge is not reduced to context or knowers.

Participants were chosen based on the subject that they taught (phase one) and their different roles in the profession (phase two), and I decided that this should be the only identifier. Race labels can be fraught – does one draw on Apartheid era categories that should now be a matter of history and yet continue to be used, often problematically? If one asks the participant how they choose to identify, does this add meaningfully to the data or does it invite assumptions based on the reader’s interpretations of these labels?

I note here, however, that this small purposive sample is diverse: In phase one, the group of participants comprises three women and two men; three Black and two White. In phase two, the group of participants comprises three men and two women: four Black and one White. I hope that this diversity will ensure that the research does not replicate the silencing of Black and female voices in the legal profession, described in chapter two.

Part of the decision to avoid identification by gender was driven by the need to protect the participants’ anonymity, especially in phase one of the research. The South African legal academy is small, and the identification of participants’ subject areas already narrows the field and threatens anonymity. I have therefore chosen to use the pronouns ‘she’ and ‘her’ generically, to refer to all the participants, throughout this thesis.

Another decision that had to be made was regarding the naming of participants in the study. Although it is common practice to give participants pseudonyms, I have some reservations about this. Firstly, these pseudonyms often reveal participants’ gender or ethnicity (for example, when “Zandile” becomes “Zinzi” or “Marianne” becomes “Marie”). Secondly, and this is probably a personal quirk, I feel that pseudonyms take away from the participant’s identity. I wanted to protect their anonymity, but I did not want to turn their story into someone else’s. For these reasons, I decided to simply label each participant with a number. The number does not signify anything except the sequence of the interviews (which took place according to participants’ availability and so does not signify anything about relative importance). For example, the first participant that I interviewed was called “P1”. I am aware that some readers may find this method of naming alienating in its impersonality, but I decided to trust that the participants’ voices would emerge strongly enough to counteract any alienating effect.

The participants are thus identified as follows:

**Table 4: Participants and subjects/location in the legal profession.**

| **Phase one of the research:** | |
|---|---|
| Participant name: | Subject/Location in the Profession: |
| P1 | Family Law |
| P2 | Jurisprudence |
| P3 | Constitutional Law |
| P4 | Intellectual Property |
| P5 | Civil Procedure |
| **Phase two of the research:** | |
| P6 | Retired judge, advocate, and attorney; trains practitioners through LEAD |
| P7 | Senior advocate; trains CLPs for Bar examinations |
| P8 | Senior advocate and member of an alternative Bar; trains CLPs for Bar examinations |
| P9 | Younger attorney at legal NGO; responsible for in-house training programme for CLPs |
| P10 | Older attorney based at a firm; trains both at LEAD and in-house |

### 3.4.2 Data collection

**Semi-structured Interviews**

Data was collected through ten interviews. For both phases of the research, semi-structured, in-depth interviews were chosen to offer a balance between reliability and flexibility. The mix of more and less structured interview questions, the ability to use questions flexibly, whilst still generating specific data from all respondents and remaining guided by a list of questions to be explored, was held likely to yield thicker, more descriptive data than a highly structured interview schedule or written questionnaire (Merriam, 2009).

The same interview schedule was used for all interviews (although, as the interviews were semi-structured, there were some variations due to probing questions and further discussion). The interview schedule began with some background questions about the participant's legal experience and legal education. It went on to ask questions about their conceptions of legal knowledge, followed by questions about legal education (both its role and current state). This was followed by a range of questions about legal writing in general, as well as more specifically (in relation to a specific assignment, if one had been identified). It concluded with an open-ended question to elicit any further thoughts on any of the topics, which may have emerged during the interview. The full interview schedule can be found as Appendix 1.

**Phase one: (2016-2017)**

Data was collected from five interviews with academics who teach at LLB level in one South African law school. Academics were chosen, rather than students, as I wanted to find out about their conceptions of legal writing, as well as what criteria they used to assess students' writing. Students' perceptions about legal writing might be a valuable source of data for a further, related study, but would not speak directly to this research question. The sample is deliberately small to attain greater depth of analysis. The length of the interviews – on average an hour and forty minutes each – contributed to the generation of deeper, thicker data.

Each lecturer was interviewed separately, in a one-on-one, in-depth, semi-structured interview, which was recorded. These interviews took place between September 2016 and June 2017, at the law school where all phase one participants work. In the first part of the interview, I asked lecturers questions about legal education, legal knowledge, and legal writing. The second part of the interview focussed on the task demands of the written assignment. Lecturers were asked to select three writing samples from each class: one that they regarded as excellent, one that had some features of good legal writing but that did not meet expectations overall, and one that lecturers regarded as very poor writing. The intention was that these samples would be shared with the researcher before the interviews, but this did not always happen. In several of the interviews, only one or two student scripts were brought or discussed, and in two cases, no scripts were brought at all, so this second part of the interview had to take place later. (Problems with this aspect of the research design are discussed later, under "Ethical Matters"). Discussion often took us away from the questions in the interview schedule, or else the participant volunteered the information before the question was asked, making it redundant.

**Phase two: (2018-2019):**

Data was collected from five interviews with legal practitioners who are involved in practical vocational training in the same geographical area as the law school in phase one. As in phase one, the sample was deliberately small to attain greater depth of analysis and to ensure that phase one and phase two sample sizes were comparable.

The same interviewing process was followed as in phase one. These interviews took place between November 2018 and May 2019 (a time frame determined by participants' availability to be interviewed). The interviews took place at a venue preferred by the participants. Three preferred to be interviewed at their workplace, one at her home, and one preferred to be interviewed at the law school. These participants were asked the same questions from the first part of the academics' interviews; questions about legal education, legal knowledge, and legal writing. It was not possible to conduct the second part of the interview with most of the participants, as they felt that candidate legal practitioners' writing was "work product" and therefore confidential, so they did not bring any samples of writing to discuss. This probably led to the data from phase two being less "thick" and yielding less insight into specific conceptions of legal writing. The interviews were somewhat shorter than the interviews with academics (on average, one hour and fifteen minutes as opposed to one hour and forty minutes) but sufficiently long to attain depth.

### The process

The interviews were audio-recorded, using a digital voice recorder, and professionally transcribed. I then went through the transcriptions to check for accuracy, to add detail that had been inaudible to the transcriber, and to correct minor errors and omissions that I identified when checking the transcripts against the audio recordings. These reworked versions of the transcripts were used as the texts for analysis. These texts are long (at 243 pages) and so are not included as part of the appendices.

### Artefact collection

Participants in the interviews were asked to bring an example of a recent written assignment, and three samples of students' or candidate legal practitioners' written responses to the assignment question, to the interview. The intention was to make photocopies of both questions and answers, so that these tasks and responses could also be coded and analysed. A set of five assignment questions, and fifteen written responses, was thus envisaged for coding and analysis in phase one; a similar number was envisaged in phase two.

This aspect of the research design proved unexpectedly difficult to realise. In phase one, two of the participants brought both assignment questions and written answers, but the other three did not. (I did not infer anything regarding reasons for this, except that the period during which the research took place was a fraught and extremely busy time for legal academics, and this research was clearly not their priority). After several false starts, we settled on a compromise: we agreed to use a question that required extended writing from the respective November 2016 examinations, and I selected three examination scripts, based on marks, that seemed to reflect a "good", "average" and "poor" answer. This was clearly not ideal, and may have implications for the research, as the samples do not represent these lecturers' choice of good and less successful writing. Moreover, as discussing the scripts came right at the end of the interview, in several cases only two of the scripts were discussed, due to time constraints. When asked if the third could or should be discussed at another time, participants indicated that they had said all they felt they could say about the tasks. These artefacts, then, may be more 'ad hoc' than the initial design had intended. Furthermore, for reasons discussed in the "Ethics" section, it proved unexpectedly difficult to get student permission to use these artefacts for this research, so I have not included student scripts as a unit of analysis or as appendices.

In phase two, as mentioned earlier in this chapter, several participants either felt that writing samples were "work product" and therefore confidential, or they simply failed to bring any samples of writing or tasks to the interview. Others said that their students kept all the writing, and they could therefore not bring any samples. Although two participants brought one or two examples with them, and these were discussed, this second part of the interview went largely unrealised in phase two. However, some data on criteria was generated in other questions in the interview.

### 3.5 Analysis and analytical framework

The ultimate focus of the analysis is to understand participants' conceptions of legal writing. To test my hypothesis that such conceptions may be influenced by conceptions of legal education and legal knowledge, an analytical framework was developed that categorised participants' legal education conceptions first, then their legal knowledge conceptions, and then their legal writing conceptions.

The legal education questions arise from quadrant 2 of the conceptual framework (Chapter 2, Diagram 2), to investigate whether the participants' views reflect the claims in the literature that legal education in South Africa is in crisis, and to investigate their stance on the contested academia-practice divide that is summed up in the "Pericles and the Plumber" (Twining, 1967) debate.

The legal knowledge questions arise from quadrants 3 and 4 of the conceptual framework (Chapter 2, Diagram 2), to investigate whether participants' approaches to knowledge reflect either positions in the knowledge dichotomy presented in the legal literature (positivist vs interpretivist) or whether they could be categorised using the third lens of social realism. The social realist construct of "knowledge boundaries" (Young & Muller, 2010) is employed to investigate what participants' positions on these are, as well as whether they view any such boundaries as necessary or limiting. Social realism works with the notion of knowledge boundaries in two main ways. One is the boundary between everyday knowledge (horizontal discourse) and specialised knowledge (vertical discourse) (Bernstein, 1999a). The second is the boundary between different subjects or knowledge fields (Young & Muller, 2010). I use the second understanding for the analytical framework. I was interested in finding out if the participants held strong and clear boundaries between legal knowledge and other forms of knowledge, or whether they drew on conceptions of legal knowledge that view the boundaries between law and other subjects, such as political science, philosophy, or economics, as weak or becoming weakened.

The legal writing questions arise from quadrant 1 of the conceptual framework (Chapter 2, Diagram 2), which reflects the range of legal writing and writing development literature canvassed in chapter two. These are used to probe the dimensions of legal writing investigated in the study.

These dimensions and categories are summarised in an overview of the analytical framework, below. A detailed account of how I defined the dimensions and categories and how I decided to classify responses, within this analytical framework, can be found in section 3.5.2.

**Table 5: Analytical framework**

| | | | | |
|---|---|---|---|---|
| **Legal Education (*three dimensions*):** | | | | |
| **Dimension:** | **1. Role of legal education** | | | |
| Categories: | Broad (Inclination to Academia) | | Narrow (Inclination to Legal Practice) | |
| **Dimension:** | **2. State of legal education** | | | |
| Categories: | In crisis | In flux | Stable | Not in crisis |
| **Dimension:** | **3. Reasons for views on state of legal education** | | | |
| Categories | Multiple – derived from the data. | | | |
| **Legal knowledge (*three dimensions*)** | | | | |
| **Dimension:** | **1. Approach to legal knowledge** | | | |
| Categories: | Traditional/positivist | Social realist | General/constructivist | |
| **Dimension:** | **2. Boundaries between legal knowledge and other subjects** | | | |
| Categories: | Strong | Weak | Necessary | Limiting |
| **Dimension:** | **3. State of legal knowledge** | | | |
| Categories: | Contested | Stable | Partially contested | |
| **Legal writing (*five dimensions*)** | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| **Dimension:** | **1. Orientation to legal writing** | | | | | |
| Categories: | Traditional | | | | Revised | |
| **Dimension** | **2. Framing of legal writing** | | | | | |
| Categories: | Same as other good writing | Different/ Unique | Orientation shared by colleagues | Orientation contested amongst colleagues | Includes legal academic writing | Only writing done in the legal profession |
| **Dimension** | **3. State of legal writing amongst students/ candidate legal practitioners** | | | | | |
| Categories: | Problem | Not a problem | Same problems over time | | New/different problems | |
| **Dimension** | **4. Criteria for good legal writing** | | | | | |
| Categories | Multiple – derived from the data. | | | | | |
| **Dimension** | **5. Reasons for problems in student/candidate legal practitioner writing** | | | | | |
| Categories | Multiple – derived from the data. | | | | | |

My aim in the data analysis was, primarily, to identify participants' conceptions of legal writing, and secondarily, to identify conceptions of education and knowledge, and to analyse whether these conceptions are aligned to any suggested by the literature, or whether they are different conceptions. This required a very close, methodical working with each transcript, revisiting each one multiple times to ensure that i) I had identified all the statements that implied or directly stated any of these conceptions and ii) I was categorising conceptions across transcripts in a consistent manner.

The analysis involved several iterations: identifying and categorising each participant's conceptions; identifying patterns of conceptions both within and across participants; and identifying similarities and differences: between participants; between academics and practitioners; and between the data generated through the interviews and the existing literature canvassed in chapter two.

### 3.5.1 Content Analysis

Content analysis was used to analyse the empirical data generated in the interviews. Henning et al. (2004) conceive of content analysis as being congruent with grounded theory analysis and suggest that coding and categorising data too soon can lead to over-simplistic data and "thin" description (p. 102). Their suggested approach to grounded qualitative content analysis is thus to start with the data set (here, the phase one transcribed interviews with lecturers) and to use open coding to identify units of meaning and to create categories. I chose, however, to begin with some key ideas identified from the literature as a starting point, using the fields of education, knowledge and writing identified in chapter two, to develop categories. So, for example, participants' orientations to legal writing were categorised as traditional or revised; their approaches to legal knowledge categorised as positivist, social realist or general-constructivist. This phase of the coding was thus deductive, based on theory, rather than the inductive approach of grounded theory. Mindful of Henning et al.'s (2004) caution about the potential for this to lead to over-simplistic data; and to ensure "thick" description, I went on to create further categories that were named inductively, using the data as a guide.

In addition to the two initial types of coding, this research required some axial or link coding. Henning et al. (2004) define this as "the part of the analytic process where the researcher puts the parts of the data identified and separated in open coding back together in new ways to make connections between categories or the codes" (p. 132). Bringing the separate parts of the question together is necessary to reflect the complexity of any likely picture of the relationship between legal education, knowledge, and writing. After I had coded using the broad fields of legal education, legal knowledge, and legal writing, I then analysed across the three fields, to see if any patterns emerged across the data.

In phase two of the research, I followed a similar process for analysis. Data was analysed largely using the categories developed in phase one. Some new categories were developed, where new units of meaning emerged. Axial coding was again used, both within the phase two data and across both phases of the research, to be able to identify similarities and differences in conceptions, and to be able to answer the research question.

### 3.5.2 Developing the codes

My intention had been to use qualitative data analysis software Nvivo to code the data. After initial attempts to do so, it seemed to me that the software did not offer any meaningfully different functionality that was not already available to me in Microsoft Word. I therefore reverted to using Word to highlight, annotate and create memos and mind maps as I coded and analysed the data. I felt closer to the data, and more attuned to the nuances in the transcripts, than when I used the data analysis software.

My first attempt at coding categorised the data using the three fields from the analytical framework: legal education, legal knowledge, and legal writing. In this section, I describe the categories and their respective codes. I show how the data was categorised, using a sample from the transcripts as an indicator. Unless otherwise indicated, these categories and codes were developed in phase one of the research and used in both phases. I provide brief qualitative examples in the chapter, to show how I decided to categorise statements. A more detailed table, summarising the main codes, and an example indicator for each code, can be found as Appendix 2.

Moore and Muller (2002) observe that "the strength of a grammar, and hence the power of a knowledge structure, derives from the strength of its 'languages of description'" (p. 633). Internal and external languages of description are another concept from Bernstein; the former comprising the main concepts and conceptual language of the theory or subject, and the latter referring to the coding systems researchers develop to connect between the theory and empirical phenomenon. As I developed the codes, I tried to ensure that my external language of description was accurately capturing the main concepts from the data.

**LEGAL EDUCATION:**

Legal Education was analysed using three main dimensions from the analytical framework: Firstly, I analysed participants' conception of the **role of legal education.** In this dimension, there were two categories: **Broad role** (reflecting the academic, or philosophical view identified in the literature) [Code=Aph] and **Narrow Role** (reflecting a focus on legal practice, or legal skills) [Code=LS]. For example, if a participant stated, "*if you come to my course, when you get to your office, you're able to work using those skills*", I identified this as reflecting a clear focus on legal practice and coded it "LS".

The second dimension was participants' perceptions of the **state of legal education**. This dimension initially had three categories, but a fourth was added. These were: **legal education is in crisis** [code=IC]; **legal education is changing or in flux** [code=IF]; **legal education is relatively stable** [code=S]. Since there was a strong reaction from some participants to the notion of "crisis", I added a fourth category here: **legal education is not in crisis** [code=NIC]. For example, a statement by a participant that "*I would certainly not agree that legal education is in crisis. I think legal education is in a process of change*" seemed to fall clearly into this fourth category and I coded it as "NIC" and "IF".

In phase two of the research, it was necessary to differentiate between when participants were speaking about university-level legal education (indicated through the addition of a 'U' for university to the code) and when they were speaking about the vocational training of candidate legal practitioners (indicated through a 'P' for practice) added to the code. For example, when a practitioner participant described the training pupils receive now as "*very different…chalk and cheese*" I coded it as "IF-P"

To understand this second dimension in both phases better, a third dimension was added during analysis: **reasons for the positions on the state of legal education**. Categories here included: the relationship between staff and students [re]; pedagogy [p]; curriculum [cu]; decolonisation [dc]; constitutional basis [cb]; changes in law [l]; stability of the law [sl]; changes in Higher Education [he]; a drop in standard [s]; funding or funding models [f]; student numbers [sn]; and student preparedness [sp].

In phase two of the research, it was necessary to create two new categories for this third dimension, as participants put forward reasons for the state of legal education that were not explored by the legal academics in the first round of data collection. The first was LPA (the Legal Practice Act). This Act includes several requirements that changes how attorneys and advocates are trained, and regarding ongoing professional development, even after they are admitted to the profession. This is explored in more detail in chapter two. The second is pro (the legal profession); several participants offered, as one of the reasons for why legal education will need to change, is that the profession itself is changing rapidly. Although these changes in the profession are partly due to the LPA, not all changes can be ascribed to the LPA, and so I decided to keep this as a separate category. For example, the statement "*The legal profession is undergoing changes, within the next five years it will be unrecognisable. It's been deregulated, lawyers are competing with other professions*" fell clearly into this category and was coded as "pro".

Please see Appendix 2 'Table of Codes' for a summary of these codes and sample indicators.

**LEGAL KNOWLEDGE:**

I wanted to discover participants' **views** on the three dimensions of legal knowledge articulated in the analytical framework. Firstly, I sought to identify their **approach** to legal knowledge; secondly, their perceptions of the **boundaries** of legal knowledge; and, thirdly, their perceptions of the current **state** of legal knowledge. The first two of the three categories for approach to legal knowledge emerge from the legal education literature, which characterises approaches as either "positivist" (sometimes the word "traditional" or "restricted" is used) or "constructivist"/ "critical"/ "general" (See, for example, Modiri's 2013, 2014 & 2016 work, canvassed in chapter two).

I decided to call the first category **traditional-positivist.** This term is constructed from two commonly used words for this approach to knowledge in the legal education literature. I called the second category **general-constructivist**, drawing on terms from legal and educational literature. The word "general" is used in the sense of Douzinas and Geary's (2005) "general jurisprudence". I then added a third category – **social realist** – that emerges from the social realist literature on the sociology of knowledge (See, for example, Moore & Muller, 1999 and Young & Muller, 2010). This third category challenges the existing dichotomy in legal education literature and offers a third lens through which to frame approaches to knowledge.

I used the defining criteria from the literature to help me to decide how to categorise statements. For example, to be categorised as "**traditional-positivist**" a statement would have to reflect an approach to knowledge that is narrow, focused on legal rules, and does not include critique, contestations, or knowledge from other disciplines. It would also not include knower perspectives or experiences as part of knowledge. Such a statement would likely to lead to the second dimension – **knowledge boundaries** – as being viewed as strong and necessary to distinguish legal knowledge from other forms of specialised knowledge. The third dimension – the **state** of legal knowledge – also emerges from the approach and is more likely to be viewed as stable if the approach is traditional-positivist. To be categorised as "**general-constructivist**" a statement would have to imply an approach to knowledge that includes critique, contestation, and change; that might draw on knowledge from other disciplines; that might incorporate knowers' perspectives and experiences; and that may reject formal or traditional approaches to knowledge as being reactionary or untransformative. The related **knowledge boundary** view is likely that boundaries between law and other subjects are either weak or limiting and the related **state of knowledge** view is likely to be that legal knowledge is contested or partially contested. Lastly, to be categorised as a "**social realist**" approach, a statement should state or imply that knowledge is emergent from but not reducible to context; that objectivity is possible; and that knowledge is systematically revisable (often through the courts or the legislature). It might acknowledge contestations and knowers' perspectives and experiences, but not regard them as reasons for the need for change or reasons for a crisis of legal knowledge. The related **knowledge boundary** view is likely to be that boundaries between law and other subjects are strong and necessary and the **state of knowledge** view here is likely to be either stable or partially contested.

Three examples to show how I inferred participants' approach to legal knowledge from their statements follow. A statement like "*because so many of its hallowed assumptions are seem to more and more to be difficult to grasp, difficult to accept, foundations are shifting, whether law can even be thought about in foundational terms is not so clear anymore"* seemed to reflect a clear general-constructivist approach to legal knowledge and so was coded "GC". Whereas a statement like "*legal knowledge is a very technical thing. It requires memorising the rules off by rote*" seemed to reflect a traditional-positivist approach, and so was coded "TP". Thirdly, a statement like "*moral views or jurisprudence that is incorporated through the courts become part of legal knowledge"* was coded as "SR" as it demands a context-emergent, objective and systematically revisable approach to incorporating context or non-legal knowledge into legal knowledge. In law, systematically revisability occurs primarily through the courts or through the legislature.

Although discussed briefly above, the details of the second and third dimensions are as follows: the second dimension is participants' approach to **the boundaries between legal knowledge and other subjects**. Here, there were four categories: Did they see the **boundaries** of legal knowledge as **strong** [code=BS] or **weak** [code=BW]? Moreover, did they believe these **boundaries** to be **necessary** [code=BN] or **limiting** [code=BL]? Last, is the dimension "**the state of legal knowledge**". Here, there are three categories: whether participants thought that legal knowledge is **contested** [code=KC], **generally accepted/stable** [code=KA] or **partially contested** [code=Kpc].

There were a further four categories that the literature suggested would be important to examine: legal tradition [LT]; legal pluralism (and the related issue of decolonisation) [LP]; academic vs professional understandings of legal knowledge [A/Pr]; and the role/status of the Constitution (was it seen as stabilising/transformative or restrictive/flawed)? [Ct/Cf]. However, very little was said about the role of legal tradition, and participants seemed unconcerned about its importance, or unable to elaborate when probed, so these categories were abandoned. The other categories emerged occasionally, as reasons given for the positions outlined above, and so have been used as sub-categories, rather than as separate categories. They were not, however, commonly occurring.

A fourth dimension was initially planned to analyse **reasons for participants' beliefs about legal knowledge**. However, different participants offered such distinct reasons for their beliefs about legal knowledge that it was impossible to categorise them all. For this reason, some of the reasons are explained descriptively, rather than categorised. Some reasons that were possible to identify from the data included: Stability of laws or legal principles [ls]; contextual or political changes [pc]; the influence of critical theory [ct]; previously accepted assumptions about the law, or theories about the law, that were now being contested [ca]; the inter-disciplinarity of law [id]; law as a distinct discipline [dd]; law as being technical [t]; old and established law [oe]; that it fell under private law [pl].

**LEGAL WRITING:**

The general discussion about legal writing, as well as the discussion of examples of student writing, was analysed using the five dimensions from the analytical framework:

Firstly, there is the dimension of "**orientation to legal writing"**. The two categories, based on a distinction identified in the literature, are: **Traditional** [code=Tr] – which focuses on formal aspects of writing such as basic literacy, grammatical accuracy, and other surface level features; and **Revised** [code=Re] – which focuses on the underlying thinking and awareness of requirements of legal discourse. Both terms are drawn from Rideout and Ramsfield's (1994) work. For example, when a participant said (in reference to the problems in graduates' legal writing) "*they did not even know how to spell*" it seemed to me to reflect a traditional orientation to writing and so I coded this statement "Tr". Whereas a statement like

"*Writing is about thinking… writing is not about simply putting words on paper*" reflects a revised orientation to writing and was coded "Re".

The second dimension developed was "**framing of legal writing"**. Six categories were used here: did participants frame legal writing as the **same as good writing** in general [LWS] or **different/unique** [LWU]? Did they feel their understanding of legal writing would be shared/**accepted** by colleagues [LWA] or was the term **contested/**understood differently [LWC]? Did they frame legal writing to **include academic legal writing** [LWAc] or did they frame it as the kinds of **writing required by the profession** [LWPro]? For an example here: "*That's academic writing, it's writing about law. But for a practitioner, that's not legal writing*" – this was coded as "LWPro" as the statement seemed to indicate a clear framing of legal writing as something done for and by the profession.

The third dimension created for the legal writing analysis was participants' perceptions of the **state of law students' writing**. Here, four categories were created: Was it a **serious problem/concern** [LWP]? Or was it **not a particular problem** [LWNP]? Did students present **similar problems with legal writing over the years** [LWSP]? Or were there **new / different problems** [LWDP]? As a final example: a participant said (in relation to whether legal writing was a problem) "*it's the core of why we are what we are as lawyers…and we're not trained… I think it will be a major embarrassment for the profession in future"*. I coded this as "LWP" as this statement reflects a serious concern about writing, but I also coded it as "LWDP" as this participant foresaw the problems with writing as a potential embarrassment for the profession in the future; in other words, aspects of the problem of writing were new or emerging.

The fourth dimension was created to capture the **criteria**, or reasons, for participants' statements about writing, both in general and specifically. These were developed from the data. Categories were identified from data from both general and specific discussion, and include: method of analysis [m]; use of legal language [ll]; formality of tone [ft]; the need to be specific [sp]; coherence [co]; correct identification of legal issue/s [lii]; type of content or evidence accepted [ev]; ability to construct an argument [arg]; ability to apply law to facts [applic]; formal requirements [fr]; clarity and precision [cp]; good English [Eng]; structure or format [struc]; plagiarism [pl]; grammar and punctuation [gp]; lack of conceptual depth [cd];

lack of depth of analysis [da]; and correct citation [cit]. Further categories that emerged from the specific discussion of student writing were synthesis [synth]; “role of context [ctxt]; “topic analysis” [TA]; relevance [rel]; “Elegance of rhetoric” [ElR]; thoughtfulness [th]; and initiative and creativity [IC].

In phase two of the research, fourteen new writing criteria emerged from the data. These were: Persuasiveness [pers] ; achieved purpose [purp]; fit for audience [aud]; understandable [und]; good literacy skills [lit]; brevity [brev]; no jargon [jarg]; no precedents [prec]; works out cause of action [caus]; understands legal significance of facts [fact]; communicates client’s case clearly [communic]; understands the role of definitions [defn]; leads with the facts not the law [LWFNL]; and simplicity [simp].

Lastly, the fifth dimension captures participants’ **reasons for problems in student writing.** These included: students do not read [sdr]; English not home language [EL2]; we do not expect them to write enough/assignments are too infrequent and too short (not enough writing) [new]; students apply formats in shallow ways [shf]; large student numbers [sn]; poor basic educ [be]; and unclear or conflicting expectations regarding writing [exp]. How university lecturers mark – valuing content and not the way an answer is written – was a reason identified in both phase one and two of the research [mark].

Further reasons identified in phase two, in addition to the above, were that the LLB is now a first degree (LLB) and that there is no longer a language requirement for the LLB (LR). One participant attributed the reason to where the students had studied [educ] or where they had previously worked [work]. Another felt that it was due to universities becoming over-focussed on being financially viable to the detriment of a focus on knowledge and literacy [fin] as well as anxiety generated by an intimidating legal environment [intim].

Please refer to Appendix 2, which summarises all codes used, and provides a sample indicator from the data for each one.

### 3.5.3 Analysis of data

Once all the interviews had been coded, it was necessary to start to critically examine the dimensions and categories, and to see if any patterns emerged that might start to speak to the research questions. Although this was highly dependent on my personal inferences, I made sure to keep track of these patterns, through tabulation, and to revisit the transcripts and categories frequently, to crosscheck claims, to ensure the analysis was rigorously done.

#### 3.5.3.1 Phase One

To capture my first impressions of the data, I initially made notes on each interview and created a descriptive portrait of each participant (Appendix 3).

From these portraits, some patterns and queries emerged. For example, only one of the phase one participants echoed the literature's claim that South African legal education is in crisis, although there was a strong agreement that it is in flux. This made me wonder whether the literature reflected the views of the profession more strongly than the views of legal academics. What was clear from the portraits is that participants have quite different conceptions of legal knowledge and that all except one seem to accept that knowledge boundaries are both strong and necessary in law. This seemed to be an important pattern to explore more thoroughly in the data analysis. Another pattern that emerged from these portraits was that most participants seem to draw on the revised orientation, of writing as thinking and reasoning, rather than on the traditional orientation to writing – again, not what the literature had led me to anticipate (Greenbaum, 2004). This too made me alert to this question in the data analysis. Lastly, these portraits revealed a range of criteria associated with good legal writing, and a range of understandings of legal writing, which confirmed my hunch that the term "legal writing" is used to mean different things. Interestingly, this is something that most participants acknowledged too.

After I had created the participant portraits, I started to analyse each interview more systematically, using the dimensions and categories identified above. Chunks of text that reflected a particular conception were highlighted and identified with the related code. For example, P1's claim that "*legal knowledge is knowing the law, so knowing what is written or unwritten, but what is law. Understanding it and having the ability to apply it to a given scenario*" was coded [TP] for a traditional-positivist approach to legal knowledge.

Where a participant repeated a view, that they had already expressed earlier in the interview, I still assigned it a code, as the repetition is likely to indicate the importance of that view to the participant. Once all the interviews were analysed in this way, I added up each of the codes, categorising them by the fields of legal education, legal knowledge, and legal writing, to identify any patterns that emerged. A summary of these can be seen in the tables below. These tables are included here, not to present the findings, but to illustrate how patterns in the data were identified.

**Table 6: Summary of the main Legal Education Codes.**

| | Role | | Status | | | |
|---|---|---|---|---|---|---|
| Code: | Aph | LS | IC | NIC | IF | S |
| P1 | 0 | 2 | 0 | 4 | 9 | 5 |
| P2 | 8 | 8 | 0 | 0 | 25 | 0 |
| P3 | 3 | 3 | 0 | 0 | 6 | 7 |
| P4 | 0 | 3 | 5 | 1 | 11 | 0 |
| P5 | 0 | 5 | 0 | 0 | 13 | 3 |

**Table 7: Summary of the main Legal Knowledge Codes.**

| | Approach | | | Boundaries | | | | State | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Code: | TP | SR | GC | BS | BW | BN | BL | KC | KA | Kpc |
| P1 | 2 | 0 | 0 | 6 | 0 | 8 | 0 | 0 | 6 | 2 |
| P2 | 0 | 12 | 13 | 4 | 19 | 2 | 10 | 19 | 4 | 0 |
| P3 | 6 | 9 | 0 | 15 | 6 | 6 | 0 | 0 | 9 | 2 |
| P4 | 4 | 4 | 0 | 9 | 2 | 4 | 2 | 0 | 9 | 2 |
| P5 | 4 | 0 | 0 | 5 | 0 | 4 | 0 | 0 | 8 | 1 |

**Table 8: Summary of the main Legal Writing Codes.**

| | Orientation | | Framing | | | | | | State | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Code: | Tr | Re | LWS | LWU | LWA | LWC | LWAc | LWPro | LWP | LWNP | LWSP | LWDP |
| P1 | 3 | 6 | 0 | 4 | 1 | 0 | 0 | 1 | 3 | 0 | 3 | 0 |
| P2 | 6 | 10 | 8 | 10 | 0 | 2 | 6 | 3 | 8 | 3 | 0 | 0 |
| P3 | 1 | 7 | 2 | 2 | 3 | 0 | 2 | 2 | 2 | 1 | 0 | 0 |
| P4 | 0 | 11 | 0 | 6 | 2 | 2 | 2 | 4 | 8 | 0 | 0 | 5 |
| P5 | 4 | 3 | 0 | 12 | 0 | 9 | 2 | 18 | 12 | 0 | 0 | 7 |

Although the numbers in themselves are not significant, counting in this way made it easier to identify patterns in the data, which I could focus on in the subsequent qualitative data analysis. As an example of how I interpreted the codes: with reference to the main legal education codes (Table 6), three of the participants (P1, P4 and P5) conceive of the role of legal education in terms of legal skills for the profession (LS), whilst the other two (P2 and P3) present a balance between academic and professional conceptions of the role (Aph and LS). The codes in Table 6 also show that all participants believe that the status of legal education is in flux (IF), although only one – P4 – agrees that it is in crisis (IC).

The legal knowledge table (Table 7) confirms the pattern suggested in the participant portraits that, apart from one outlier (P2=12SR, 13GC), all participants draw on traditional-positivist or social realist approaches to legal knowledge (P1= 2TP; P3=6TP, 9SR; P4=4TP, 4SR; P5= 4TP). Knowledge boundaries (BN) were mostly understood as strong and necessary, except by P2.

The legal writing table (Table 8) confirms early patterns detected in the participant portraits: that most participants' orientation to legal writing is more revised than traditional (RE); that legal writing is largely seen as different from other good writing (LWU) and there is general agreement that it is a problem (LWP).

After some thought, I decided not to tabulate the fourth category of legal knowledge (reasons for beliefs) or the last two categories for legal writing (criteria and possible reasons). There were two main reasons for this: one practical and one principled. Firstly, there were so many sub-categories for these categories that I was not sure that any meaningful patterns could be discerned in very large tables. More importantly, because some of the criteria were discussed qualitatively, instead of being categorised, and because it was clear that participants meant quite different things by these criteria, I was not sure that these tables would contribute to the reliability of the data analysis. These criteria are captured in the diagrams for each participant in the data analysis chapters instead. Dimension five – "reasons for problems in student writing" – was not tabulated as, although interesting data, it did not speak directly to the research question. I used these responses to help me to understand the rest of the data, rather than as distinct data to be analysed.

Lastly, for this section, although the samples of students' writing were not analysed as separate artefacts, it seemed useful to continue to set out the discussion of the criteria used to respond to the writing samples separately. This offered a way of being able to check whether what participants said in general about legal writing in their subject was consistent with how they responded to the samples of student writing. Therefore, in chapter four, where the first phase data is analysed, participants' general conceptions of legal writing are set out before their discussion of writing samples, although the overall findings about writing are discussed together. The diagrams of criteria for each participant, in chapter four, thus show the criteria participants used when speaking about legal writing in general; the criteria they mentioned when discussing successful student writing; and criteria that they used when discussing less successful student writing.

#### 3.5.3.2 Phase Two

In the same way as in phase one of the research, I initially made notes on each interview and created a descriptive portrait of each participant (Appendix 3). This made it possible to note the early patterns of similarity and difference between the academic participants and the practitioner participants, as well as early patterns amongst the practitioners. Like the academic participants, three practitioner participants resisted the notion of legal education being in crisis, and for similar reasons, although two agreed very strongly that there was a crisis. Apart from one participant, there was general agreement that the four-year LLB was problematic and did not prepare students for practice. All participants were vociferous in arguing that a much stronger practical skills component should be included in the degree. This was such a strong thread in the data that it led me to identify this as a new area of focus for analysis and discussion.

Regarding legal knowledge, and like phase one findings, different conceptions of legal knowledge emerged. Interestingly, there was less agreement amongst this group of participants that legal knowledge boundaries were strong and necessary. There was a much stronger equation of knowledge with practical legal skills amongst these participants, again suggesting that an interrogation of the notion of skills would be necessary in this phase of the research.

Participants' orientations to legal writing were less clearly revised than in phase one, although P6 clearly equated writing with thinking. This group spoke more about the role of audience and purpose in writing, and one participant was very critical of the so-called requirements of legal writing. Like in phase one, a very different set of criteria emerged, suggesting that the hunch that legal writing means very different things to different people is likely to be confirmed in the analysis. However, because phase two participants did not discuss samples of CLP writing, a less detailed and nuanced picture of specific legal writing criteria emerged in this phase of the research, which may be a weakness in the data generated.

After I had created the participant portraits, I started to analyse each interview more systematically, using the dimensions and categories in the same way as described in 3.5.3.2. Once all the interviews were analysed, I again added up each of the codes, to identify any patterns. The tables below summarise these:

**Table 9: Summary of the main Legal Education Codes**

| | Role | | Status | | | |
|---|---|---|---|---|---|---|
| Code: | Aph | LS | IC | NIC | IF | S |
| P6 | 0 | 8 | 4 (U) | 0 | 18 (10U; 8P) * | 0 |
| P7 | 0 | 4 | 0 | 4 (3U;1P) | 5 (1U;4P) | 0 |
| P8 | 7 | 8 | 0 | 2 | 7 | 6 |
| P9 | 1 | 3 | 0 | 3 (U) | 7 (4U; 3P) | 0 |
| P10 | 0 | 4 | 7 | 0 | 0 | 0 |

*As explained earlier in the chapter, 'U' = university; 'P' = during vocational training in practice.

**Table 10: Summary of the main Legal Knowledge Codes**

| | Approach | | | Boundaries | | | | State | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Code: | TP | SR | GC | BS | BW | BN | BL | KC | KA | Kpc |
| P6 | 3 | 0 | 0 | 2 | 5 | 2 | 6 | 0 | 2 | 9 |
| P7 | 1 | 4 | 1 | 1 | 2 | 1 | 4 | 0 | 2 | 2 |
| P8 | 0 | 3 | 7 | 1 | 3 | 0 | 4 | 8 | 2 | 0 |
| P9 | 0 | 3 | 0 | 1 | 2 | 1 | 2 | 3 | 1 | 1 |
| P10 | 2 | 1 | 0 | 1 | 2 | 2 | 0 | 6 | 0 | 0 |

**Table 11: Summary of the main Legal Writing Codes**

| | Orientation | | Framing | | | | | | State | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Code: | Tr | Re | LWS | LWU | LWA | LWC | LWAc | LWPro | LWP | LWNP | LWSP | LWDP |
| P6 | 6 | 8 | 2 | 3 | 2 | 1 | 0 | 4 | 10: 6(U); 4(P) | 0 | 1 | 6 |
| P7 | 6 | 6 | 4 | 5 | 1 | 0 | 1 | 6 | 3 | 0 | 0 | 0 |
| P8 | 0 | 7 | 0 | 3 | 0 | 1 | 0 | 4 | 3 | 0 | 0 | 3 |
| P9 | 8 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 4 | 1 | 0 | 0 |
| P10 | 1 | 4 | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 0 | 1 | 2 |

Although the numbers themselves are not significant, the tables again show some interesting patterns in the data. For example, in Table 9, perhaps unsurprisingly for practitioners, only one of these participants viewed the role of legal education as being both academic/philosophical (Aph) and to impart legal skills (LS). The rest strongly felt that the role of legal education was to prepare students for practice (LS). Regarding knowledge (Table 10), a greater range of positions on knowledge boundaries (KB) can be seen, although the reasons for these positions were quite different from the reasons offered by the academic participants. This was identified as an area needing interrogation. The orientation to legal writing (Table 11) is an interesting mix of traditional and revised, suggesting that there may be a mismatch between academics' and practitioners' conceptions here. That legal writing is a problem, and mostly an emerging one, was a strongly held perception. A strong framing of legal writing as being writing done in the profession can be seen.

One important difference between phase one and phase two of the research is that it is not possible to differentiate between general conceptions of writing and the discussion of the specific tasks, for reasons set out earlier in this chapter. This part of the analysis therefore is set out slightly differently in chapter six: the writing criteria diagrams show the similarities and differences between academic and practitioner participants' criteria, and not the distinctions between general writing criteria and those used in relation to specific texts.

This lack of specific, task-related identification of legal writing criteria is a weakness in this part of the analysis. It may be necessary to view the first phase data analysis as the primary focus of analysis, and the second phase as secondary, as a result.

## 3.6 Ethical Matters

An ethics clearance application for phase one of the research was made to the Wits School of Education Non-Medical Ethics Committee. Ethics clearance was granted on the 7th of November 2016 (Ethics protocol number: 2016ECE056M – Appendix 4). Letters of permission were subsequently sent to the Acting Head of the School of Law, to the Registrar's Office, and to the Vice-Chancellor's Office. Permission was granted by these offices for the research to proceed (Appendix 5). All participants were given, and signed, letters of informed consent (Appendix 6). For phase two, a further ethic clearance application was made and granted on the 24th of October 2018 (Ethics protocol number: 2018ECE023D – Appendix 7). As phase two of the research was not conducted at the University, it was only necessary to send a further letter of permission to the Head of the School of Law (Appendix 8) who wholeheartedly supported the further research. Phase two participants were also given, and signed, letters of informed consent (Appendix 9).

In both phases, the usual conditions of confidentiality were met. Each participant was assured that their identity would remain anonymous and that a pseudonym would be used. All were given the opportunity to choose their own pseudonym, but all declined. Participants were informed that all data and findings would be shared with them. All participants were asked if they would prefer to have the name of the law school removed from the title of the study, and/or the whole of the study. Although no one objected to the site of study being identified, I decided not to identify the law school where the research was conducted, to maintain confidentiality of the academic participants. All participants preferred that their own identities remain anonymous, and I have taken as many steps as I can to protect this anonymity.

In phase one, the issue of student permissions became more problematic than initially envisioned. Although they were not direct participants and were in no way affected by their work being chosen for discussion, I had originally intended to get their informed consent in the following ways: My plan was to go to a lecture of each of the lecturers involved in my study and explain the purpose and scope of my research to the whole class. I then intended to explain to them how three anonymous scripts, chosen by the lecturer, would be discussed as part of the interview. I envisaged getting consent forms from all students in each of the five courses, once I had explained how they would be used, so that any student, who preferred not to have their script discussed, could explicitly withhold consent.

These in-lecture explanations of the research were scheduled for October 2016. Due to the student protests that emerged at this time, most of the classes were cancelled and I was not able to speak to the students in class. The protests also meant that interviews that had been scheduled for November and December 2016 were, for the most part, postponed to the following year, as lecturers were under immense pressure, not only to find ways to finish their teaching, but to set and mark a series of examinations, between November and January. For this reason, I did not obtain whole-class student consent. Instead, I decided to contact the individual students whose scripts had been selected for discussion, explain the purpose of the research, and ask these students if they had any objection to their work being discussed as part of the research. This, however, meant that the students were no longer anonymous to me. I attempted to protect their anonymity to some extent by not finding out their names, but simply using their student numbers to email them on their student email addresses. In this email, I explained the purpose of the research, and attached a letter of explanation and letter of consent and asked the students to reply. I also explained in the email that I had purposefully not found out their names, to offer them some level of anonymity. Despite repeat emails, I only received one reply. (This student consented – and cheerfully added her name).

Since the students' work is neither identified, nor referred to directly, in the study, I decided enough had been done to attempt to obtain their consent.

## 3.7 Limitations

Although the attempt to develop a conceptual answer to the research question should be relevant to South African legal academics and practitioners involved in vocational training, it is likely that the results of the empirical research may have limited generalisability. It may reveal common beliefs about and responses to legal writing, and its intersection with legal education and legal knowledge. However, it could also simply yield five academics' and five practitioners' personal or institutional understandings of particular task requirements, and the nature of legal writing, rather than yield insights that can be applied to legal writing in general, or to the broader legal writing community.

I do not claim to have found answers to the perplexing question of what counts as good legal writing that are true for every university, or the whole of the legal profession, or even answers that might hold true in ten years' time. This is a fluid time for law and legal education in South Africa, both in academic and professional circles. At universities, what counts as legal knowledge is contested, the LLB curriculum recently underwent review and resultant changes are being implemented, and attempts are being made to agree on effective legal pedagogy, all within broader conversations about transformation, decolonisation, and academic writing more generally. Amongst practitioners, the LPA contributes to fluidity, as do changes in the profession, in professional legal writing, and challenges to some aspects of the law. However, I hope that the methodology that I have chosen, the "thick" data it generates, and the detailed analysis that it requires, generates research findings that will contribute to contemplating, if not answering, the complex question of what it means to write in law in South Africa at this point in the twenty first century.

In the next chapter, an overview of the data analysis from phase one of the research is presented.

# CHAPTER 4: PHASE ONE DATA ANALYSIS: AN OVERVIEW OF DATA FROM INTERVIEWS WITH LEGAL ACADEMICS

This chapter presents an overview of the analysis of interviews with legal academics, per participant, organised using the fields of legal education, legal knowledge, and legal writing (phase one of the research). Details on how the dimensions and categories were developed can be found in chapter three. This overview will be drawn on in chapter five, which presents the findings from this part of the data analysis. The aim of this chapter is to present a systematic "big picture" analysis of the data on legal academics' conceptions, within the fields identified in the literature, before particular findings are analysed in more detail, and before data across the phases is analysed and discussed.

## 4.1 Participant One (P1): Family Law

### 4.1.1 Legal Education

P1's views on the role of education were coherent and oriented towards legal practice. She twice expressed views that reflected an inclination to legal practice or legal skills [LS=2] but none that reflected the academic-philosophical view [Aph=0]. In the more general discussion about whether the LLB was in crisis, whilst refuting the notion of crisis, she agreed that, with regard to being prepared to enter the legal profession, "perhaps the graduates that get out of the programme are not as well equipped as we would want them to be".

P1 expressed a range of opinions regarding the state of legal education in South Africa today. She was firmly of the view that legal education is not in crisis [NIC=4] as seen in the following comment: "I think the Constitution is doing well to actually guide the transformation of legal education; transformation of education in general... I would certainly not agree that legal education is in crisis". She then went on to identify a number of ways in which she believed legal education was in flux [IF=9] – "I think legal education is in a process of change, and with change comes a little bit of friction" – as well as ways in which it was stable or similar to her own experience of legal education [S=5].

The main reason for her view that legal education was not in crisis, was that it retained and could be guided by a strong constitutional foundation [cb=1]; this was also offered as a reason for it being stable [cb=1]. The reason given for perceived stability was that she felt that legal pedagogy has remained essentially the same [p=2] – “I think the way that the law is taught is similar”.

Reasons given for P1’s view that legal education was in flux were as follows: The main reasons related to changes in curriculum [cu=4], closely followed by changes in the relationship between staff and students [re=3]. In this regard, she felt that it was now a more open relationship, with students expecting more from lecturers. The decolonisation debate was mentioned once as a factor contributing to flux [dc=1] as was the impact of the Constitution [cb=1]. This change was perceived as positive, as reported above: “I think the Constitution is doing well to actually guide the transformation of legal education; transformation of education in general”. P1 thus understands the Constitution to be simultaneously stabilising and transformative, both for legal education and for legal knowledge, as seen below.

### 4.1.2 Legal Knowledge

P1 indicated that, in general, legal knowledge in her subject, Family Law, was accepted and stable [KA=6]. Reasons given for stability were generally rooted in the foundational nature of the Constitution; that it provided a very clear framework for how the law is to be developed [Ct=6]. Her opinion of the Constitution was a very positive one and she indicated that she had not yet seen anything that had convinced her of the need to take a more critical approach to it. The following quotation captures much of this position:

> I don’t know…I’m very much in love with the Constitution (laughs). So I wouldn’t want anything that sort of rocks that. But that’s mainly because I haven’t been convinced that there’s a need for it…at the moment I’m not being convinced of anything that requires such a drastic shift. I don’t think the Constitution has failed us.

She twice acknowledged partial contestation of legal knowledge in her subject [Kpc=2]. The reasons given for the partial contestation related to legal pluralism [LP=2]; that there were matters relating to religious or customary law where the law was not clear, or there was not a single legal answer to a question.

She made statements such as “law has its own method, has its own learning” that indicated that boundaries in her subject were both strong and necessary [BS=6; BN=8] and made no statements that indicated that boundaries were either weak or limiting [BW=0; BL=0].

Overall, her approach to legal knowledge seemed to reflect the traditional-positivist approach [TP=2; SR=0; GC=0]. This is reflected in statements like "I think legal knowledge is knowing the law, so knowing what is written or unwritten, but what is law. Understanding it and having the ability to apply it to a given scenario".

### 4.1.3 Legal Writing

P1 initially presented a revised orientation to legal writing [Re=2] in that she defined legal writing in terms of knowing, understanding, and applying the law; something that required discourse-specific thinking and reasoning [arg=2; ev=2; applic=2]:

> It is all about knowing the law, understanding it, and being able to apply it. That is what legal writing would consist of. Getting the knowledge, understanding it, and then being able to compose a response to a particular legal problem in terms of your writing.

Later in the interview she made several statements regarding writing that reflected a more traditional orientation [Tr=3] in which she focussed on grammar, punctuation, and language use [gp=2], and in which she suggested that a possible solution to students' legal writing problems was a legal language course.

However, during her discussion of examples of student writing, she again reflected a revised orientation to writing [Re=4]. P1 explained that, in order to succeed in this assessment, students had to take information from research, and present it in "a logical fashion". In particular, she said she was looking for "how logical are the arguments" and "how logical are the conclusions" – and added that a common problem was that there was very often a collapse in logic between what is written in the body of an essay, and the conclusions drawn. She also specified that clear articulation of legal principles, and an appropriate level of detail in articulating these principles, was essential. The role of writing in this assessment was described as "extremely important".

With regard to framing, she felt that other legal academics shared and would agree with her understanding of legal writing [LWA=1]. She felt quite strongly [LWU=4] that legal writing was different from other forms of good writing. She described these differences in terms of unique legal language [ll=2]; unique methods of analysis [m=1] and the requirements of a more formal tone [ft=1]. She saw legal writing as the type of writing required by the profession [LWPro=1].

With regard to the state of students' legal writing, P1 felt that it was a problem [LWP=3] and that it was a consistent problem; she had noted no shifts or changes in the types of writing problems during her time at the university [LWSP=3]. The main types of problems she identified were plagiarism [pl=4] and problems with language use, including grammar and punctuation [gp=2]. She felt that the main reasons for problems with writing were rooted in students not reading [sdr=2] and the reality that English was an additional language for many students [EL2=1]. She offered two possible solutions to the problems experienced by students: to make better use of the Writing Centre [WC=1] and for the School to introduce a compulsory legal language course for all students [ll=1].

These conceptions of legal education, legal knowledge and legal writing are summarised in Diagrams 3, 4 and 5 at the end of this section.

### Conceptions of samples of student writing

#### *The writing task: A Family Law Essay (mid-term assignment)*

Write an essay discussing the statement highlighted below in the context of the questions posed. In doing so you must find, read and use at least the following sources:

1 book chapter and;

2 local academic articles and;

1 international academic article and;

2 reported cases.

You may use more sources, but not less.

Statement:

**"Thus, where parents (or their estates) are unable to provide maintenance [for their children], the duty to do so devolves, if the claimant is legitimate, upon the grandparents on both sides, or, if he is illegitimate, upon the maternal grandparents only. The burden falls to be shared between grandfather and grandmother." [Boberg, 1977, *The Law of Persons and the Family]***

Do maternal and paternal grandparents have a duty to support grandchildren born out of wedlock? Also discuss whether they in fact should have this duty of support? Your discussion should include a human rights perspective and consider all relevant legislation, common law and case law. **[30 marks]**

#### *Purpose*

P1 described the purpose of the writing task discussed as being to assess whether students could research a legal question, find the types of sources that they were required to draw on, and synthesise these sources to build an argument that answered the question posed. This included being able to structure this argument in the form of a "traditional" academic essay with an introduction, body, and conclusion. When probed, she explained that students were expected to go beyond the minimum research requirements set out in the instructions, and that this research required finding the most up-to-date legal information and – in particular – finding the case that showed the shift in law. The task required students to go beyond describing the legal position (the "is"), to critically analysing the legal position from a human rights perspective (the "should"). However, this latter part of the question should not be misunderstood as reflecting an interpretivist approach, as students are expected to draw on the Bill of Rights (part of South African law) and critically analyse within the boundaries of this part of the law.

***Role of writing***

P1 described the role of writing in this assignment as follows:

> The most important part of the essay is writing, because it's about taking all the information and presenting it in a logical fashion so that the reader can understand how exactly you went about answering the question. So writing is extremely important.

***Conceptions of successful writing***

In the discussion of what had contributed to successful writing in this assignment, the main criterion was evidence [ev=5]. P1 expected a successful student to draw on case law and to find one particular case in which the shift in law was shown. Without this evidence, a student could not succeed in this assignment. She further explained that it was necessary to derive a particular kind of evidence from these cases: the relevant legal principles. The successful student showed the shift in law, with reference to these legal principles. She further commented that "this person is doing well by showing the complete shift" which suggests that it is not only the quality of evidence that is important, but knowing what to do with it, and what level of detail is relevant [rel=1].

Topic analysis was another criterion that was used [TA=1]. P1 observed that most students did not fully respond to the topic and left out the human rights perspective. The successful student drew on Section 9-3 of the Constitution to evaluate the legal position from a human rights perspective. Again, this suggests the importance not just of identifying the necessary supporting evidence, but of knowing how to use it in ways that are valued, to respond to the question, congruent with Bangeni and Greenbaum's (2013) findings, discussed in chapter two.

Adhering to formal requirements was mentioned once [fr=1] – the successful student had drawn on the number of sources specified in the instructions.

***Conceptions of less successful writing***

A greater range of criteria was identified in the discussion of the less successful writing. Problems with structure [struc=5] was the most commonly occurring criterion. P1 was particularly concerned about the failure of the introduction and conclusion of the essay. She explained:

> The introduction was inadequate because it didn't sort of adhere to what an introduction should be doing, it should be telling the reader, okay, this is what the issue is, and this is what I'm going to do with it. Instead it appeared that the student went right into the issue, instead of introducing it.

She later added "that was a very big problem with students, just no introduction, just go for the answer". Participants had starkly conflicting expectations about how a piece of legal writing should begin. Here, P1 expected introductory information in which the writer identified the issue and set out how she would deal with it in the essay. However, other participants had the exact opposite reaction to introductions, and bemoaned the "waffle" and "unnecessary general information" that they had to read before the student got to the issue. In other words, they wanted students to "just go for the answer". This will be discussed in more detail in chapter five.

With regard to the conclusion, P1 read out the comment she had written at the end of the script: "your conclusion is unclear or not consistent". In discussion, she elaborated that

> when you're concluding you're drawing together everything that you've been writing and then now you conclude to support what you've been saying. So sum up what it is. And this particular student took a quote from someone else, took something else as their conclusion.

The student's conclusion did not meet P1's expectations about the purpose and accepted 'moves' of a conclusion. It was also inconsistent with the information that had been presented earlier in the essay: "what he was saying wasn't actually connected with the actual topic". So not only was it structurally problematic, but also drew on irrelevant evidence.

Concerns about the ethics of the writing recurred [pl=4]. Pl identified plagiarism as a "major problem" in the writing, in particular the "taking words directly from the case without acknowledging that that is where this comes from". In discussing the plagiarism in the work, P1 went on to explain that "we discourage excessive quotation because that's also done as a form of plagiarism, you're not presenting your own work". It became clear in the discussion that a very precise and consistent form of paraphrasing was required, to avoid charges of plagiarism.

Failure to develop a sound legal argument [arg=3] and failure to fully understand and respond to the topic [TA=3] were also recurring. With regard to argument, P1 stated that it was a common problem, and that "I felt that the student didn't really make arguments. There was no analysis...it was just descriptive. There was just, this is the law and therefore, yes, they should have obligation to support". Of interest is that the student had drawn on the required evidence, and described it, but it was the failure to use that evidence to construct an argument that had contributed to this writing's lack of success.

It has already been mentioned that many students failed to include a human rights perspective in their essays. Here, P1 went on to explain that the greatest problem, in this regard, was that even when students had included a human rights perspective, it was nearly always with regard to the rights of children, whereas she had expected students to consider the rights of the grandparents as well. She felt that it should be clear to students that the word "discussion" required them to consider both sides – children and grandparents:

> That's what a discussion is, to generally look at both sides. And I don't know why they would have not thought that actually the grandparents also have rights. Why should their rights be limited in favour of the rights of the child?

The student's failure to deduce what the lecturer believed was clear in the instruction "discuss" may have led to the failure to fully respond to the topic.

Two other criteria that were identified were relevance of information [rel=2] and the quality of evidence [ev=1]. It was intriguing that quality of evidence was the most commonly occurring criterion in the discussion of the successful writing, but the criterion of lack of quality evidence did not occur as strongly in the discussion of the less successful writing.

The main legal education, legal knowledge, and legal writing dimensions, discussed above, are summarised in the three bar graphs below. The third legal education dimension (reasons for views on the state of legal education) is not included as participants across both phases use too wide a range of categories to represent clearly in a graph.

These graphs are followed by three pie charts that represent the criteria that P1 used in the general discussion about writing; when she discussed successful student writing; and when she discussed less successful writing. (A separate list of codes is provided, to use as a key. See the addendum to Appendix 2).

**Participant 1: Summary of main codes**

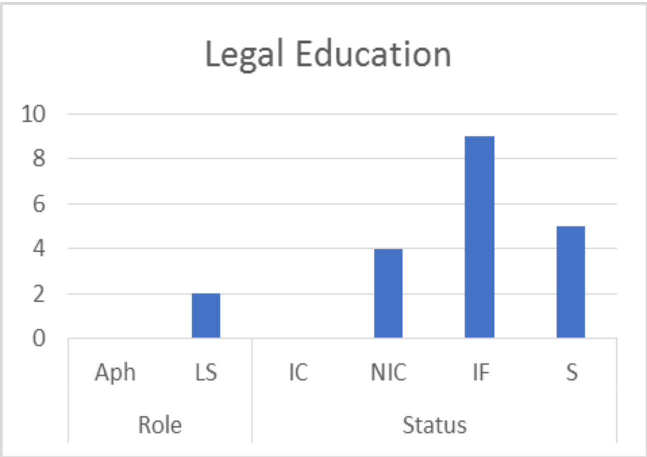



**Diagram 3: Legal Education (P1)**

P1's view of the role of legal education as being to prepare students for legal practice is congruent with her framing of legal writing mostly as the kinds of writing required in legal practice. This may be associated with her strongly traditional-positivist approach to knowledge and her sense that knowledge in her subject is mostly stable, with strong and necessary boundaries.

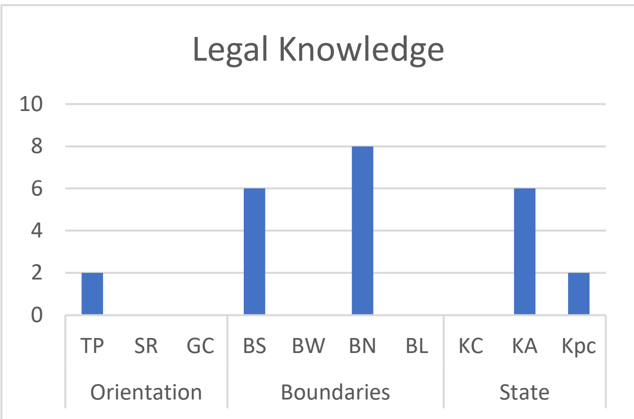



**Diagram 4: Legal Knowledge (P1)**

It may also be associated with her sense that legal writing is unique and different from other kinds of good writing, and that it is a problem for students.

Although P1 refutes the notion that legal education is in crisis, she strongly agrees that it is in flux, although she also sees ways in which it is stable. She regards

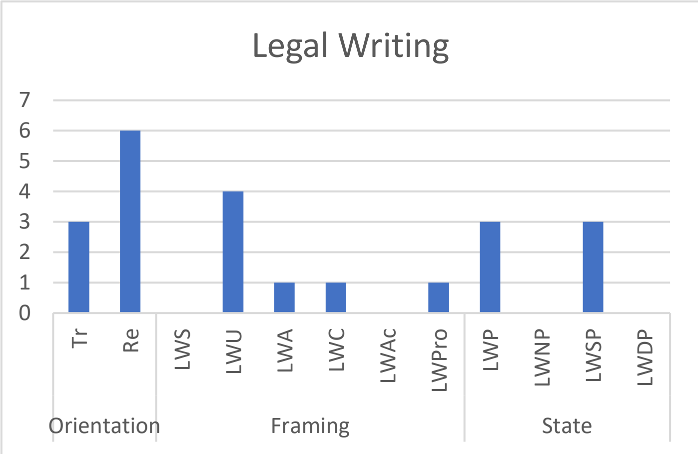



**Diagram 5: Legal Writing (P1)**

the problems in legal writing as stable, in that she felt these problems are the same over time. P1's revised orientation to writing is seen twice as often as her traditional orientation, suggesting that she values the kinds of reasoning, evidence and argument required in legal practice, in the writing of her students.

**Summary of main writing criteria:**

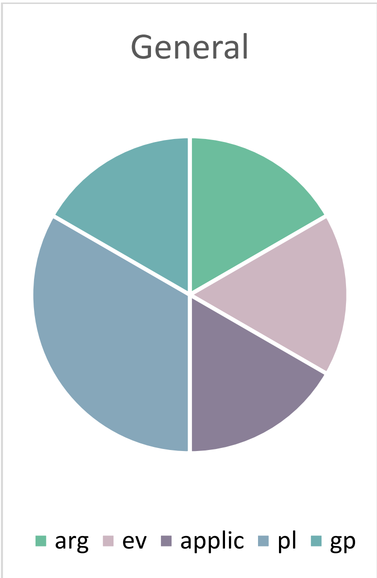



**Diagram 6: General (P1)**

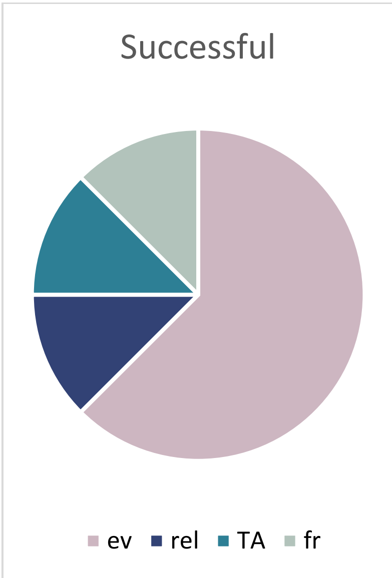



**Diagram 7: Successful (P1)**

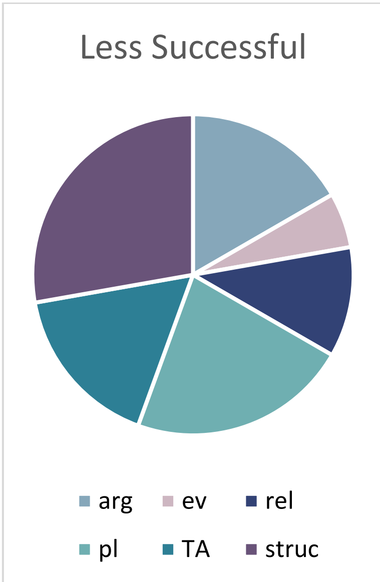



**Diagram 8: Less Successful (P1)**

These pie charts clearly show that P1 strongly values relevant evidence, application, and argument. Interestingly, although structure is not mentioned in conceptions of general or successful writing, it is a criterion for less successful writing. Plagiarism is a significant criterion, both in general and in the less successful piece. The ability to analyse the topic correctly is also valued. Although accuracy in terms of surface level features like grammar and punctuation is identified as a criterion in the general discussion, it is not used as a criterion in either of the other two.

## 4.2 Participant Two (P2): Jurisprudence

### 4.2.1 Legal Education

With regard to role, P2 offered equal recognition of the two perspectives [LS=8; Aph=8]. Whilst she repeatedly acknowledged the role that legal education had to play in preparing students for practice, this was generally offered as the prelude to a ‘however’ which signalled the broader, more philosophical view. Of note here, is that P2 rejected the dichotomous view of legal education’s role; repeatedly suggesting that a critical academic education is necessary to create better, more creative practitioners. For example, “I think that those students who are more exposed and more receptive to critical ways of thinking are more likely to be better and more creative practitioners”.

With regard to status, although P2 was reluctant to engage in the notion of crisis, she asserted strongly that legal education is in a state of flux [IF=25]. This strong sense of change is perhaps best reflected in her statement that

> I think a lot of the assumptions behind the curriculum are really…they have sort of feet of clay increasingly, and it’s almost like we lawyers are like medieval priests discovering that God doesn’t really exist but we still have to hold onto the doctrine.

No statements regarding stability were made [S=0].

P2 offered a broad range of reasons for her view that legal education is in flux and different from when she studied law. The most commonly cited reasons for change were curriculum-related [cu=15]. These curriculum-related changes included a greater range of curriculum options, a shift to more public law subjects, semesterisation, a more socially responsive curriculum, and greater criticality. Changes in the law itself [l=7] was a fairly strong theme. Other reasons were the changing nature of higher education [he=4], particularly the call for decolonisation [dc=4], and changes in pedagogy [p=4]. Lastly, the impact of the Constitution [cb=3] was mentioned although, unlike P1, the Constitution was seen as a force for change, rather than stability: “I think there’s been a huge change. Largely under the impact, I think, of the political changes and the adoption of a constitution, so there’s been a fundamental change in particularly public law but also private law”.

### 4.2.2 Legal Knowledge

P2 offered a complex, nuanced range of approaches to legal knowledge, which could seem, in places, contradictory. This can be understood by her considering both legal knowledge more broadly, and legal knowledge in her subject, which she describes as being “legal theory – the ideas perhaps that in other courses are not explicitly acknowledged. It’s the theoretical, philosophical edifice upon which other subjects are premised”.

P2 indicated very strongly that legal knowledge in her subject, and more broadly, was contested [KC=19] although she also indicated that there were ways in which legal knowledge, in general, was accepted [KA=4]. Reasons given for accepted legal knowledge all related to certain law, or legal principles, which she felt were stable and should be taught as such, rather than simply being critiqued [ls=4], for example, the concept of rights. Reasons given for why she felt legal knowledge was highly contested were more varied, and related both to legal knowledge in general, and in her subject more specifically. With regard to law in general, contestation seemed very strongly related to political contestations and changes [pc=9]; P2 suggested that the distinction between law and politics is collapsing, and that current political contestations presented related contestations to the notion of what legal knowledge is. This sense of a disappearing distinction between powerful knowledge and knowledge of the powerful (Young & Muller, 2013; Muller & Young, 2019) is reflected in statements like:

> And so I feel like at the moment that we’re holding onto foundations which are in the process of crumbling, and that may be a creative kind of hiatus moment, that it’s either there are new ideas, new ways of thinking about law and institutions are developing, and the students they have the good fortune in a way of studying law at a time like this but it also brings with it a lot of uncertainty about law and its role in our society. And it’s highly contested.

Here, P2 refers both to the critical approach to the Constitution, reflected in the work of scholars like Modiri (2013, 2014 & 2016) and Heyns (2014), as well as political challenges to the law and how it operates, for example, challenges to laws governing property ownership, particularly land.

With regard to her subject in particular, the need to engage critically with theory [ct=4] and moreover, that the assumptions of classical or liberal jurisprudence are under scrutiny [ca=6] were offered as reasons for the contested nature of legal knowledge.

P2 indicated strongly that the boundaries of legal knowledge, both in her subject and more broadly, were weak and in many cases crumbling [BW=19]. This can be seen in statements like "in Jurisprudence it's definitely interdisciplinary" and, more powerfully:

> I don't think it's an exaggeration to say that legal theory increasingly shows elements of a kind of intellectual crisis. Because so many of its hallowed assumptions seem more and more to be difficult to grasp, difficult to accept, foundations are shifting, whether a law can even be thought about in foundational terms is not so clear anymore.

She made several statements to indicate that she felt that these boundaries were limiting and therefore should crumble [BL=10] – "I think it's usually contested. And that's a good thing" and

> South Africa is perhaps a newcomer to these rapid changes in the way we think about law and legal institutions and its relationship to other forms of knowledge. So it's a very interesting and exciting time but it's also quite disconcerting.

However, she also indicated that there were some ways in which boundaries were both strong [BS=4] and necessary [BN=2]. Here, she felt that some elements of law had to be taught, before they were critiqued [ls=2] and she gave the specific example of how she felt that the old debates from classical jurisprudence should be taught, without necessarily having their assumptions interrogated [ls=1].

The reasons given for her opinion that boundaries of legal knowledge were weak, and crumbling were varied. The main set of reasons related to her understanding that legal knowledge in her subject is strongly interdisciplinary, and that there were increasingly fewer clear boundaries between law and politics, or law and philosophy [id=7]. The other main set of reasons related to increasingly questioned assumptions, and changes in social theory [ca=8] and the related challenges of teaching where classical foundations of knowledge are increasingly suspect. P2 saw the weakening of boundaries in her subject as simultaneously positive and as creating uncertainty, as discussed above.

P2 made no statements that could be interpreted as traditional-positivist [TP=0] but made an interesting range of statements that reflected both a social realist approach [SR=12] and a general-constructivist approach [GC=13]. This range represents P2's reflections on her own approach, which is deeply nuanced; sometimes strongly social realist, yet also drawing on a strongly critical approach, whilst wishing to engage fairly with and be open to more radical and constructivist approaches. The tension in P2's position can be seen in statements like:

> I think that law, it's both discrete and it is distinctive and at the same time a part of the social and political system. So…in that sense I think that suggests that there is much more of interplay between law and other disciplines. And there are certain risks, in my view anyway, to think about law as if it's discrete, as if it's autonomous, and that idea itself is based on a set of philosophical assumptions about law and the nature of legal institutions that need to be critically assessed.

Here, P2 seems to draw on a social realist approach to legal knowledge when she describes legal knowledge as "discrete" and "distinctive" – suggesting strong and clear knowledge boundaries – but then draws on a more general-constructivist approach to knowledge with no clear boundaries very soon after that in statements like: "So what is legal knowledge? I mean, increasingly in, say, Constitutional Law, I don't know how clear the distinction is between law and politics" and "foundations are shifting, whether a law can even be thought about in foundational terms is not so clear anymore". Although this may seem surprising at first, it may also simply indicate that P2 is grappling reflectively with epistemological debates in law, and is able to draw on a range of approaches to knowledge.

### 4.2.3 Legal Writing

Some of P2's responses in this section proved difficult to code, as she spoke in such depth, and with such nuance, about the notion of writing and legal writing. I have therefore categorised what I could, but also included a greater range of statements that went beyond these categories, to ensure the data includes and reflects these important thoughts.

P2 presented a strongly revised orientation to legal writing [Re= 8]. She conceived of writing as construction and support of argument; the application, critical analysis, and evaluation of content [arg=8; applic=4; ev=4]: "I tell them...what I'm looking for is an argument and the way you support that argument. Other than that, I have no framework for what is good writing”. Although she made a range of statements to suggest this, it is perhaps best captured in this one:

> I think there is an interaction between the conceptual side and the writing side, your ability to construct arguments and your ability to understand the concepts, there is a relationship. And the best students are those who have both sets of skills.

She went on to reject the claim that law students cannot write, drawing on an orientation to writing as thinking and questioning the idea that one can equate writing with linguistic or formal accuracy:

> You could have a student who is a brilliant thinker, but who doesn’t express herself effectively in the language that is required here, the language of instruction. So I think that the whole statement is one that I don’t agree with.

P2 did, however, go on to acknowledge the role of more formal elements, such as grammar, sentence structure, paragraph structure [gp=2], as well as citation standards [cit=2] which expanded her orientation to include these traditional elements [Tr=6]. She also spoke about the importance of ethics in writing [pl=3]; the need for acknowledging sources and avoiding plagiarism.

P2 framed legal writing as predominantly academic [LWAc=6] and made it clear that writing in her subject was both interdisciplinary and that it offered a wider scope in terms of argument construction:

> Good legal writing, good writing in Jurisprudence, is not different from good writing in Philosophy or Political Science, but the content is different. So it’s about how you construct an argument, and how you support that argument with evidence, different kinds of evidence.

She also indicated that she had begun to experiment with alternative genres, such as fictional judgments and the narrative form, as a valid type of legal writing in her subject. She did not state whether or not her understanding of the term “legal writing” was one that would be shared with her colleagues [LWA=0] but she was very clear that there are different types of legal writing at university [LWC=2]. She felt that writing in her subject was both the same as good writing in other university courses, such as Philosophy or Political Science [LWS=8], but also different – both from these kinds of courses as well as different from other kinds of legal writing at university [LWU=10].

Reasons given for legal writing being similar to academic essays in other disciplines included that it was the same kind of discursive practice [m=2]; that similar expectations regarding structure and support of argument existed [arg=4]; and that similar formal rules or unstated English protocols were an expectation [fr=3]. Reasons given for legal writing being different [LWU=10] from other good writing were framed in two ways. Firstly, she identified four ways in which writing in Jurisprudence is different from other academic writing. Reasons given here mostly related to the type of evidence that was regarded as valid [ev=4]. She then identified ways in which Jurisprudence is different from other forms of legal writing. These mostly related to method [m=4] – the distinction between application and critical evaluation or discussion. The need for correct identification of the legal issue [lii=2] and including specific legal proof [ev=2] were also reasons for other kinds of legal writing being different from writing in Jurisprudence. Finally, the interdisciplinary nature of Jurisprudence was contrasted with "strictly legal" writing in which "there are correct answers and wrong answers to legal questions". Here, legal opinion writing was framed as a type of professional writing that was not done in Jurisprudence [LWPro=3].

As already mentioned, P2 was uncomfortable with the claim that law students cannot write. Her refutation of this statement was coded as [LWNP=3]. This could be seen in statements like:

> You also have the problem of students who have great understanding and creative minds and who are thoughtful, and they can develop arguments, but the writing skills are not as developed, and I think that sometimes will obscure the quality of their thinking. If that is all that you are seeing, if that is bad writing, then you're…it's like a barrier to appreciating the conceptual abilities of the student.

P2 suggested that there is a broad range of student ability; and that many students handle the complexity of legal writing well. However, she went on to acknowledge that, for a small group of students, legal writing is a problem [LWP=8.] Twice, these problems were related specifically to Jurisprudence, and were regarding uncertainty about evaluation criteria, as compared to other legal writing [exp=2]. Here, shallow, or inappropriate application of formats learned in other legal subjects was mentioned [shf=1]. The other reasons were conceptual [cd=2] and relating to basic education not having prepared some students for university [be=4]. She also acknowledged the challenges associated with studying in a language that is not your home language [EL2=4]. This is most eloquently summed up in this quotation:

> So it's not only the problem of basic education deficits from a township school, but also people who have grown up all their lives without English. And it's not a language that they think in. So that issue of the centrality of language in English actually in the way we communicate and what we expect from students is a big issue. That obviously impacts on their ability to write in English and to simultaneously deal with the language problems as well as the sort of complex range of social theory that they're exposed to in Jurisprudence without the benefit of an…although that will change more and more…of any kind of social theory. So you come to Jurisprudence where there's language deficiencies and for the first time in your life you're exposed to Marx and Foucault and…actually it's impossible.

Here P2 reflects an acute and poignant awareness of the complex and inter-related challenges that students face with regard to reading, thinking, and writing in a language that is not their own, particularly when faced with highly complex and challenging theorists like Foucault. She clearly understands how alienating this experience must be for students.

These conceptions of legal education, legal knowledge and legal writing are summarised in Diagrams 9, 10 and 11 at the end of this section.

### Conceptions of samples of student writing

#### *The writing task: A Jurisprudence Essay (take home examination)*

INSTRUCTIONS

1) Answer one QUESTION (25 Marks).

2) Since this is an assignment, reading of prescribed materials is required. Additional reading will be rewarded.

3) Essay length: 4 pages; New Roman font size 12; 1,5 spacing.

4) Referencing: The essay should be correctly referenced and a Bibliography should be included as the last page.

5) Due date: in light of the requests received from students the due date has been extended to the 18 November 2016. The assignment must be completed and submitted to Room 41 by 12:00 on the 18 November.

Assignment Questions

1) In his article "Memory, Metaphor and Triumph of Narrative", Njabulo Ndebele argues that by developing a shared consciousness, all South Africans can unite and reconcile as a single political community. He suggests

that this can be done by way of ongoing exchange of stories amongst very differently situated South Africans. Critically analyse this idea, taking into account the arguments of critical race theorists such as Derrick Bell and Kimberlé Crenshaw. OR

2) Liberal Legal theory celebrates the idea of universal human rights as promoting human liberation and essential in a democracy. Some critical legal theorists on the other hand criticise rights as legitimising continued domination. Other 'Crits' embrace rights as empowering marginalised groups and agree that protection of rights is essential in a Democracy. Critically discuss the idea of rights in the light of 'Critical Race, Feminist or Queer Legal Theory'.

***Purpose***

These two essay topics are set up as conversations between different theorists that students had studied in this course on critical jurisprudence. P2 explained that the purpose of the essay was to assess whether students were able to go beyond reading and understanding course material, to using the ideas from social theory to critically assess specific ideas (in the first essay, the notion of developing shared consciousness through narrative exchange; in the second, the idea of rights). The underlying requirement of both essays was that students had read required reading with understanding and care. To do very well in this assessment, students would need to read beyond the course outline. P2 felt that the first essay was more complex than the second, as it required students to synthesise different elements of the course.

***Role of writing***

P2 described writing for this task as "the how": how a student writes goes to show how persuasively the argument is constructed. She also reflected on how accuracy of language and an expressively developed argument would go a long way to "help the reader appreciate the complexity of the argument". With regard to the technical proficiency of elements like references, she said that if the essay was not technically proficient, it could see a shift from, say, 80% to 75%. However, she indicated that the ethics of referencing (i.e., failure to acknowledge sources) could reduce the mark much more significantly. P2's orientation to writing here is both revised [Re=2] – in that it is very much about thinking, thoughtful engagement, and logical structuring of argument – and traditional [Tr=2] – in which language accuracy and technical proficiency are valued. This is somewhat different to orientations observable in her general discussion of writing, where she expressed a much more strongly revised orientation to writing [Re=8; Tr=4]. Generally, these criteria are applicable to academic writing in the Social Sciences and Humanities – which is congruent with P2's own deliberations about whether writing in Jurisprudence is any different to writing in subjects like Political Science or Philosophy.

***Conceptions of successful writing***

The successful writing task was written in response to the first question. P2 tended, more than the other participants, to express recognition for less tangible qualities in the writing. For example, the criterion of "thoughtfulness" was identified and valued five different times [Tht=5]; and "initiative and creativity" were each identified and valued twice [IC=2]. "Thoughtfulness" then, was one of the main criteria that P2 used to value the writing, as it occurred more or less as frequently as the two other most frequently occurring criteria: development of argument [arg=6] and application [applic=5].

Congruent with her orientation to writing articulated earlier in the interview, that "what I'm looking for is an argument and the way you support that argument", the ability to present a good argument was frequently mentioned as a reason for this student's success. The student's writing was variously described as "an interesting argument", demonstrating "complexity of argument" that "the argument is expressed clearly" and as an "expressively developed argument".

Application was a frequently valued criterion, seen in statements like:

> This student has shown that they've got a good understanding of critical legal theory and they're able to apply it to this statement. I think that shows that the student has understood these themes, and has been able to apply them to an interesting question in a thoughtful and interesting way.

Interestingly, application was always qualified, as it is in the previous quotation. Further examples are "this is a student who can apply the readings in a thoughtful and creative way" and "the best students are applying the ideas that they've engaged with in the course creatively, thoughtfully". P2 further observed that this type of application was distinct from other types of legal writing in that "it's not application of law to facts, it's application of theory to theory, in a way".

Synthesis was also valued [synth=4] – as seen in comments like "this is a student who can synthesise" and "only the best students have integrated different elements of the course". The kind of synthesis described by P2 is made possible by wide and thoughtful reading of critical theory: "This is a thoughtful engagement with the question and obviously this results from wide reading, a synthesis of the knowledge". In fact, in some ways this seemed to be one of the most important criteria for P2, as seen in the following comment: "without demonstrating that ability to understand and synthesise and integrate this knowledge, no way you can get a distinction".

Structure was valued to a lesser extent [struc=2] which is congruent with P2's comments in the general discussion of writing in which she stated that "there are different ways of constructing an argument and I personally take a sort of very broad view". "It's logically structured" seemed to be enough for P2, who did not expect the kinds of traditional elements of an introduction or conclusion expected by P1.

P2 mentioned technical accuracy as an attribute of this writing – "this is a paper in which the language is accurate" [gp=1] and "it's properly referenced, respecting the ethics of writing" [cit=1] – but only as part of a broader discussion of the quality of argument. Although quality of evidence [ev=1] was only explicitly mentioned once, I do not think this is an accurate reflection of the value placed on it, as much of the discussion of argument and application assumed that the student had drawn on sources from the course and beyond.

***Conceptions of less successful writing***

This writing task was written in response to the second question. Before the specific piece of writing was discussed, P2 observed that "in this question then, I think a student who takes a sort of linear perspective will often go wrong". When asked to elaborate on the notion of a linear perspective, she explained that

> if a student answered this question simply…as if the whole of critical theory can be understood through the lens of rights scepticism, then that would count against a good answer, I think, because that would show a lack of kind of full engagement with the complexity of critical theories. Like saying the theories are all black, whereas actually there are grey areas.

P2 returned to this notion of complexity a little later in the discussion, saying "there is an element of complexity there, which I would think for a good answer, say seventy upwards, you're looking for them to have engaged with".

The writing itself, however, did not so much fail to engage with the complexity of the arguments, but with the correct critique they were expected to draw on. In this way, a major flaw was the failure to fully understand what the topic required [TA=2] – "this is sociological. It's not the critique". Related to this was lack of quality evidence [ev=2]:

> The student could have and should have done more. There is such a rich debate to be had in answering a question like this and it would have been emphasised, I think, so much in the readings and in the classes that more of an answer could have been expected.

P2 identified, in this writing, failures in structure [struc=1], argument [arg=1] and clarity [cp=1]. She summed these three criteria up using the umbrella term “technique”:

> I would say that that is also then a failure of technique. This is someone whose ability to structure an argument in the form of an essay is also a failure at the level of how. This is a failure of how to present an argument by channelling your reader, by directing your reader, so…as a way of explicating your argument in a way, isn’t it? Or making it clear what your argument is. And if you don’t do that then you’re leaving the reader/marker with a responsibility they don’t have, shouldn’t have, generally, to establish those parameters.

Lastly, P2’s position on the role of context and personal experience [ctxt=1] was significant. Unlike some of the other participants, P2 was sympathetic to students’ inclination to draw on their own experiences, even though, in this case, the drawing on experience caused the student to write off-topic:

> I would have also had some sympathy with the student because I wouldn’t be surprised if there were some readings along these lines, if there was some discussion in class along these lines, and I think that this is a question that resonates very directly with the experience of our students, this gap. So it’s an entirely understandable and expected line of attack, if you like, of critique of the Constitution and of rights and rights discourses. But it’s not…I mean, a thoughtful, careful student shouldn’t have made this kind of basic error.

It will be seen that other participants, particular P3 and P4, did not find this tendency to draw on personal experience, or to write off-topic as “entirely understandable”.

These writing criteria, discussed above, are summarised in Diagrams 12, 13 and 14 at the end of this section.

**Participant 2: Summary of main codes**

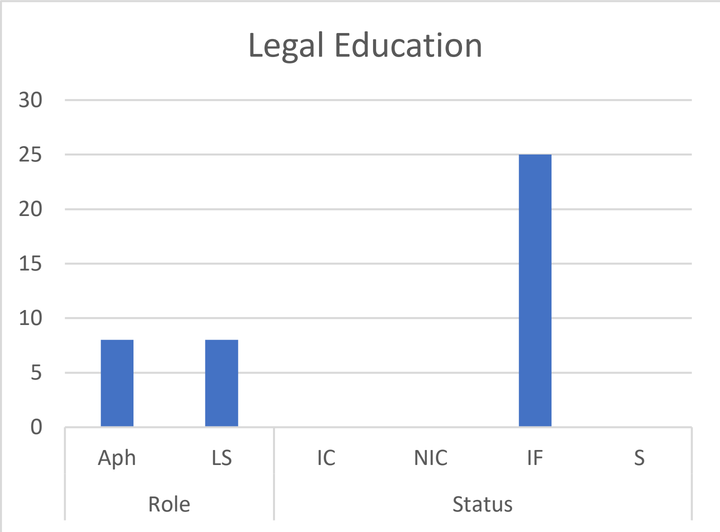



**Diagram 9: Legal Education (P2)**

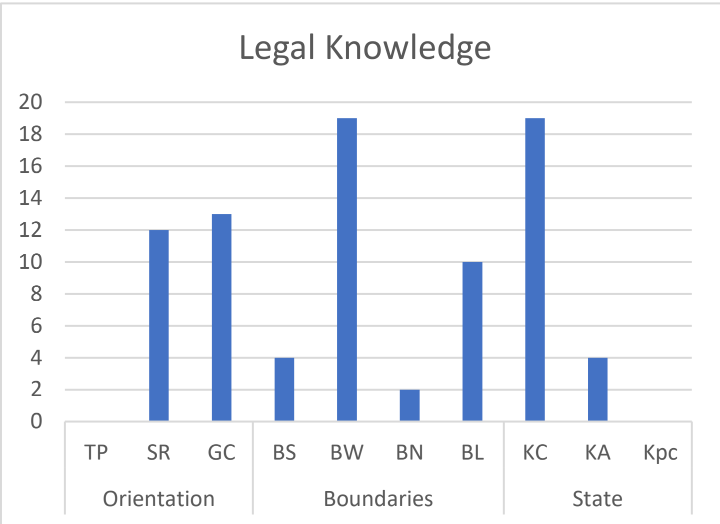



**Diagram 10: Legal Knowledge (P2)**

P2 agrees that legal education is in flux and views the role of legal education as roughly equivalent: both academic-philosophical and to prepare students for legal practice. This is congruent with her recognition that her subject is closer to social theory or philosophy but that other subjects in law are more practical. This may explain why she sees legal writing as both unique to the discipline, as well as being like other fields. It also explains her framing of legal writing as both academic and professional.

This comfort with duality is similarly reflected in her approach to legal knowledge that is both social realist and general-constructivist. It may also explain why, overall, she regards knowledge boundaries as weak and limiting.

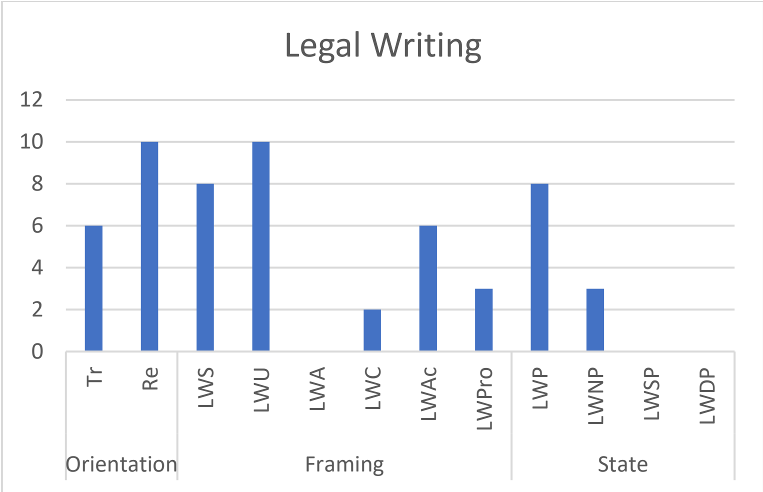



**Diagram 11: Legal Writing (P2)**

Interestingly, for P2, legal writing is not a problem for most students. However, she strongly agrees that for a small group it is a problem. Like P1, P2's revised orientation to writing is seen almost twice as often as her traditional orientation.

**Summary of main writing criteria:**

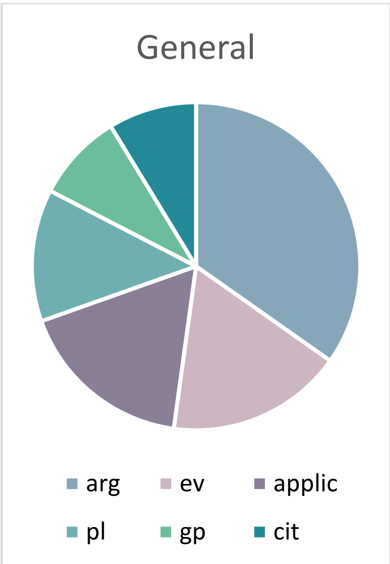



**Diagram 12: General (P2)**

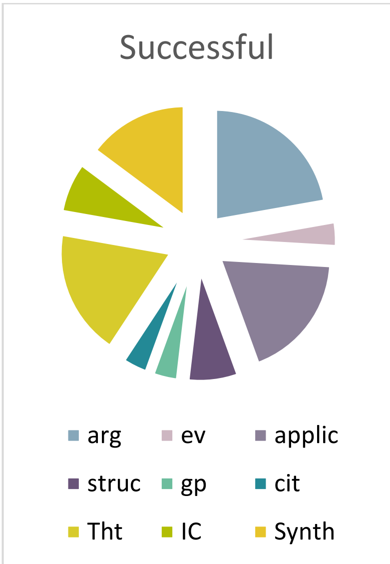



**Diagram 13: Successful (P2)**

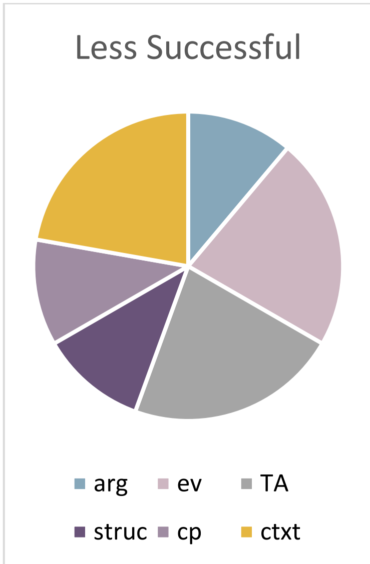



**Diagram 14: Less Successful (P2)**

These diagrams show that, like P1, P2 strongly values argument, use of relevant evidence, application, and structure. Similar too is her awareness of plagiarism in the general discussion. Interestingly, a greater range of different criteria is used to evaluate the successful writing although, in the discussion of the less successful writing, like P1, failure to correctly analyse the topic is a criterion used.

## 4.3 Participant Three (P3): Constitutional Law

### 4.3.1 Legal Education

With regard to role, like P2, P3 offered equal recognition of the two views on the role of legal education [LS=3; Aph=3]. For example, her comment “I don’t think that being a lawyer is such an elite thing. I think that you can learn to do it in four years” suggests that she views legal education as preparing students to practise as lawyers. At the same time, her opinion that law students who study a general undergraduate degree before studying law are “superior… because they’re getting another perception, because they’re more mature, because by the time they get there they’re better and know about other things” suggests the academic-philosophical view of the role of legal education. However, unlike P2, P3’s discussion of the value of a broader academic education did not seem to be included in her idea of legal education. Rather it was education seen as valuable but separate; ideally acquired before starting legal education. The role of legal education itself was strongly framed as preparing for practice, and this was related to the need to protect and retain a private law core to various subjects: “we do have to be rigorous in holding that private law very powerfully”.

With regard to state, P3 rejected the idea that legal education was in crisis [NIC=1], suggesting that it was only in crisis to the extent that higher education itself was in crisis [he=1]: “Well I think the universities are in crisis. Is legal education in crisis? Um…only in the sense of being part of the university”.

She then explored an approximately balanced range of reasons why she felt that legal education was stable [S=7] as well as in flux [IF=6]. Factors contributing to legal education’s perceived stability were curriculum-related [cu=3]; pedagogy-related [p=2] and regarding the students’ role in relation to lecturers [re=1]. She suggested that law continues to be taught in unchanging and effective ways, and that the structure of the curriculum is fairly stable and unchanged. She explained:

> Well…you see, I love law, and I’ve bought into it. So…I…I think it’s very well taught, and I think that staff make a big effort to include different points of view and to contextualise things.

Regarding student role, an interesting claim was that student passivity and lack of preparation for class – although apparent – was unchanged and stable since she was a student: “I don’t think students ever really prepared…I think the passivity is not new, it was always there". Another claim regarding legal education's stability was that "it's got more clarity on what it's doing and what it's supposed to be doing than most…than a lot of fields. More like Science than Humanities" – a position in stark contrast to P2's perspective.

Factors contributing to legal education's perceived changes were mostly curriculum related [cu=4], as well as the changes in higher education [he=1] and due to a perceived drop in standards [s=1]. Her main concerns regarding curriculum were the shifts between an undergraduate degree, and a second degree, and whether these shifts were sustainable or not. Interestingly, she saw no reason why a lawyer could not be trained in four years (noting that a four-year degree was sufficient to train engineers). However, she felt strongly that offering legal education in the form of a second degree was "a superior product".

P3 also spoke strongly about the need to protect the private law core of subjects and not to allow public law, or contextual discussion, to reduce this focus: "we do have to be rigorous in holding that private law core very powerfully" and "holding the private law core quite sacred, because those are the real skills that students need. And that we teach". Here, her choice of words is intriguing: "sacred" and "the real skills" suggests that she regards private law both as more important and more conceptually demanding. This suggests that she sees private law as "powerful knowledge" (Young & Muller, 2013) as discussed in chapter two, reflecting the strongly social realist approach that becomes apparent in her discussion of legal knowledge.

### 4.3.2 Legal Knowledge

Like P1, P3 indicated strongly that legal knowledge in her subject was stable [KA=9] but made two statements that recognised that, for some, what counts as legal knowledge is contested [Kpc=2]. The main reasons she gave for the acceptance of what constitutes legal knowledge related to the fact that it came out of the 1994 transition, was guided by the Constitution, and was very much about related cases and their reasoning [Ct=8]. She acknowledged contestations – mentioning the idea that "Mandela sold out" [Cf=1] – but described such contestations as "marginal" and commented, like P1, that "I'm yet to see anything cogent".

With regard to knowledge boundaries, P3 drew a distinction between private law subjects, such as Property Law, and public law subjects like Constitutional Law. Her statements suggesting that legal knowledge has strong boundaries [BS=15] were related to her discussion of private law subjects, and her statements that reflect weaker boundaries, or that acknowledge the role of philosophy and social context [BW=6], were all about Constitutional Law. Interestingly, her statements about the necessity of boundaries [BN=6] applied across both public and private law spheres. Her reasons for the necessity of boundaries reflected a clear sense of law as a distinct discipline [dd=3]: "if we start doing something else then other people can do that better than us". Furthermore, she made no statements that indicated that she believed boundaries of legal knowledge to be limiting [BL=0].

Reasons given for the idea that legal knowledge has strong boundaries seemed firmly situated in a professional conception of legal knowledge [Pr=12]. Here she described legal knowledge as being very much "what has been decided" in court cases, with philosophy and context only having relevance "when they come in the cases". Reasons for statements that reflected an acknowledgement of weaker boundaries related mainly to Constitutional development [pc= 4]. Here she acknowledged the role of philosophy and "deep moral values... ubuntu and African values" as part of the Bill of Rights' background and development and stated that students could "sort of get away with" more "waffle" in Constitutional Law than in a private law subject [id=2]. This, though, she qualified by stating that Constitutional Law used to draw more broadly on knowledge outside of law in the beginning, but now tended to be guided by knowledge that had become part of law through the cases. Again, this hints at a social realist approach, which acknowledges that knowledge develops in particular historical contexts and that it is systematically revisable (Young & Muller, 2013).

The private-public law distinction also accounts for her approach to legal knowledge being categorised as both traditional-positivist [TP=6] and social realist [SR=9]: her social realist approach was apparent when discussing Constitutional Law whilst a more traditional-positivist approach became more apparent when she discussed Property Law. These two examples illustrate the contrast:

> In Constitutional Law...principles, Dworkinian liberalism, there are other ways of seeing the same problems, ways of interpreting the property clause. And ways of looking at freedom of expression. So the debate about dignity and freedom of expression, they all draw on deep philosophical roots. And there is discussion about Ubuntu and African values and so on, but these are just deep moral values I think that we all share that *are part of the background of the Bill of Rights* [my emphasis].

In other words, these kinds of knowledge are seen as background or context to legal knowledge, but not part of it, unless it has been incorporated into the law.

Whereas:

> In Property, legal knowledge is what the judges say, the reasoning in the cases, criticisms of reasoning in the cases, and alternatives to reasoning in the cases... a private law course, it's like a learning subject. There's nothing you can say which is of any consequence unless you learnt it. It's like biology. No one wants to hear your view on anything ...you just have to know what the law is about these things and how it works. And it's more fun in some ways to teach it; the student has to learn to do a puzzle. And if they can't then it's just hopeless.

Her social realist approach can be seen in her recognition of the context and theories from other disciplines, including African morality, that were all part of the development of the Bill of Rights. Importantly here, however, is that they are only conceived of as being part of legal knowledge once they have been incorporated into the Bill of Rights i.e., they achieve objectivity or incorporated through case law (which, in law, is how knowledge is systematically revised). On the other hand, reasons for her traditional-positivist approach drew mostly on professional conceptions of legal knowledge [Pr=5] reflected in statements like "we look at law as its practised in court" and "what we teach is quite technical and specific and it's aimed at the courts". She defended this approach by noting that law was like doing a conceptual puzzle, and that only legal pieces "fit" – in other words, that it is a distinct discipline [dd=2]. Here, she seemed to assume that other disciplines, such as the Humanities, had weaker knowledge boundaries than law.

### 4.3.3 Legal Writing

P3 presented a revised orientation to legal writing [Re=4; Tr=0] in that she defined legal writing in terms of conceptual coherence [co=4] and the ability to apply and analyse [applic=4]. She claimed that she looked beyond any surface level writing issues and was only interested in students "looking at the facts really carefully, looking at the law really carefully, and putting it together – I don't really look at anything else".

With regard to framing, although she qualified this with a "you'd have to check" she felt that other legal academics would agree with her understanding of legal writing [LWA=3] and that there was no difference in expectations between a legal opinion written in different legal subject areas. She suggested that legal writing might be different from good writing in general [LWU=2] but also that it could be the same [LWS=2]. She described the commonalities in terms of similar requirements regarding coherence [co=2]. She described the differences in terms of level of specificity [sp=2]; that in legal writing you need to include specific things and if they are not there, it cannot pass. She was very clear that legal writing at university and legal writing in practice were different:

> Legal writing could be a whole lot of things. The legal writing we do in class is not the sort of legal writing people do for courts. What we do in class is really essays or answer problems. Those are the main types of writing we do at university.

She stated that the types of writing law students have to do (essays and legal opinion writing) are different from legal writing in practice [LWAc=2] although she described how the specific genres required in practice were taught in procedural law subjects [LWPro=2].

Of interest here, was her observation that legal opinion writing (a common type of legal writing at university) was seldom required in practice (unless one is a judge) but that its value lay in that "this opinion understanding is behind everything. I mean, it's your understanding of the law and whether you can write down your understanding of the law". This could indicate some blurring of this category, if P3 is defining this kind of writing as an academic training ground for understanding law in preparation for legal writing in practice, whilst other participants understand it as a practical/professional type of legal writing (as P1, P4 and P5 did).

With regard to the state of students' legal writing, P3 commented that "it seems unremarkable to me" – although she acknowledged that she may simply overlook the writing and assess only for the quality of analysis [LWNP=1]. This suggests that her orientation to writing here, as surface level concerns, was more traditional [Tr=1]. She did go on to identify concerns about the lack of conceptual depth [cd=1] and the lack of depth of analysis [da=1] in students' writing [LWP=2]. She did not discuss any possible reasons or solutions.

These conceptions of legal education, legal knowledge and legal writing are summarised in Diagrams 15, 16 and 17 at the end of this section.

## Conceptions of samples of student writing

### *The writing task: A Constitutional Law Legal Opinion (mid-term assignment)*

**ASSIGNMENT:**

It is October 2017. As universities across South Africa announce their fee increases for the 2018 academic year, there is a resurgence of the #feesmustfall protests of 2015. After 2 days of protests at X University, the University obtains a High Court interdict against protestors, which determines:

"The respondents or any other persons participating in protest action on the University's precinct are herewith interdicted and restrained from

- In any way disrupting the normal activities of the University, including registration, classes, lectures, tutorials and the like

- Obstructing or preventing any person from entering or leaving the precinct of the University or any of its buildings

- In any way causing damages to the property of the University, its staff or students

- Participating in, calling for, inciting or encouraging unlawful behaviour

- Harassing, intimidating, threatening or assaulting any of the University's students or staff or any members of the public

- Carrying firearms or dangerous weapons".Two days after the Court grants the interdict, the Students Representative Council (SRC) of X University sends out tweets calling on students to participate in a mass demonstration outside of the University's administration building. The tweets make it clear that the demonstration will take the form of a peaceful "sit-in" on the steps outside the building, with the effect of blocking its entrance. Six hundred students arrive to participate in the protest, and sit down on the stairs. University management learns about this and calls the police to enforce the interdict. When police arrive on campus and approach the students, a student leader shouts over a megaphone that "the peaceful protest is under siege, we must retaliate!" The SRC President immediately takes her own megaphone and screams "No! This is a peaceful protest!". Despite this, about 100 students get up and storm at police officers, who respond by firing a canister of tear gas. This causes the group to disperse. One splinter group, however, runs through a staff parking lot and smashes the windscreens of 12 cars. Police proceed to arrest students near the parking lot and also arrest the student leader who made the call for retaliation, as well as the SRC President. They are charged with contravening the terms of the interdict by obstructing the entrance to the building; with violating the provisions of the Regulation of Gatherings Act 205 of 1993 and for causing damage to staff vehicles. The University also files a separate claim for damages against the SRC as organisers of the protest, claiming the full amount of damage to the cars from them.

Write a researched legal opinion of **1500 words (including footnotes, excluding bibliography)** where you advise the student leadership on the constitutionality of the following:

| |
|---|
| -The terms of the interdict<br><br>-The arrests on campus and the accompanying criminal charges<br><br>-The claim for damages. |

***Purpose***

P3 described the purpose of this assignment as being for students to give legal advice. She explained that she did not insist on any particular format, so that the advice could either be structured as an essay, or in the form of a legal opinion. This is fairly unusual, in my experience, as most legal advice assignments are written in the form of a legal opinion. Towards the end of the interview P3 reflected that perhaps they should have required the legal opinion format, as this might have helped students to be clearer about audience and purpose.

P3 described the question as being “a complex problem” that required students to do a number of things: go through the terms of the interdict; evaluate whether the terms had been violated; evaluate whether the provisions of the relevant Act had been violated; and advise whether the students had caused damage. This further required students to refer to a relevant decided case; to establish whether the interdict was constitutional or not; to establish whether the interdict was too wide or too restrictive; to distinguish between the different people in the problem and comment on each person or group’s liability; to identify that the claim for damages was central to the problem; and to finally advise whether or not the protest organisers had taken all reasonable steps within their power to prevent an act or omission. P3 further explained that the assignment required students to be able to work very closely and thoughtfully with the facts provided: good students would claim that not enough steps had been taken by the organisers, but better students would observe that there is not enough information given on the steps taken to fully assess.

***Role of writing***

With regard to the role of writing in this assignment, P3 said that “being able to coherently put together the material is the key thing” and “writing well is going to make a huge difference”. Here she clarified that she envisaged writing, in this case, as primarily being a tool with which to organise and address the problem coherently. However, later in the interview she commented that “I was foregrounding content much more” although she felt that language, editing, flow of argument and referencing were all factors that would influence her marking to some degree. P3 showed a somewhat more revised orientation to writing here [Re=3; Tr=1] which is consistent with the orientation observed earlier in the interview.

***Conceptions of successful writing***

P3 overwhelmingly valued quality and relevance of evidence in this piece of writing [ev=6; rel=5]. This was often described in terms of what the student noticed, understood, recognised, and cared about: “she sees that these terms of the interdict come out of the Regulation of Gatherings Act, she thinks it’s a reasonable limitation on the right to freedom of assembly, which is debatable, but she thinks that the terms of the interdict are constitutional”. Here, the student being able to see what is relevant, and think about what this evidence means for the question, is valued. What the student “sees” with regard to the evidence continues to be important:

> she sees that’s very important whether they are or aren’t blocking them. It was also important to see what was not relevant… if you’ve got an opinion, no one’s interested... it’s sort of negative if you start to rave on about it. But you’re also wasting words.

Development of legal argument and counter-argument was also valued [arg=4]: “it’s very effective, she counter argues… she decides it’s proportionate... she’s aware that there’s no threat to private property... so she’s really seeing it from a whole lot of angles”.

Clarity and precision [cp=4] were valued: “the precision with which she’s looking at exactly what they’re told about the facts”; and “there’s a lot of precision there, there’s a lot of detail”.

Recognising that general context was not appropriate [ctxt=2] was valued. Of interest was this statement (made in relation to critical commentary of a particular, contested judgment): “However for this it really doesn’t matter. The Constitutional Court has said that these sections are constitutional, and students waste their words rehashing that debate”. Here, she valued this student not including any of the kind of critical discussion that they had had in class, as it was not legitimate legal knowledge in this context.

Coherence [co=2] was identified as something that could be expected with a good answer: “It’s easy to read. I mean, for me it’s secondary but I think usually it would come together. It would be rare that I’m struggling through something, and I think it’s good”.

***Conceptions of less successful writing***

The most commonly identified problem with these two pieces of writing was the relevance of the information writers had chosen to include [rel=18; ev=11]. Much of this was the inappropriate use of contextual or critical evidence [ctxt=9] seen in comments such as

> this is like, this is quite deep into the paper and she's saying something which is well established…and now marginal groups can communicate, they're saying it again…and it's the same singing to the choir point. Okay, so it's a lot of background.

P3 also read out the written comment on the third piece of writing: "You would do better if you spent more time on specific facts and application of law to the facts. Too much general material". Again, this raises interesting questions about the role of the introduction: P3, unlike P1 but like P4 and P5, did not value general or overview-type introductions; she expected students to get straight into identifying the legal principles and applying them.

The value placed on relevant legal evidence is also seen in comments like: "It's just got no basis in law. I mean, it doesn't link to sources. And I think maybe that is one of the main things. That we're really not interested in anything which isn't directly linked to a source". This link to legal sources is what distinguishes, for P3, legal writing from other forms of good academic writing. This is in contrast to P2's "sympathy" for students who refer to their own experience or general social conditions or issues and sees space for it in good legal writing.

It was necessary to create a new criterion – elegance of rhetoric – as this occurred as a recurring critique of the third piece of writing [ELR=12]. This was expressed in a variety of ways:

> It's nicely written that paragraph. It's sort of pretty, it talks about freedom of assembly and coming together and protest peacefully, the space to speak can be heard in a constitutional democracy…and then they like this thing that X [colleague who published an article on this topic] said, I think he quoted it from someone else. 'Unlike a single voice that's more likely to be drowned out, the chances of a choir getting its message across are very high'. You know, it's not really what you want to know if you want to know whether it's okay for the guy to get arrested. I mean, it's sort of implicit.

Clearly, however, this student had not realised that this kind of information was supposed to be implicit rather than included at length, which is congruent with Bangeni and Greenbaum's

(2013) findings on the struggles that law students have with understanding what information legal experts consider should be tacit.

Comments included, “It’s nicely written. It’s sort of rhetorically appealing if you’re doing a speech on freedom of expression” and “this student likes to make speeches and does it very well”. Here, P3 is dismissive of appealing rhetoric, deeming it inappropriate for this kind of writing. She also commented: “And it’s also pretty, it’s pretty language. I mean, I think that this student can write…and I think she might do well as a politician…” Pretty language and “being able to write” – as an act of rhetoric – are both clearly not valued in this type of legal writing.

P3’s last comment in this regard is perhaps the most certain:

> This is useless…I mean, it’s just…you know…it’s not a commentary, but you can see that this is a natural politician. It’s a sentence of a political speech so it doesn’t even go logically. But it’s not appropriate to this assignment.

P3 deems political-type commentary as having no place in this kind of legal writing. This is in contrast to P2’s perspective, which seemed to allow much more space for this.

Somewhat less common criticisms were failure to apply the law to the given facts [applic=4]; lack of clarity and precision [cp=3]; and lack of opinion or argument [arg=2]. Meeting formal requirements [fr=1] – “he’s made an effort to comply with the formal requirements” – and an acceptable citation standard [cit=1] – “he did make an effort with the footnotes” – were identified in one of the pieces of writing. However, neither of these criteria seemed to count for much in the assessment of the writing, unlike with P1, where these elements were more important.

These criteria are summarised in Diagrams 18, 19 and 20 at the end of this section.

**Participant 3: Summary of main codes**

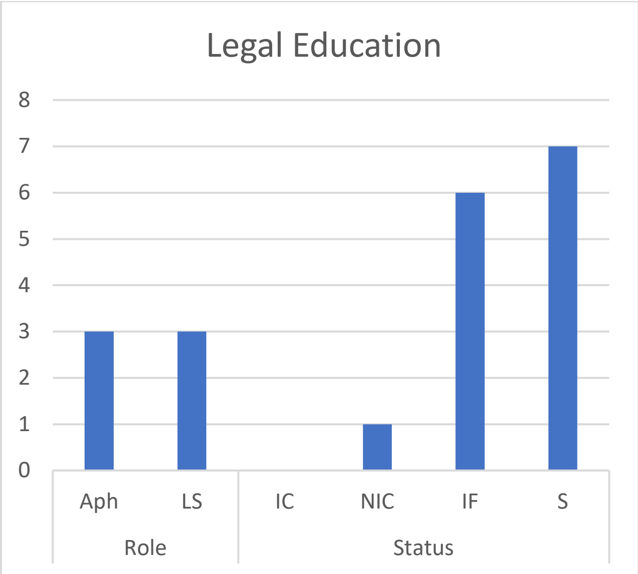



**Diagram 15: Legal Education (P3)**

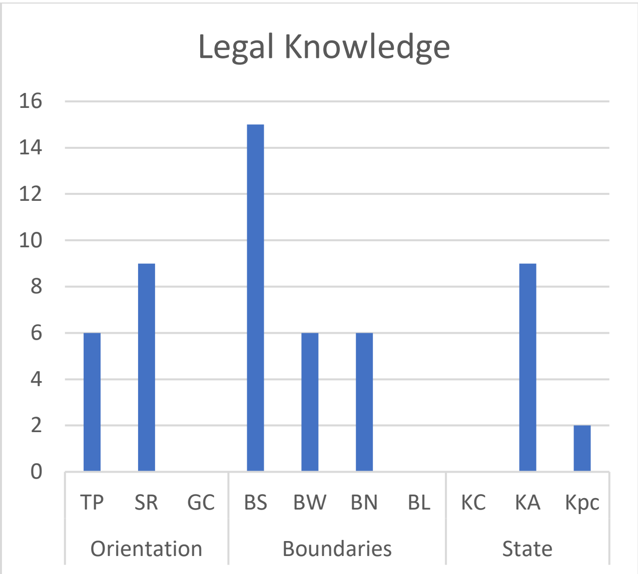
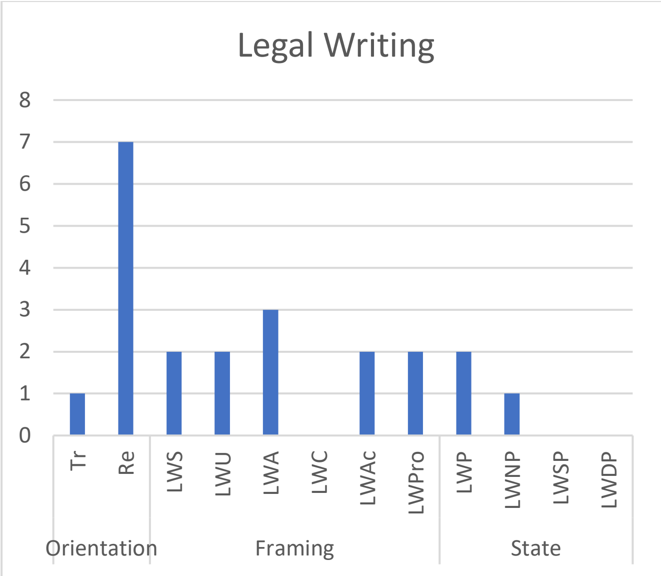



**Diagram 16: Legal Knowledge (P3)**

Like P2, P3 accepts the dual role of legal education and similarly conceives of legal writing as being both academic and for legal practice, both unique and similar to other kinds of good writing.

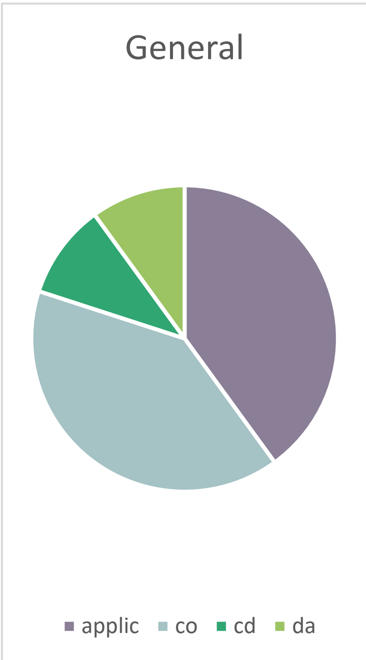
What makes her quite different from the previous two participants is that she not only refutes the notion of crisis in legal education, but she describes the status of legal education as being stable slightly more than she describes it being in flux. This might be associated with her understanding legal knowledge to be mostly accepted, with a notable sense of strong knowledge boundaries. This is congruent with her mostly social realist approach to legal knowledge.

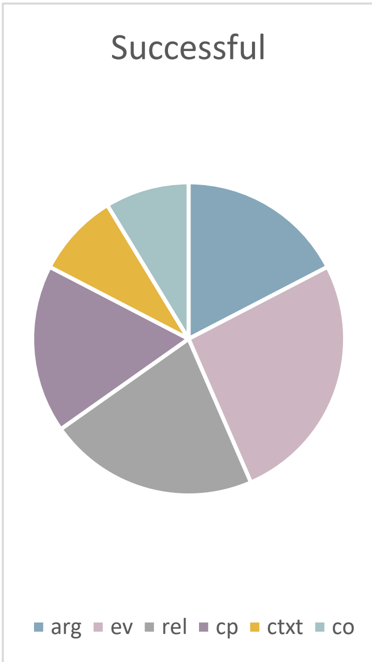



P3 presents a more strongly revised orientation to legal writing than either P1 or P2. She also has a stronger sense that its meaning would be accepted or agreed on by colleagues.

**Diagram 17: Legal Writing (P3)**

**Summary of main writing criteria:**



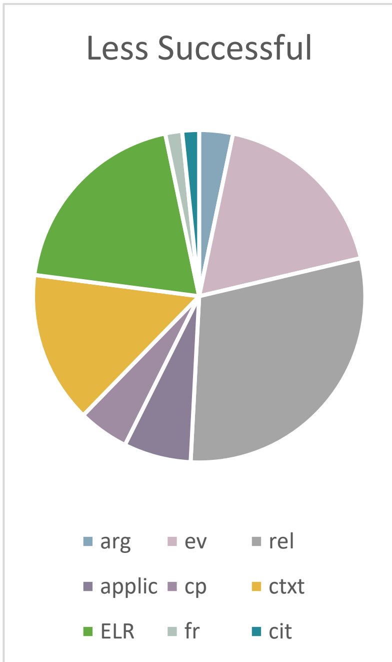




**Diagram 18: General (P3)** **Diagram 19: Successful (P3)** **Diagram 20: Less Successful (P3)**

These diagrams reflect P3's strongly revised orientation to writing, which is consistent across all three diagrams. Like P1 and P2, relevant evidence, application and argument are valued. Related to this, is P3's valuing of depth – both conceptual and in application. Coherence is a criterion that featured strongly in P3's general discussion of writing, and to a lesser extent in the discussion of the successful writing. This criterion was not mentioned by P1 or P2. Clarity and precision [cp] and the use of relevant evidence [rel, ev] is highly valued in the successful writing, whereas the lack of these [rel, ev and cp], and the inappropriate use of contextual information [ctxt] and elegant rhetoric [ELR] are all criteria used in the discussion of less successful writing (Diagram 18).

## 4.4 Participant Four (P4): Intellectual Property

### 4.4.1 Legal Education

With regard to role, P4 offered the strongest views that the role of legal education is to prepare students for practice [LS=3; Aph=0]. This can be seen in statements like: "we used to do internships and our lecturers used to go where we were placed and we used to get marks for that", in which she explained how students could be made more aware of the realities of legal practice, and "I said to them, you know, law is a profession, you are going to be dealing with people's lives here".

With regard to state, P4 indicated strongly that she perceived legal education to both be in flux [IF=11] and in crisis [IC=5]. No statements about stability, or refuting the notion of crisis, were made [S=0]. This can be seen in statements like:

> Legal education is in crisis for the same reasons I stated earlier on about our students…we've got people here who just want to get marks. After you do your articles, you're going to be representing people, their lives will be at stake, and you know nothing because all you wanted to do was to get marks.

Here, P4's concerns are centred on students' lack of preparedness to represent people as legal professionals, reflecting her awareness of the role of law in society.

The main reasons given for legal education being in flux were falling standards [s=5]; changes in curriculum [cu=3]; changes in students' relationship to lecturers [re=3]; and student numbers [sn=1]. Echoing P1, P4 felt that students expected more of lecturers but did less themselves – failure to read or prepare for class was repeatedly mentioned. Unlike P3, who felt this had always been the case, P4 felt this was a recent problem. P4 also claimed that university funding models and subsequent large class sizes had fundamentally altered the nature of legal education.

Falling standards was the most commonly mentioned reason to support the idea that legal education was in crisis [s=5]. For example, in a statement that reflects a commonly held perception that students who barely pass end up as state legal advisors, she said: "They are university graduates, and you are expecting to see some kind of quality service delivery, but they can't even think. So, they are going to run to government". In another, disturbing example, she recalled the advice she was given as a new lecturer at another institution:

> I remember one lecturer said to me, you know, the way you have to do it, at least make sure that you discuss some of the exam questions during tutorials. I said, oh, that's how you do it! He said, ja, otherwise these people cannot pass. So, either you lower the standards, or you discuss questions before the exam…okay, that's the way you're going to meet the performance requirements. And so, the students get to know these things. And so, they relax, and they don't work hard at all. The degree is going to be given to them on a silver platter.

The other reason, not mentioned by any of the other participants, was contemporary funding models for universities [f=2]. Here, the idea that commodification of universities was contributing to a crisis in legal education was strongly expressed:

> I think the root causes are the university funding models, because now universities have to fend for themselves. And by so doing they have to accept as many students as possible. And with the many students that we have in class, I have to give them shorter questions and shorter assignments. And I'm not helping them, because they are not developing skills to write.

Here, like P3, P4 locates the crisis in legal education within the broader changes and challenges facing higher education.

### 4.4.2 Legal Knowledge

Like P1 and P3, P4 indicated that, in general, legal knowledge in her subject was accepted and stable [KA=9]. Although the subject is relatively new in South Africa, she asserted its stability in terms of it having ancient European and English roots, that there are clear laws and rules, and that it is "clear and uncontested".

She twice acknowledged a partial contestation to legal knowledge in her subject [Kpc=2]. The reasons given for the partial contestation both related to legal pluralism [LP=2]. She described how students try to argue for traditional knowledge and knowledge systems being part of Intellectual Property (IP). P4, however, was adamant that this was not possible – “I would say, keep on protecting your traditional knowledge in ways that you have been doing it. Don’t try and push it under the mainstream Intellectual Property because it won’t pass” indicating strong boundaries between IP (a private law subject) and traditional knowledge [BN=4].

Reasons she gave for these necessary boundaries included that it was a very technical subject [t=2]; that private law has its own requirements [pl=2]; and that you cannot incorporate traditional knowledge into IP as it relates to collective and not individual Intellectual Property [LP=2]. She explained it as follows:

> Where they fail is that when you look at Intellectual Property it falls under private law, because it’s your right, you’ve got to invent as an individual, it has its own requirements. But with traditional knowledge, the definition on its own will say that it’s an existing knowledge that has been passed on from generation to generation.

This suggests that P4 has considered her subject in terms of decolonisation but decided that traditional knowledge and knowledge in Intellectual Property are conceptually different. Traditional knowledge’s failure to meet the requirement of systematic revisability suggests that P4’s social realist approach to knowledge can be inferred from these statements.

Most statements that P4 made about knowledge boundaries were that boundaries were strong [BS=9]. The main reasons for this related to the knowledge being very technical [t=3]; that it was old and established, and only new in SA [oe=4] and that it fell under private law [pl=2]. However, interestingly, she made two statements that could be categorised as indicating weak boundaries [BW=2] and – related to this – that boundaries could be limiting [BL=2]. Both of these statements related to the need for a good general knowledge, particularly relating to the sciences, to be a good IP lawyer [id=2]. Where she felt boundaries could be limiting, was that students only perceived the value of legal knowledge (strongly and narrowly defined) and did not include broader or scientific knowledge in this. She felt students were limited by this lack of general knowledge, and scientific knowledge, so that their answers became mechanical, or what she called “one sided boring answers” [t=2]. Here, there seemed to be some tension between the acknowledged technical nature of the knowledge whilst simultaneously expecting the technical knowledge to be demonstrated within broader interdisciplinary knowledge.

Although her repeated statements that IP knowledge is “all about rules” and “technical” seemed to indicate a traditional-positivist approach to legal knowledge [TP=4], P4 made an equal number of statements, some of which are explored above, that reflected a social realist approach to legal knowledge [SR=4].

### 4.4.3 Legal Writing

P4 reflected a very strongly revised orientation to writing [Re=7; Tr=0]. Everything she said about writing related to legal analysis [m=7], conceptual depth [cd=4] and the necessity of being able to correctly identify legal issues in legal writing [lii=3]. She gave a vivid example of knowledge trumping traditional writing proficiency:

> I have marked students, when I read their paper; it’s like really reading a very nice written story. But when I have to award a mark, I think, ‘but there was nothing here’. And then sometimes you come across another student who can barely construct a sentence but hell no, they’ve got it.

She recognised that her understanding of the term “legal writing” may not be shared by colleagues [LWC=2]; in both cases she attributed this to differences in institutional understandings of legal writing [inst=2]. She felt that both between different South African universities, and between South African universities and those overseas, there may be different ideas about what it meant to write in law.

In her discussion, P4 framed legal writing as both academic and professional [LWAc=2; LWPro=4]. The academic framing occurred specifically for post-graduate writing and included dissertations and theses. The professional framing was used for all references to undergraduate writing and generally referred to writing opinions in response to a particular legal issue. (Legal opinion writing, however, was regarded as an academic type by P3.) It was clear in P4’s discussion that she identified strongly as a lawyer: “as lawyers, we are always confronted with problems, legal problems, right. And legal writing to me would mean that type of writing that is going to respond to the legal problem”.

P4 was consistent in framing legal writing as being distinct from other good writing [LWU=6]. The reasons given were mostly related to the distinctiveness of legal method [m=3]; the unique necessity of being able to correctly identify the legal issue [lii=2] and the need to be more specific [sp=1] than in other types of writing. For example, “you’ve got to be guided by, for us as lawyers, the law of the statutes and cases. So, you can’t just talk. You can't just write. You've got to be supported by the law" and "good writing in itself won't get you very far in law. No, it won't. What will get you far will be your ability to identify issues".

This reflects a similar conception to P1, P2 and P3, in which use of legal sources distinguishes good legal writing from other academic writing, again congruent with Young and Muller's (2013) conception of "powerful knowledge".

In contrast to P3, P4 was very clear that legal writing was a problem [LWP=8] and that the problem is new and different to when she was a student [LWDP=5]. The main reason given is that students were not given enough assignments and, when they were set, assignment length was too short [new=7]. She attributed this, in part, to the rise in student numbers [sn=2] – there were too many students, so academics set fewer and shorter assignments. She also felt that students do not read sufficiently [sdr=3] which affects their ability to write. She identified a range of other problems: that the conceptual depth and depth of application were insufficient [cd=2; da=2]; that students applied formats in a shallow, mechanistic way [shf=2]; and that they were not specific enough in their answers [sp=2]. For example, she described the failures in their written answers as follows:

> Law is contextual... I see them as – I don't even know if that would be the right term but as – mathematics lawyers, type of thing. One plus one is two, that's the kind of answers; very short, very brief, no content, just you apply this legal principle to this and you arrive at the conclusion. You can't even say however.

Here P4 values nuanced understanding of content, including different possibilities regarding answers in law.

P4 did not offer any solutions to the problem, except to suggest that if students were required to do practical work sooner in their degree, they would realise what was expected of them in practice, and rise to the challenge, rather than simply being marks-focussed, as she feels they are at present [prac=1].

These conceptions of legal education, legal knowledge and legal writing are summarised in Diagrams 21, 22 and 23 at the end of this section.

## Conceptions of samples of student writing

***The writing task: An Intellectual Property Legal Opinion (examination question)***

QUESTION 1

Pharma AG, a Swiss company manufacturing medicines, applied for patent protection in South Africa on its drug Lamivudine. In its claims and specifications, Lamivudine was indicated as suppressing HIV virus. The patent application was granted in May 2007. The five claims for Lamivudine are as follows:

[page with scientific properties of the product included here]

Lamivudine is received well in the South African market by the HIV/AIDs patients; thousands of HIV patients who have progressed into AIDs stage became better and functional again. Five years later, Pharma AG found out that HIV patients who developed skin lesions got cured while using Lamivudine. Consequently, Pharma AG wanted to file another patent application in South Africa on Lamivudine for curing skin lesions.

Seven years into Lamivudine protection, Nino de Pharma, a generic company registered in South Africa, uses Lamivudine to manufacture nevirapine. Pharma AG brings a law suit against Nino de Pharma for infringing its patent on Lamivudine. Nino de Pharma raises a defense that Lamivudine should not have been patented since it lacks novelty. The group argues that Lamivudine is not novel as it is based on xezoradine and that everyone in the pharmaceutical industry was aware that xezoradine could be more effective if it comes in a tablet form and not syrup form since government hospitals diluted liquid medicines with water. The claims for xezoradine are as follows:

[half page with scientific properties of this product inserted here]

With reference to both statute and case law, answer the following questions:

Discuss the prospects of Pharma AG succeeding in its second application to have Lamivudine patented for skin lesions.

(7 marks)

Can Nino de Pharma succeed in its defense of lack of novelty in respect of Lamivudine? In your answer, you must consider how the court will determine novelty or lack thereof.

(13 marks)

### *Purpose*

P4 succinctly described the purpose of this question as being to assess the ability of the student to identify the relevant law, and to apply it in a coherent manner.

### *Role of writing*

With regard to the role of writing, P4 said that coherence was very important to a successful written answer. When probed, she elaborated that a successful answer would be one in which the student "identified the correct law, the correct cases, excellently applied them to the facts, without waffling" – suggesting that precision and clarity were also necessary attributes. This reflects a strongly revised orientation to writing [Re=4; Tr=0] which is consistent with the orientations identified earlier in the interview [Re=7; Tr=0]. However, P4 did not elaborate on what it means to "excellently" apply law to facts – something that I, as researcher, should have probed.

***Conceptions of successful writing***

P4 identified a narrow range of criteria that she used to evaluate students' writing, which were consistent with what she identified as the purpose of the task and the role of writing. With regard to the successful piece of writing, quality of evidence and the ability to apply it to the facts of the problem were the most frequently occurring criteria [ev=5; applic=6]. The importance of drawing on the right evidence could be seen in statements like "They did well because they know the legal principles, the requirements that one has to meet in order to patent a non-patent"; and "he's starting to find the law here, he's stating the principles", and "he or she went on into the case, and cases are very important in law".

Successful application of the law to the facts was the most important criterion. This can be seen in statements like: "I had given them the facts, so here I can see the application. Now he's going directly into the facts to say that the first use was the treatment of HIV and the second one is the treatment of skin rashes" and "They didn't just give me this [the law]. They are able to even comprehend it and apply it to the facts".

Clarity and precision [cp=2] were also valued, seen in phrases like "no waffling" and "no generalities." Like P3, and unlike P1, P4 did not value a general introduction; she expected a good answer to start straight away with the setting out of relevant legal principles.

***Conceptions of less successful writing***

With regard to the two less successful pieces of writing, the most frequently occurring criterion was poor quality evidence [ev=8] and the related relevance of evidence [rel=4]. One of the pieces of writing was regarded as unsuccessful because they had misunderstood the topic [TA=1] – "you were not answering the question" – and had therefore been based on the wrong kind of evidence – "this one has given me a procedure; how can I say…the procedural requirements". This piece was very short.

The other piece of writing also drew on the wrong evidence – "this one didn't know the answer at all"; "they have written a lot, but there are no principles that were relevant here".

Interestingly, this third piece was of similar length as the successful piece of writing, and was structured similarly. P4 explained: "Yes, the structure is correct, but he referred to the wrong section [of the relevant Act]". It was clear that, for this writing task, a traditional orientation to writing was not in operation at all; quality and relevance of evidence, and ability to apply it to the given facts of a legal problem, were what counted.

These criteria are summarised in Diagrams 24, 25 and 26 at the end of this section.

**Participant 4: Summary of main codes**

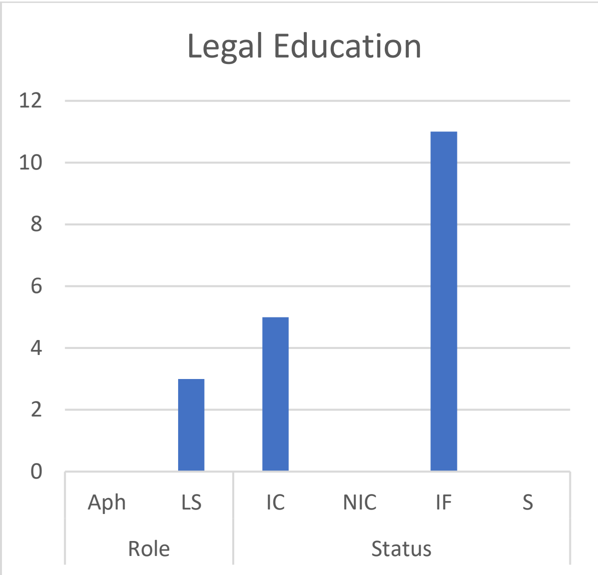



**Diagram 21: Legal Education (P4)**

P4, who conceives of the role of education strongly in terms of preparation for legal practice, presents with the strongest view that legal education is both in flux as well as in crisis. This may account for her strong agreement that there is a problem with students' legal writing and that this is a problem that did not exist when she was a student.

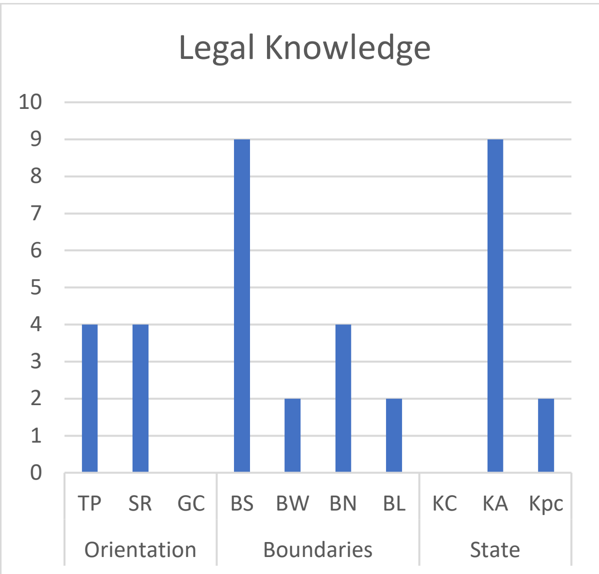



**Diagram 22: Legal Knowledge (P4)**

Congruent with her view of the role of education, P4 largely sees legal writing as being unique to law, and to prepare students for the kinds of writing they will have to do in practice.

This may be linked to her social realist/ traditional-positivist approach to legal knowledge, and her general sense that knowledge boundaries are both strong and necessary: if the writing is oriented to practice, then there will be clear boundaries for the knowledge included in such writing.

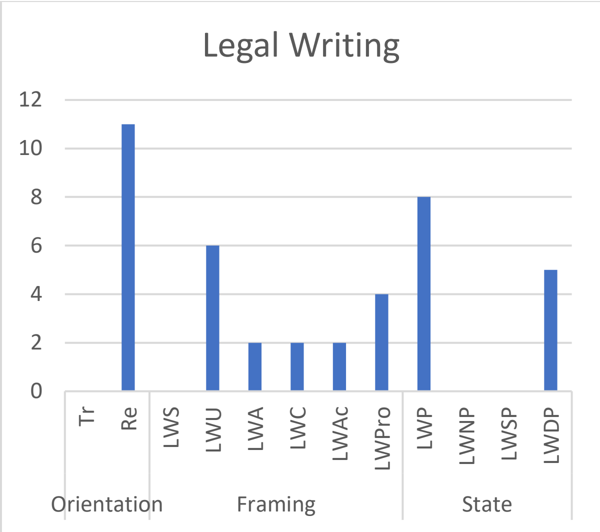
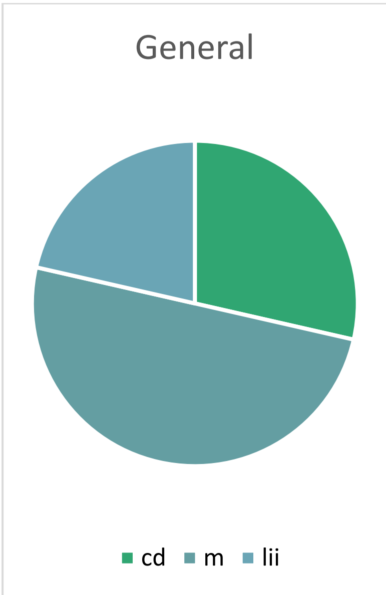


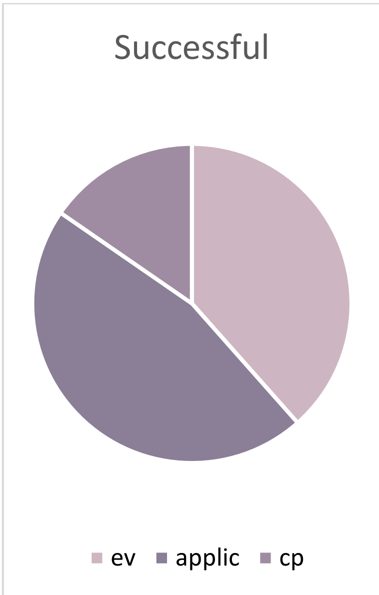

**Diagram 23: Legal Writing (P4)**

Where she does acknowledge weak and limiting knowledge boundaries, and partial contestation, this is with regard to the fields of knowledge that Intellectual Property is close to, such as Medicine and Chemistry.

P4 also presents with a strongly revised orientation to legal writing.

**Summary of main writing criteria:**



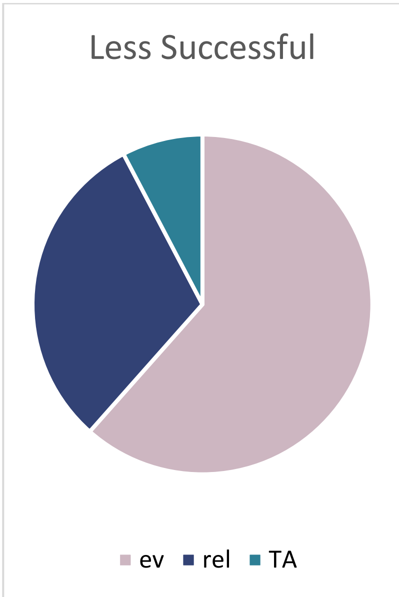




**Diagram 24: General (P4)** **Diagram 25: Successful (P4)** **Diagram 26: Less Successful (P4)**

These diagrams show, starkly, how consistently few criteria P4 used to evaluate writing. All these criteria reflect her strongly revised orientation to legal writing, and are consistent with the criteria valued by P1, P2 and P3 – relevant evidence and conceptual depth are key. Clarity and precision is valued in the discussion of good writing, as with P3. In her general discussion, great value is given to specifically legal criteria: legal issue identification and legal method, which is more strongly featured here, than with other participants.

## 4.5 Participant Five (P5): Civil Procedure

### 4.5.1 Legal Education

P5 spoke very particularly about legal education in relation to her subject, Procedural Law, and preferred not to comment on legal education more broadly. As such, her statements must be understood as being about Procedural Law education, rather than legal education as a whole.

With regard to the role of legal education, all of P5's statements reflected an inclination towards legal practice [LS=5] – perhaps unsurprising given that her subject exists to prepare students for practice. This is reflected in statements like "you can't practise as an attorney if you don't know how to draft pleadings. That's a basic tool of an attorney, is civil procedure...and evidence" and "the procedural courses are purely practical…practice driven in purpose". What is worth noting is that, although all of her descriptions of legal education reflected the narrower view, she made several other statements regarding her own education, or education in general. These suggest that, like P3, she values a broad, literary education – just not necessarily in the School of Law. For example, as part of a reflection on her own language development, she said "so I learnt mathematics, music, a love for music, which is another form of language as well. You have the language of mathematics, the language of music and the language of words". The following statement reflects a particular value placed on literacy and education:

> It's what my father said to me…when you make friends and you go to your friend's house, look to see how many books they have in their house. The more books they have, the more likely you will be friends with them. The less books they have, I don't think you're going to be very friendly with them for very long.

P5, out of all the participants, presents the closest association of writing with cultural resources and social networks.

With regard to state, she did not view legal education as being in crisis [IC=0] although she did suggest that the crisis lay in the state of court administration. The basis for her position that legal education is not in crisis [NIC=0] was that Procedural Law itself is clear, stable, and uncontested [sl=1]. This was also the main reason given [sl=2] for the occasions when she asserted that legal education was stable [S=3].

Her predominant view, however, was that legal education had changed significantly since she was a student, describing it as “completely different” and that it is currently in a state of flux [IF=13]. Her main reasons for these claims related to lack of student preparedness [sp=5] and an overall drop in university standards [s=5]. These two reasons were, in P5’s case, related: she felt that academics had had to change their assumptions about what students knew and could do, and as a result, standards across the whole university had dropped significantly since her student days. This is seen is statements like:

> I started off with the assumption that students knew something about the subject. So I made a number of assumptions, which turned out to be incorrect. I had to go back to basics because my experience in the last ten years is that you can’t expect students to know anything, and that you literally have to explain to them, almost like little children, the law, otherwise it just goes beyond them.

She explored a nuanced range of factors impacting on student lack of preparedness for university. These ranged from a perceived lack of family literacy and educational levels, poor primary and secondary schooling, and socio-economic factors like transport, housing, electricity and household demands on poor students. The following extract, although long, captures some of these, as well as P5’s acknowledgement of the contrast in her own experience:

> I can understand that for a lot of students coming from a very poor background the idea of going home after school and actually studying for homework might be an alien or a foreign thing for a number of reasons. By the time they get home having caught a bus or a taxi, or having that walk, they’re too tired, and maybe they need to do other chores, look after younger children or whatever it is, so they never get around to doing homework. The other thing is they might not have the facilities to do it; when you live in a one-bedroom shack with other children, you don’t have the privacy in which you can actually do your homework. And at night maybe you don’t have the facilities, like light, for example, or even basic things like stationery. So, I mean, the paraphernalia of teaching and learning for me was very easy because I had all those facilities. But also, in addition my parents were both quite well educated. My father was a civil engineer, my mother was a music teacher, was a graduate of Rhodes University. So, both my parents were educated university professionals and we had a culture of book learning in our house, and my house was surrounded with books.

Here P5 demonstrates empathy for students who do not present with the cultural resources and social networks traditionally associated with academia, and of which she has had the benefit, rather than blaming them for failing to present with them.

She attributed some of the changes to a changed relationship between staff and students [re=2], suggesting that students do less, expect more and that staff had to teach them "like little children" – which echoes P4's frustrations. She also suggested that the nature of legal education had fundamentally changed due to the shift from small "high expectation" classes to the current large "passive" classes [sn=1].

A final factor contributing to changes in legal education were attributed to the current chaotic administration of courts: she described how they had to change their teaching from how processes work, to including what commonly happens and how to plan for and anticipate when processes do not work [l=1]:

> So for example, back in the old days, when you drafted up a particulars of claim or a summons, you needed three copies: one for the plaintiff, one for the defendant, and one for the registrar's case file. And these days we teach our students that you need at least four summonses: one for the plaintiff, one for the defendant, one for the registrar, and one copy that you keep yourself, stamped and issued properly because you know that the registrar's case file will go missing or substantive documents within that case file won't be filed.

### 4.5.2 Legal Knowledge

P5 was very confident that legal knowledge in her subject was accepted and stable [KA=8]. Like P4, she asserted its stability in terms of it having very clear and established English roots [oe=2], that it is very technical [t=5] and that there are clear laws of procedure and practice manuals [ls=1] to clarify what it is and is not. In general, she felt that legal knowledge in procedural subjects was "pretty much a given".

Interestingly she acknowledged the colonial nature of her subject, but argued there was no plausible alternative:

> Procedural Law is actually English law, so it is an inheritance from our colonial past and our apartheid past, and there's a clear divide between rich people who can afford law and poor people who can't. But yet in Procedural Law we're not seeing those

> issues of transformation or decolonising Procedural Law, because then what do you replace it with? There is no indigenous African system of Procedural Law. There might be indigenous African systems of substantive law, but there is nothing along the lines of Procedural Law. So, to replace it would result in chaos.

She made one statement that could reflect partial contestation [Kpc=1] but this was with regard to interpretation – a technicality [t=1] – rather than with regard to the knowledge itself. She said: "there is a small amount of interpretation where a rule or a section of an Act is unclear, or there is a procedural argument as to how the procedure applies".

P5 made no statements that could indicate that knowledge boundaries are weak [BW=0] or limiting [BL=0]. She made five indications that knowledge boundaries are strong [BS=5] and four that boundaries are necessary [BN=4]. Reasons relating to both of these categories were largely due to its procedural, technical nature [Pr=2; t=2] and due to its strong roots in English Procedural Law [oe=1]. P5 explained her understanding of "technical" in various ways. One aspect related to knowing and operating within very specific rules: "so you have to operate within the confines of those rules. Any material infringement of those rules will result in an extinction, or you'd have to start again". She went on to explain how very particular – or technical – these rules could get:

> Each court in South Africa, each division of the High Court has its own practice manual. So that if you practise in a particular division of a High Court, not only must you know the Superior Courts Act and the uniform rules or the Magistrate Court rules depending in which particular court you're practising, but each one of those divisions has its own practice manual, which is based on the rules but with a spin to it.

Another aspect to her notion of technical can be found in this example:

> Legal knowledge is a very technical thing. It requires memorising the rules off by rote. Which is the first thing. That produces the framework. So when you plead you should know the format of what the pleading must take because if you infringe those technical rules you have to start all over again.

Thus, "technical" seems to refer to knowing rules, knowing formats, and knowing when to draw on very particular ones in very particular ways. These formats, however, are ones required in practice, and therefore different from P4's critique of shallow academic formats.

Overall, P5 showed a strong traditional-positivist approach [TP=4] and said nothing that indicated the other two approaches. She saw legal knowledge as a clear set of rules, with an internal logic, that were undisputed:

> No…Procedural Law is a fairly technical subject, and it's the tool of practice that you need to practise as an attorney. So, it's like a carpenter's tool, I don't think there's any dispute as to the fact that you've got to use a lathe or a saw if you're a carpenter.

Here I should have probed the notion of "technical" – used by both P4 and P5 – but failed to do so. In this instance, it refers to the rules, procedures, and terms for court documents. In the next chapter, the explanatory power of Bernstein's (1999a) concept of grammar for this orientation to writing is explored.

#### 4.5.3 Legal Writing

P5's orientation to legal writing was mixed. She saw legal writing as part of broader legal discourse, and inseparable from legal knowledge [Re=3]. However, her orientation was also traditional [Tr=4] in that she said several times that good writing cannot be taught; that it can only be learned through repetition and practice. She was different from the other participants in that she felt that much of this depended on family and community literacy and attitudes to writing:

> Mastering legal writing… you have to start mastering by repetitive practice. The more you practise the better you become at it. And that kind of practice has to start early on; it's got to start at school...and you have to start that at an early age. You can't do it at university. If you don't have those basic foundational keys or tools, then you cannot learn it in a year or two or three or four years at university.

P5 stated that the term "legal writing" was too broad and said that there are many different types of legal writing [LWC=9]. Here, she distinguished both between substantive and Procedural Law courses at university, which required different kinds of legal writing. She also distinguished between different types of legal writing within procedural courses, and within the profession. She offered two main sets of reasons here. One related to whether an academic had been in practice or not. She felt that those who had been in practice were likely to value clarity and precision [cp=6] and use less jargon and "flowery" language [ll=3] than those who were "just" legal academics. The other reasons related to the type of writing itself, in which procedural writing was likely to be more precise and clearer [cp=4] and use plain English [Eng=3].

P5 asserted that good legal writing was not the same as good writing in general [LWU=12], giving examples of how often, in practice, good legal writing does not follow rules of grammar, nor is it "elegant" (echoing P3's critique of elegant rhetoric). Rather, P5 suggested, it is governed by principles of economy, clarity, and precision [cp=6]. She also asserted its uniqueness in terms of method [m=3]; structure [struc =2]; and the ability to correctly identify the legal issue [lii=1].

Unsurprisingly, given that she teaches procedural subjects, P5 framed legal writing largely as professional [LWPro=18], discussing a range of genres such as pleadings, contracts, wills, codicils, summonses, particulars of claim, and defences to claims. She made two references to academic instances of legal writing [LWAc=2] – one was the writing of examinations, and the other referred to FIPAC (which, interestingly, she framed – like P3 – as an academic format, and not one which she drew on in her courses). Characteristics she identified of professional legal writing were adhering to specified structures or formats [struc=6]; precise and clear use of language [cp=10]; correct use of legal English [ll=6]; and use of good English more generally [Eng=3].

With regard to the state of students' legal writing, P5 suggested that there was a problem [LWP=12] but added "in the beginning students don't know how to write, but you drum it into them, so that by third or fourth year they have some knowledge of how to write. At least the ones who are making the effort" (which somewhat contradicts her earlier position that it is too late to teach students to write at university). Here, the main reasons related to their prior education [be=7]. Interestingly, P5 did not only talk about the failure of education at school level but also that legal academics had been used to assuming that general academic writing had been learned in a prior degree, when the LLB was completed after a first degree, so she also referred to the challenges presented by students who were not learning to write in non-law courses.

The other major reasons given for writing difficulties were located in the reality that many students learn in an additional language [EL2=4] although she did also state that levels of English generally were a problem [Eng=1]. A different point that P5 raised was that she felt that legal discourse was utterly unlike any discourse that students were familiar with from school (as opposed to many other university courses, which were more recognisable and comparable to school subjects) which she felt contributed to student difficulties with legal writing.

These conceptions of legal education, legal knowledge and legal writing are summarised in Diagrams 27, 28 and 29 at the end of this section.

**Conceptions of samples of student writing**

***The writing task: A Civil Procedure Board-Exam based question (test question)***

<u>**CIVIL PROCEDURE TEST QUESTION**</u>

Joe Green has contracted Jim Plummer to install a geyser in the kitchen of his new holiday cottage. He has also contracted Paul Electric to install a number of light fittings in the lounge. Jim Plummer has failed to connect the geyser to the main water pipe and Paul Electric has failed to connect the light fittings to the main electric box. Joe Green has accordingly suffered damages in the amount of R 20 000 in respect to the geyser and R 20 000 in respect to the light fittings.

Q. Joe Green wants to sue both Jim Plummer and Paul Electric for the amount of R 40 000 in a single summons. May he do so? Explain.

***Purpose***

P5 described the purpose of this question as being to prepare students for board or bar examinations. She said that the question required students to correctly identify specific factual knowledge (in this case knowledge of joinder), and that this knowledge needed to be written down coherently – "not just bullet points". However, she added that, in the past, facts and coherence were regarded as equally necessary in a good answer, but that now she looked more at the factual content and was "very flexible – otherwise we'd fail a good 60 to 70 % of the students".

***Role of writing***

Despite her earlier comment that she looked more at the factual content of answers, P5 stated that "writing is the essence of everything". She went on to explain that "in law, we require a certain flow or a certain coherence in writing the law. Otherwise, it becomes indecipherable". She further explained that "in Procedural Law, it's got to be clear and concise. The more clear, the more concise, the better an answer it is". This suggests some tension between what she believes is necessary in a good piece of procedural writing, and how she awards marks in practice. It does, however, reflect a similar mix of traditional and revised orientations to writing that were observed in her general discussion of legal writing.

***Conceptions of successful writing***

The two most recurring criteria for the successful piece of writing were coherence [co=7] and application [applic=7]. For example, her first comment about this piece of writing was that

> this flows, there is very little crossing out because the student already knows what he is going to write before he's even begun writing it. So, he's already formulated the answer in his mind and all he needs to do then is put it down on a piece of paper in a logical flowing way.

Notably, P5 understood application to be a particular kind of coherence, as opposed to a criterion on its own. She explained:

> So it's coherence in the structure of your answer, but it's also coherence in the way that you apply the answer to the set of facts. The way that you read the facts. And then the way that you interpret the facts that way as well. So, coherence is more than just good flowing English, it also means practical application, the way you apply it.

Slightly later in the discussion, P5 elaborated on this conception of coherence and included a third element:

> So, it's the technical knowledge, which is your factual knowledge. Two, the flow of coherency of your answer. And three, the way that you apply that technical knowledge to the practical problem. So, there's a practical component, a language component, and also a technical component to coherence.

Structure was valued [struc=4] with an interesting comment on introductions: "You need to analyse the question and then you need to go directly to the answer". Like P3 and P4, P5 did not value general introductions or contextualising information. Quality of evidence [ev=2] and meeting formal requirements [fr=2] were also identified as important for the success of this piece of writing. In this case, formal requirements were the formal procedural requirements of the courts, rather than the formal requirements of academia. P5 explained that "in Procedural Law knowing the section numbers, for example, is very important. So you need to know that in the Uniform Rules of Court, rule 5 deals with a summons".

***Conceptions of less successful writing***

P5 identified a range of problems in the two less successful pieces of writing. The most commonly occurring criteria were poor use of evidence [ev=6] and lack of coherence [co=5]. Less frequent were structure [struc=2]; application [applic=2]; clarity and precision [cp=2]; formal requirements [fr=2] and failure in topic analysis [TA=1]. With regard to evidence, one of the pieces of writing simply drew on the wrong law:

> This question was wrong because what was asked was joinder. And it's defined in the Magistrates Court in terms of section 41, 42, and Mag Court rule 28 and that's what you want to see. And they failed to put that down, and that's why he only got one.

The other piece of writing, on the other hand, included some relevant evidence but this was repeated in various ways that did not develop the answer:

> They might know one or two facts about that question, but not more than that, so they try to cover up their lack of knowledge by putting those one or two facts down in as many different ways as they can.

P5 pointed out that poor structure was often a clue that the student's understanding and thinking was poor: "This is "structured in a very vague and incoherent fashion... they're only structuring their answer as they are writing, and then they miss points out and then they try and fill them in." She also pointed out that being over-length was also a predictor of a poor answer: "because they don't understand the question properly, they then write too much but it would be repetitive, in other words, they would say the same thing over two or three times just to fill up space". She further explained that "with a bad answer you keep on having to go back to what you've already read because it's disjointed and incoherent and it doesn't flow".

However, the majority of her evaluation centred around quality of evidence (or what she called technical knowledge of Procedural Law) and the three kinds of coherence she described earlier:

> It's a lack of the technical knowledge of Procedural Law which made it a poor answer. So, this answer lacks both quantity of factual knowledge, and coherency in those three forms that I said: coherency in setting things out in a coherent fashion, but also technical coherency, lack of application to the question.

These criteria are summarised in Diagrams 30, 31 and 32 at the end of this section.

**Participant Five: Summary of main codes**

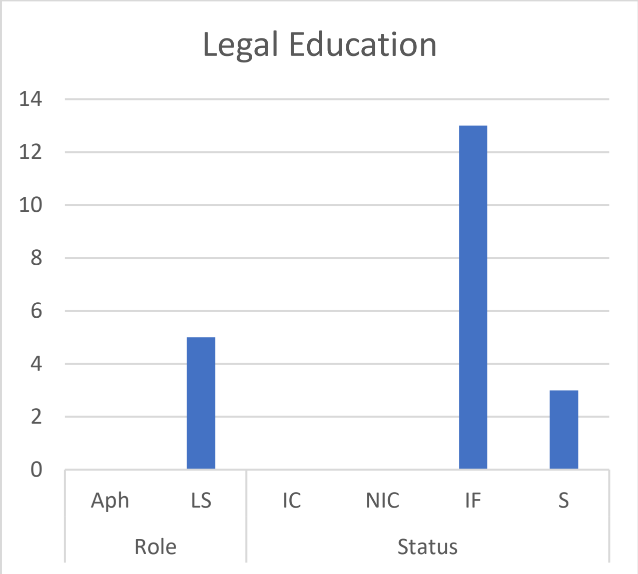


**Diagram 27: Legal Education (P5)**

Like the other academic participants, P5 strongly agrees that legal education is in flux. She sees the role of legal education very much in terms of preparation for legal practice. This may be linked to her strongly traditional-positivist approach to legal knowledge, which she sees as stable, with strong and necessary boundaries.

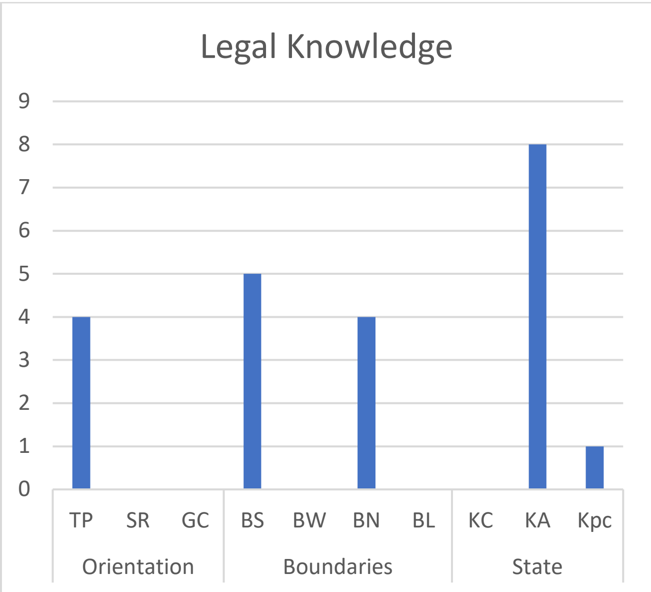
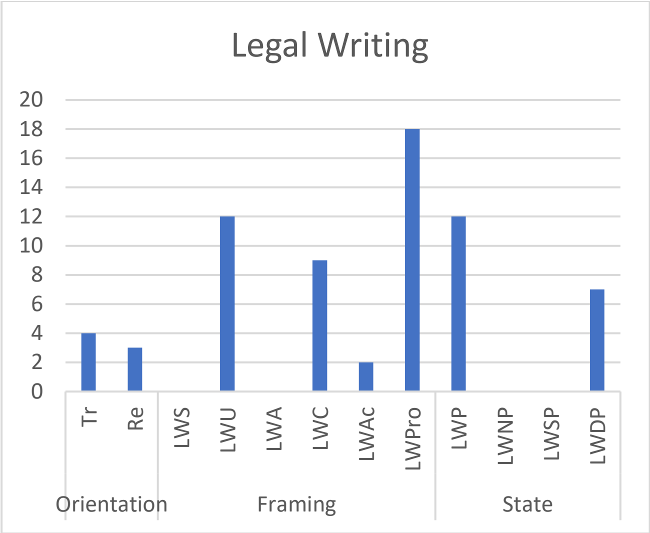


**Diagram 28: Legal Knowledge (P5)**

Like other participants who see the role of legal education as preparing students for practice, P5 sees legal writing as unique and the kinds of writing required in practice. Again, there may be a link between these views and regarding legal writing as a problem, and a problem that is different from when she was a student.

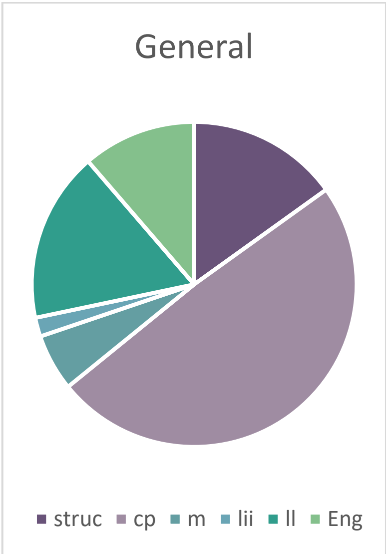
P5 presents a more mixed orientation to legal writing than other participants,




drawing on both traditional and revised orientations. This may be associated with her strong affiliation with legal practice, where both may be valued.

**Diagram 29: Legal Writing (P5)**

**Summary of main writing criteria:**





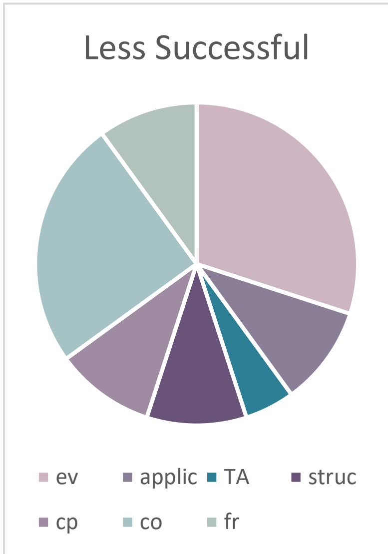



**Diagram 30: General (P5)** **Diagram 31: Successful (P5)** **Diagram 32: Less Successful (P5)**

These diagrams show that, although P5's knowledge approach is similar to P4's, P5 draws on a wider range of criteria to evaluate students' writing. This could relate to her subject, which is all about legal rules and procedures to prepare students for legal practice, and so a range of revised writing criteria must apply. Like P4, though, she uses some specifically legal criteria, like legal method and legal issue identification, although these only are used in her general discussion. Although she refers to traditional writing criteria, such as good English and legal language in the general discussion, the criteria used when discussing students' writing – like the other participants – are strongly revised.

This overview of phase one data analysis is followed, in the next chapter, by an overview of the main findings, in relation to the research question, from phase one.

# CHAPTER 5: FINDINGS FROM PHASE ONE DATA ANALYSIS (LEGAL ACADEMICS' CONCEPTIONS)

In this chapter, I set out the most significant findings about legal academics' conceptions from the analysis presented in chapter four. Of necessity, due to the limited scope of this research, it is not possible to include or discuss all the patterns that could be identified. I have tried to include the findings that emerged most clearly, and the ones that have most significance to the research question.

## 5.1 The academic participants have largely revised orientations to legal writing, drawing on traditional orientations less than anticipated

This finding speaks to the first part of the main research question: *What do legal academics and legal practitioners mean by the term "legal writing"?* as well as the first part of Question 1.1: *What do legal academics and legal practitioners value and what do they critique in student writing?* Overall, these legal academic participants focussed more on structure, analysis and thinking than on edit-level or basic literacy concerns.

Rideout and Ramsfield's (1994) categories of traditional and revised orientations to writing were used as one of the categories for data analysis. Explored in more detail in chapter two, a traditional orientation to writing is one that understands writing as a generic, and sometimes innate, "skill". Those drawing on this orientation believe either that writing cannot be taught, or that it can be taught and remediated separately from the content of the discipline. It tends to be associated with a focus on basic literacy, text production and surface-level concerns such as grammatical proficiency. A revised orientation to writing, on the other hand, is one that understands writing as a mode of thinking and is thus inextricable from the particular ways of reasoning in a given subject. This conception of writing thus focuses on the underlying thinking and reasoning in a piece of writing; the ability to construct arguments in ways that are valued in a particular discourse (Rideout & Ramsfield, 1994; Greenbaum, 2004).

A clear finding from the data analysis is that the academic participants have a largely revised orientation to legal writing (Chapter 4, Diagrams 5, 11, 17, 23, and 29). Relatively few statements were made about grammatical proficiency or basic literacy concerns. In the general discussion about legal writing, although P1 and P5 presented with orientations that draw roughly equally on traditional and revised orientations, P3 and P4 presented with completely revised orientations, making no statements that could be understood as traditional and P2 drew on a revised orientation twice as often as she drew on a traditional orientation. This revised orientation to legal writing is consistent across the general discussion of writing and the discussion of samples of student writing, except for P1, whose orientation grew more strongly revised (Chapter 4, Diagrams 6, 7 and 8).

All academic participants drew, initially, on a revised orientation, emphasising understanding of the law, complexity, and being able to argue based on legal evidence. P1 asserted that "it is all about knowing the law, understanding it, and being able to apply it, that is what legal writing would consist of"; P2 explained "it's about how you construct an argument, and how you support that argument with evidence...it's a discursive practice"; P3 stated "this sort of opinion understanding is behind everything. I mean, it's your understanding of the law and whether you can write down your understanding of the law"; P4 explained "legal writing to me would mean that type of writing that is going to respond to the legal problem. And when you respond to the legal problem you have to be looking at it at all its…from different angles"; and P5's position was that "it requires a knowledge of the law, but it also requires you to precisely and almost in a mathematical way set down the requirements of the law and how you would apply them in practice".

Later in the discussions, some academic participants drew also on a traditional orientation, although always to a lesser extent. For example, P1 felt that "issues of language use" were a common problem and suggested "having legal language as a subject to assist students in terms of expressing themselves in English". P5 also emphasised the importance of having a good command of English generally, and legal language more particularly:

> you need that formatting knowledge, and then you need the language ability within that structure to set out the cause of action or the defence, in a way which is clear, concise, and precise, and which doesn't allow for any ambiguity or any vagueness.

The criteria used to respond to students' writing also reflect a revised orientation to writing. P1 referred most frequently to quality and relevance of evidence used, followed by structure and argument, meeting the ethical requirements (no plagiarism), and ability to fully respond to the topic. Meeting the formal requirements of the assignment task (for example, using the required number of sources) was mentioned once, but no mention was made of any traditional writing criteria (Chapter 4, Diagrams 6, 7 and 8). P2 particularly valued clarity of thought and thoughtfulness, and argument, application and synthesis were the main criteria she used to comment on the writing samples (Chapter 4, Diagrams 12, 13 and 14). P3 and P4's main criteria were quality and relevance of evidence, and clarity and precision (Chapter 4, Diagrams 18, 19, 20, 24, 25 and 26). P3 also valued development of argument strongly. Lastly, P5 referred most frequently to the criteria of application and coherence, although quality and relevance of evidence was also common (Chapter 4, Diagrams 30, 31and 32). Overall, quality of legal evidence, and the ability to structure it into clear and coherent arguments, and the ability to apply law to facts, seemed to be most important to participants – all of which reflect a revised orientation to legal writing.

This finding of a strongly revised orientation to legal writing is one that the literature had not led me to anticipate. It is, in fact, in stark contrast to Greenbaum's (2004) findings from a 2001 survey she conducted on legal writing across twelve South African law faculties. She reported that legal writing problems were described mostly in traditional ways and that "these comments reflect concerns that focus mainly on basic literacy and surface-level grammatical skills as well as an understanding of 'writing' as grammatical proficiency" (p. 9). Although my research draws on a very small sample, these findings could indicate that the way legal writing is understood has shifted since 2001, from a focus on surface level issues to the thinking, logic and arguments, how they are structured, and how coherently they are expressed. On the other hand, these findings could also simply reflect a particular institutional culture at the site of this research.

This revised orientation probably contributes to the link that can be identified between academic participants' conceptions of legal knowledge and legal writing: if writing is conceived of as thinking, logic and argument rooted in a particular area of legal knowledge then it follows that how one defines that knowledge will greatly influence one's understanding of writing. Before these findings on the links between conceptions of legal knowledge and legal writing, and between subject and writing are explored, however, the findings on (apparently) common criteria are set out.

## 5.2 Some common criteria for writing are used, but often mean different things

This finding speaks to the first part of Question 1.1 of the research question: *What do legal academics and practitioners value and what do they critique, in student writing?* Although a few common criteria for good legal writing emerged, academic participants often mean different things by these criteria. Furthermore, many of the criteria used are not specific to law but are criteria that could equally apply to writing in the Humanities or Social Sciences.

All academic participants describe writing as being very important for the assignment, but, as seen in the above section, they do not all have traditional writing requirements in mind when they claim this importance. Some common criteria for evaluating student writing emerged. Evidence (quality and relevance); application; argument; structure; clarity and precision; accurate topic analysis; and coherence are the most frequently used criteria across participants (Chapter 4, Diagrams 6, 7, 8, 12, 13, 14, 18, 19, 20, 24, 25, 26, 30, 31 & 32). However, what they mean by these terms tends to differ.

P1 and P3 emphasised structure, logic, and coherence: For P1 "the most important part of the essay is writing, because it's about taking all the information and presenting it in a logical fashion so that the reader can understand how exactly you went about answering the question". Similarly, P3 explained, "I think that being able to coherently put together the material is the key thing. So, I suppose writing well is going to make a huge difference".

P5 presents a very particular understanding of coherence. Because she referred to the term so often, she was asked to explain exactly what she meant. Her first response was as follows:

> "So, it's coherency in the structure of your answer, but it's also coherency in the way that you apply the answer to the set of facts. The way that you read the facts. And then the way that you interpret the facts that way as well. So, coherency is more than just good flowing English, it also means practical application, the way you apply it".

P5 went on to include "technical coherence" as part of her understanding of the term coherence:

> "So, it's the technical knowledge, which is your factual knowledge. Two, the flow of coherency of your answer. And three, the way that you apply that technical knowledge to the practical problem. So, there's a practical component, a language component, and also a technical component".

This meaning of the term seems to be quite different from what the other academic participants have in mind; when they use coherence as a criterion it is synonymous with structure, clarity, and logical development. Here it is a particular way of reading and interpreting facts, and application of legal principles to facts. P5's understanding of coherence is a criterion specific to law, that incorporates reading, interpreting, and applying law to facts. Therefore, even when academic participants use similar criteria to respond to writing, they, in some cases, mean different things by these terms. The criteria that can be regarded as specific to law all relate to the legal relevance of the evidence, and how this is read, interpreted, and applied.

## 5.3 Some differences regarding structural expectations are apparent, especially with regard to the role of the introduction and the usefulness of formats

Finding 1, above, in answer to the first part of Question 1.1, shows that academic participants have a largely revised orientation to writing. Differences emerge, however, in relation to structure: Whilst P1 and P5 seem to accept that certain structures and formats are useful and necessary, there is a suspicion of generic formats from others, who perceive them to be over-simplistic.

P2 commented that

> in some courses they have been taught they've got a formula, and I say to them, what I'm looking for is an argument and the way you support that argument. Other than that, I have no framework for what is good writing.

P4 also objected to formulaic writing, suggesting that it prevented thinking and coherence:

> They write in a very mechanical way that really annoys me as a person, and I usually say, you see we give you this formula but you've got to identify the issue, state the relevant law, apply this... and I say, this mechanical way is just meant for first years, for you to know what a legal answer should look like, and as you progress in your studies, you should be writing, you know…your answer should flow very well…not in these little silly headings that are mechanical like that. Because if you do it that way, it doesn't enable you to think. It's like, now you're writing mathematics.

On the other hand, whilst P4 equated "mathematics writing" with being mechanical and lacking nuance, P5 relished the metaphor of mathematics. In describing a good written answer in Procedural Law, she said

> if you've got that factual knowledge, and you put it down in a coherent fashion, you will get full marks for that, because it's like mathematics. For mathematics you either know the answer or you don't. So, if you get the answer you're given full marks.

These differences point to the subtly different expectations about writing in different subjects, and the problems inherent in treating "legal writing" as if certain formats or structures can be applied across all areas of law.

There are notably different positions on what constitutes a good introduction, particularly regarding the relevance of contextualising information. P1 objected to one of the student's lack of explicit introduction:

> I felt that the introduction was inadequate because it didn't sort of adhere to what an introduction should be doing, it should be telling the reader, okay, this is what the issue is, and this is what I'm going to do with it. Instead, it appeared that the student went right into the issue, instead of introducing it.

P1 commented that this was a general problem; that students "just go for the answer". By contrast, P3 expected a good piece of writing to identify the legal issue straight away and "go for the answer" without contextualising information or a general introduction. She commented on the first paragraph of one of the pieces of writing: "you see, now this student is already waffling a bit" and "this is all well-established... It's a lot of background... They're singing to the choir". She reflected similar opinions in her final comments in the interview: "you know, really, if you don't know stuff, you're of no use to anyone. And pretty phrases will not do it". Thus, contrasting expectations seem to exist about the role of general or contextualising information, in legal writing, particularly at the start of a paper.

## 5.4 Beliefs about legal education have some impact on conceptions of legal writing

Speaking to the first part of Question 1.2 – *How do legal academics' and legal practitioners' conceptions of legal education and knowledge intersect – if at all – with their conceptions of legal writing*? – this finding shows some intersection between conceptions of legal education and legal writing. Academic participants who view the role of education as being to prepare students for legal practice have a clear and focused range of criteria to respond to students' writing (Chapter 4, Diagrams 24, 25 and 26). They also agree that the current state of students' legal writing is a problem. This suggests that they have a clear understanding of what the profession requires of good legal writing. This link is perhaps an obvious one: If you expand the role of legal education, it is necessary to also expand the criteria that you use to respond to writing done as part of this expanded role whereas if you are clear about what the writer will have to do in the profession, you will assess the writing according to these clear criteria. And if students are not meeting these fixed criteria, you may be more likely to see their writing as a problem.

P1, P4 and P5 all present a strong inclination towards legal practice in their views on legal education and make the most statements in agreement with the claim that students' legal writing is a problem (Chapter 4, Diagrams 3, 21 and 27). However, what they describe as the core of the problem differs: P1 most often referred to plagiarism and problems with language use; for P4 the problem is that students do not base their writing on strong legal principles – "they just waffle" – and, similarly for P5, "in Procedural Law, it's that lack of knowledge, which I think really defines or underlines everything".

P2 and P3's views on the role of legal education reflect a balance between the categories of an inclination to legal practice and the academic-philosophical view (Chapter 4, Diagrams 9 and 15). However, they differ markedly in how they respond to students' writing. P2 drew on a wide range of criteria, and accepted a range of arguments, even ones that did not directly respond to the given question. P2 also valued criticality, context, and student voice. On the other hand, despite making general statements that acknowledged the academic-philosophical role of legal education, P3's criteria for evaluating legal writing remained "strictly legal". Student voice and opinion were seen as irrelevant to the question – P3 described it as "too much general material" – and she repeatedly commented on any element of the writing that she deemed irrelevant context or "singing to the choir". This may be an example of the tendency, identified by Bangeni and Greenbaum (2013), for novice law student writers to include tacit knowledge that is deemed inappropriate by expert legal writers. It could also reflect P3's social realist approach to knowledge, with its clear boundary between everyday and specialised knowledge.

Interestingly, these two participants did not feel that students' legal writing was a particular problem (Chapter 4, Diagrams 11 and 17). P3 commented that "it seems unremarkable to me" and P2 argued that "I would say that there's quite a broad band, quite a broad range. There are some students who write very well…who are excellent". This reinforces the finding that a stronger inclination to legal practice is associated with a stronger conviction that legal writing is a problem, and vice versa.

Academic participants' views on the state of legal education do not seem to affect their opinions on legal writing greatly. Four of the five participants reject the notion that legal education is in crisis, although all strongly agree it is in flux (Chapter 4, Diagrams 3, 9, 15, 21 and 27). The participant who most strongly agreed that it is in flux, P2, also drew on the widest range of criteria for legal writing (Chapter 4, Diagrams 12, 13 and 14). However, it is interesting that this sense of legal education being in flux does not translate into being more flexible about responding to legal writing with the other participants; they retain a clear and narrow sense of what they value in legal writing, in a way that seems unaffected by changes in legal education. It could be inferred that retaining these clear, narrow boundaries for what counts as legal writing is in fact a way of attempting to create or retain some stability in the face of these changes.

The one participant who feels that legal education is in crisis, P4, also feels strongly that legal writing is a general problem for students, and that this is a new and different problem from when she was a student. Her explanation for this is rooted in the idea that the corporatisation of universities has affected standards: "I think we have become like babysitters. They are clients, well, our clients cannot do that, no, our clients cannot…you can't, that's too much torture. Don't make our clients to identify issues…" Here, she suggests that by her being required to set easier writing tasks (in which the lecturer identifies the legal issue for the student, instead of the student having to identify it) students are not able or required to write in the way she had been expected to at university. Interestingly, P4 used the narrowest range of criteria to assess her writing task, perhaps to prevent further erosion of standards.

Overall, although some interesting patterns emerge concerning the intersection between conceptions of legal education and legal writing, the clearest claim that can be made here is that a legal practice inclination is associated with seeing legal writing as a problem and using a narrower range of criteria to assess writing.

## 5.5 The link between subject and conceptions of legal writing is less clear than anticipated but grammatical strength emerges as a factor

This research began with a hunch that there may be a connection between the legal subject taught, and how legal writing is understood. This drove the selection of academic participants; they were chosen to represent a range of subject-types in law. Underlying this hunch was the question of whether legal tradition might influence how legal writing is conceived. There was also the question of whether the assumed grammaticality of the subject (Bernstein, 1999a) would have a clarifying effect on writing in that subject. This finding therefore speaks to Question1.2.

Part of the first hunch, grounded in the work of scholars like Glenn (2010) and Dainow (1966), was that the legal tradition that the subject drew on could influence understandings of legal writing. However, the data analysis shows that the participants had very little to say about legal tradition or did not seem to believe it had a particular effect on how students are expected to write in that subject. For example, regarding legal tradition, P4 commented that "for intellectual property it really doesn't matter whether you work from civil law jurisdiction or from the common law jurisdiction". P3 felt that legal tradition might have had some impact very early on in South African law but that "now really we focus on our own jurisprudence". It is therefore not possible to investigate the possible link between legal tradition and understanding of legal writing in this study. This does not, of course, necessarily show that there is no link; simply that participants did not perceive it to be significant.

The second hunch proved to be more fruitful. What emerged quite strongly was that subjects with a strong grammar (Bernstein, 1999a) have clearer criteria for writing. In fact, as I worked on these findings, it became evident that the concept of grammaticality deserved far more attention than I had given it in the data analysis. As briefly explored in Chapter Two, Bernstein (1999a) distinguishes between strong and weak grammars in disciplines. Disciplines with strong grammars have single terms to refer to an empirical phenomenon with complete accuracy. Disciplines with weak grammars have multiple terms to refer to the same empirical phenomenon (pp. 163-164). This is evident in subjects in law. Although Law, as a discipline, is generally accepted to have a strong grammar, it may be that in some subjects, at university level at least, the grammar is weak or weakening, especially where a general-constructivist approach to knowledge in the subject holds sway.

For example, in Jurisprudence, which has a weak grammar, writing was conceived of far more broadly than in other subjects, and a greater range of criteria was used to assess it. This is reflected in general statements about writing made by P2 such as "in Jurisprudence you have a much wider berth" and "there are different ways of constructing an argument and I personally take a sort of very broad view". It is also seen in some of the criteria she used when discussing the student writing samples, that were not used by any other participant: "engagement with grey areas", "full engagement with the complexity of critical theories", "who they brought together" and "application of theory to theory" (which is different from application of law to facts, required in other types of legal writing). "Thoughtfulness" and "carefulness" were also valued by P2.

This "broad view" is congruent with the weak grammar of the subject. P2 explained that "Jurisprudence is more experimental, more exploratory, you can ask deep questions, you can ask critical questions, it can re-examine root ideas". Her use of the word "more" suggests a comparison with other legal subjects and implies that there is greater acceptance in Jurisprudence than in other legal subjects, of criticality and experimentation, which extends to conceptions of writing.

Broader conceptions of writing can be seen in statements like "in Jurisprudence we've been thinking about exploring different ways of writing... more fictional ways of writing, if the question is posed in a way that lends itself to that kind of writing". It is seen particularly strongly in her description of her response to a student's research essay, which did not meet the usual criteria for research essays but which P2 nonetheless regarded as being very successful writing:

> She made a very strong case, she's very strongly opinionated, and she made arguments in a way that certainly were outside of my initial range on issues of land and property. She was introducing it with her way of thinking.

P2 went on to explain how

> Her instinct was to develop her argument and I was sort of bowled over by what I think she achieved. And also, her writing, by the way, was, in parts, it was very almost poetic and other parts it was less successful. In formal terms. But I gave her the latitude to speak more powerfully, more evocatively.

There is thus a consistency between P2's understanding of the subject, and her acceptance of a broad range of and sometimes-different criteria to respond to students' writing. In other words, the weak grammar of the subject allows P2 to accept a range of terms, even poetic rather than legal ones, as valid for writing in her subject.

Civil Procedure is the other subject in which a clear link can be seen between subject and conceptions of legal writing. Civil Procedure has a strong grammar; knowledge of the processes that must be followed and the terms that must be used in drafting court papers is essential in this subject. P5 explained that "the procedural courses are purely practical…practice driven in purpose" and that "when you draft a contract you need to be able to put that legal knowledge in words on a piece of paper in a way which is clear and unambiguous and does not allow for interpretation". It follows that, if the purpose of the course is to teach students how to draft unambiguous pleadings, contracts and other legal documents, and there is no debate about how these documents should be written, there will be no great range or flexibility in criteria used to assess legal writing in this subject. Insisting on the correct terms, in the correct order, is a] function of the strong grammar of the subject, rather than simply being a "technical" or "traditional" requirement.

In the other three subjects, grammatical strength continued to emerge as a factor affecting conceptions of writing. For example, in Intellectual Property, P4 consistently used a clear and narrow set of criteria to evaluate writing, which may be associated with the grammatical strength of the subject. Evidence emerged to suggest that Constitutional Law, on the other hand, has a weaker or weakening grammar. Both P2 and P3 spoke about how "what counted" as Constitutional Law is increasingly contested; P2 suggesting that its boundaries with Political Science are increasingly blurred and P3 observing that a student writer could "get away" with more than in other subjects such as Property or Contract Law. This leads to the next finding: the link between knowledge and writing conceptions.

## 5.6 There is a link between conceptions of legal knowledge and conceptions of what counts in legal writing

What clearly emerged in chapter four was the connection between academic participants' conceptions of legal knowledge and their criteria for what counts in legal writing. This offers some intriguing answers to the first part of Question 1.2 and may be worthy of further research. Participants who understand the boundaries of legal knowledge to be clear and necessary, and who conceive of knowledge as objective, also have strong boundaries for the range of criteria they use to define good legal writing. These conceptions are associated with claims about knowledge made by the traditional-positivist and social realist approaches, respectively. (For example, compare Diagrams 16 and 22 with Diagrams 18 and 24, in Chapter 4). Participants for whom knowledge boundaries are weak or contested also have weaker boundaries for what counts in legal writing.

P1 and P5 drew on a similarly traditional-positivist approach to legal knowledge; P4 drew on an equal combination of traditional-positivist and social realist approaches; and P3 drew on a more strongly social realist approach (Chapter 3, Table 7). The traditional-positivist approach can be seen in statements such as: "legal knowledge is knowing the law, so knowing what is written or unwritten, but what is law" (P1) and "legal knowledge is a very technical thing. It requires memorising the rules off by rote" (P5). Suggesting the traditional-positivist approach, P4 saw legal knowledge in intellectual property as "clear and uncontested" and gave as her reason for this that it falls under private law. She also described knowledge in her subject as "very technical". But reflecting the social realist approach, she stated that "law is contextual" and acknowledged that its development occurred in very particular historical and social contexts. What makes hers a social realist approach is that she nevertheless conceives of legal knowledge as emerging from and not reducible to the context she acknowledges, as well as being subject to a system of revisability, through the courts. Similarly reflecting the social realist approach, P3 acknowledged the role of social context in knowledge production: "In the beginning of the Bill of Rights there was a situation where there were just philosophical views, there were foreign views, there were views from different countries and so on, and we were drawing a lot on them". She went on to caution that "but now really we focus on our own jurisprudence" and explained that theories and philosophies that had not been made part of the law through precedent were not regarded as legal knowledge in Constitutional Law: "the ones that the South African judges have made part of our law are very much part of it, and the ones they didn't, get sort of put to the side". What makes this a social realist approach is that she acknowledges the social context in which the law was developed but that only the knowledge that judges have made part of our law, by systematic revision through case law, is seen as objective and so what counts as legal knowledge.

For these academic participants, a clarity about knowledge boundaries links to a clarity about what counts as legal writing: In P4's words: "We need to identify the legal issue, identify the relevant law and also to apply it in a coherent manner"; in P3's: "It's your understanding of the law and whether you can write down your understanding of the law". For both of these participants, clear legal knowledge boundaries translate into clear boundaries for what counts as good legal writing. Interestingly, both of these two participants also present the most clearly revised orientation to legal writing, discussed above under "Finding 1".

In P1's case, her description of legal writing was almost identical to her description of legal knowledge:

> It is all about knowing the law, understanding it, and being able to apply it, that is what legal writing would consist of. So, getting the knowledge, understanding it, and then being able to compose a response to a particular legal problem in terms of your writing.

With regard to specific criteria, she looked for a particular structure; the ability to construct an argument; the use of relevant evidence; the ability to analyse the topic correctly; to meet formal requirements; and to avoid plagiarism. In P5's case, "legal writing means to be able to take a legal point or a legal issue and take the oral meaning of that and reducing it down to clear and concise language on a piece of paper". She elaborated on this initial statement by saying:

> You have to have understood the structure of a pleading. In other words, so you need that formatting knowledge, and then you need the language ability within that structure to set out the cause of action or the defence, in a way which is clear, concise and precise, and which doesn't allow for any ambiguity or any vagueness.

These descriptions were consistent with the criteria she used when discussing the examples of student writing, where she looked for structure and coherence; the ability to correctly apply the law; and quality of evidence.

What is fascinating is that whether academic participants drew more strongly on traditional-positivist approaches to knowledge or social realist approaches to knowledge did not seem to influence their conceptions of the boundaries of legal writing greatly. Both of these approaches recognise knowledge boundaries as being necessary and acknowledge the possibility of objectivity within these boundaries. Whilst social realists acknowledge that knowledge is developed in particular historical and social contexts, this does not undermine the possibility of knowledge boundaries or objectivity. This allows participants drawing on either of these approaches to set equally strong boundaries for legal writing. However, although boundaries may be strong, this does not automatically translate into clarity regarding what counts.

It is where academic participants had a general-constructivist approach to knowledge, that an effect on legal writing boundaries could be noticed. None of the participants has a predominantly general-constructivist approach to legal knowledge. P2 is closest to this approach, although she also made a significant number of statements that reflected a social realist approach. She made no statements that could be interpreted as traditional-positivist (Chapter 4, Diagram 10). Elements of a general-constructivist approach were reflected in statements like:

> So, what is legal knowledge? I mean, increasingly in, say, Constitutional Law, I don't know how clear the distinction is between law and politics. Political theory and legal theory. And the idea that you can make those distinctions itself is open to question

and

> Jurisprudence is more experimental also, more exploratory. You can ask deep questions, you can ask critical questions, it can re-examine root ideas... South Africa is perhaps a newcomer to these rapid changes in the way we think about law and legal institutions and its relationship to other forms of knowledge.

In these statements, P2 suggests that the boundaries of legal knowledge are weak and what counts as legal knowledge is increasingly unclear. As the only participant who presents with a somewhat general-constructivist perspective on legal knowledge, she is also the only participant who has a broad understanding of what constitutes legal writing; in other words, the legal writing boundaries are also weak. This is reflected in statements like "we've been thinking about exploring different ways of writing... more fictional ways of writing" and "I have no framework for what is good writing... there are different ways of constructing an argument and I personally take a sort of very broad view".

Interestingly, P2 acknowledged that this "very broad view" on writing did not apply to subjects with strong knowledge boundaries:

> in contract law if they're given a hypothetical and asked, a contract come into being or whether a contract can be cancelled, you know, then I think the student is directed to facts, they have to apply law to facts, they're going to look at cases, they have to

> distinguish lines of authority so the understanding of the law precedent, and that's legal writing. In Jurisprudence you have a much wider berth.

Here, P2's description of legal writing in contract is very similar to other participants, who drew on traditional-positivist or social realist approaches to knowledge. P2 is also the only participant who felt that the assertion that law students cannot write was not a fair statement and went on to describe a piece of writing by one of her students – which she had given a very high mark – as "almost poetic" and that "I needed to get into her spirit in a way of her writing" and being "bowled over by what I think she achieved". But she did add: "I think that someone who maybe had a stronger set of a priori assumptions about what is good writing might not have evaluated the work as generously as I did". It is clear that P2's flexibility about what "counted" as legal knowledge in her subject extended to what "counted" as good writing.

P2 is also the only academic participant who consistently valued criticality, context, and critique of the law in legal writing. This can be seen in the following three comments: The first, made in relation to a successful piece of student writing: "she made a very strong case, she's very strongly opinionated, and she made arguments in a way that certainly outside of my initial range on issues of land and property". This is in stark contrast to P3's assertion that "no one wants to hear your view on anything". The second comment values critical reflection and a wide range of reading: "This is a thoughtful engagement with the question and obviously this results from wide reading, synthesis of the knowledge, a critical reflection on what has been presented in the course". The third comment, made in relation to a failed piece of student writing, suggests that P2's criteria for writing are broad enough to value critique from students' own experience and class discussion, even when it does not directly respond to a given question:

> I would have also had some sympathy with the student because I wouldn't be surprised if there were some readings along these lines, if there was some discussion in class along these lines, and I think that this is a question that resonates very directly with the experience of our students, this gap. So, it's an entirely understandable and expected line of attack, if you like, of critique of the Constitution and of rights and rights' discourses.

Here it can be seen that conceptions of legal knowledge where legal knowledge is seen as contested, with weak boundaries, are consistent with a wider range of criteria being used to evaluate student writing. In particular, this general-constructivist approach to legal knowledge is associated with greater acceptance, in students' writing, of students' use of their own experience, socio-political context and critique of the law, even when this did not directly answer the given question. By contrast, the other academic participants regarded student opinion, socio-political context and critique of the law as being mostly irrelevant in legal writing in their subjects, which is consistent with the strong writing boundaries associated with their strong knowledge boundaries.

Lastly, for this finding, P5 suggested that understandings of legal writing would differ between academics who had practised law, and those whose careers had been spent wholly in academia. She further believed that understandings of legal writing in substantive subjects would be different from understandings of legal writing in procedural subjects:

> I could say that there are three nuances here. You can talk about good English language in the Arts, for example, in the way that you would structure it. You can talk about legal English for substantive law. And then I think you can put in a separate category, legal writing for Procedural Law, which would be different from legal writing for substantive law.

This suggests that not only knowledge approach, but professional inclination, may affect conceptions of legal writing. Furthermore, it suggests that subject type – substantive or procedural – influences how legal writing is conceived.

Overall, this finding suggests that a fairly strong intersection between conceptions of legal knowledge and conceptions of legal writing can be identified, although clarity regarding what counts within these boundaries needs to be probed further. The impact of the strength of a subject's grammar, in combination with the strength of knowledge boundaries, on conceptions of legal writing, also requires further investigation.

## 5.7 Private law subjects are associated with stronger knowledge boundaries than public law subjects, with equivalently stronger boundaries for what counts as legal writing

Arising from Findings 5 and 6, and in further answer to the first part of Question 1.2, there is some evidence in this data that the public-private law distinction persists and that private law subjects are associated with stronger knowledge boundaries, and stronger grammar, than public law subjects. All academic participants continued to draw on the distinction, although P2 acknowledged that "there's been a fundamental change in particularly public law but also private law. I mean, some people might question that you can still make that distinction. I think you can, but there is certainly some overlap". This statement is congruent with P2's combination of social realist and general-constructivist approaches, discussed above.

The association of private law subjects with stronger knowledge boundaries and stronger grammar is seen in P2's comment, quoted earlier, about the contrast between writing in her subject, Jurisprudence, and writing in Contract (a traditionally private law subject). It is seen most strongly in P3's contrasting what counts as legal knowledge in Constitutional Law (a public law subject) and Property Law (traditionally, a private law subject):

P3 described Constitutional Law as

> a very easy course. I teach Property, it's much harder...you could get away with quite a knowledge deficit [in Constitutional Law] and still do okay. I suppose because these are general moral values and you could probably dig something out which is relevant...but conceptually I don't think it's that demanding.

She explained the difference between the courses in terms of the private-public law distinction: "one has to hold that private law core and know that that's really very important and that students in practice are going to need that". With regard to subjects with a strong private law core, she explains, "basically the skill is in dealing with things with a very high level of precision".

This differentiation contrasts with some of the literature, such as Bhana and Pieterse (2005), which suggests that the public-private law distinction is, or should be, falling away due to Constitutional supremacy. P3 reflects the perception that private law has strong knowledge boundaries, and has more difficult substantive content, whereas public law is "not really law".

Of interest for this research is that the maintenance of strong knowledge boundaries in private law subjects may translate into equally strong boundaries for what counts as legal writing in these subjects. An implication of this is that private law subjects may have stronger grammar than public law subjects. But an interesting contradiction is evident: P3 observed (as part of the discussion of the less successful piece of writing): "It's just got no basis in law. I mean, it doesn't link to sources. And I think maybe that is one of the main things. That we're really not interested in anything which isn't directly linked to a source". But here she is applying legal knowledge criteria for what counts as good legal writing to a Constitutional Law assignment, despite having said earlier that, in this course, one could "dig up" general moral values that are relevant.

A notable implication of this is that what counts as evidence in legal writing may be different between private and public law subjects. In public law subjects, there may be more room for critical and contextual evidence whereas in private law subjects what counts as evidence is strictly the relevant law. This suggests that it may be misleading to blur the distinctions between private and public law subjects if what counts as evidence in writing is different. But more than this, there may be a discrepancy between what academics say they value in legal writing in a subject, and what they really do value. This makes the different criteria for successful writing invisible and therefore confusing for students to understand why what may be valued in one subject is not valued in another.

## 5.8 "Legal writing is not telling stories": most participants believe that good legal writing is different from other good writing

This finding speaks to the first part of the main research question: *What do legal academics and practitioners mean by the term "legal writing?"* All academic participants, except P2, claimed that good legal writing is different from other good writing, although some qualified their answers and they gave different reasons for their claims (Chapter 4, Diagrams 5, 11, 17, 23, and 29). They identified some common criteria for good legal writing, discussed above in section 5.2. Although some of the most common criteria are generic and applicable to good writing in general – such as argument, structure, coherence – it is clear that the participants meant different things when they used the criteria, and that they had a particular understanding of what each meant in law.

P2 asserted that "good legal writing, good writing in Jurisprudence, is not different from good writing in Philosophy or Political Science, but the content is different". She explained the commonalities as: "it's about how you construct an argument, and how you support that argument with evidence… the ethics of the writing is very important – acknowledging where you get ideas". However, she went on to acknowledge that writing for Jurisprudence was more like other types of academic writing than writing in some other legal subjects: "bear in mind just that in Jurisprudence it's definitely interdisciplinary. So, I think students have much broader scope than they would say in Contract". P3 was also tentative about claiming that legal writing was different, saying things like "I suppose it's the same but it's specific"; "I suppose good writing is good writing" and "it's not a completely different skill". However, she went on to explain that, for her, conceptual depth was the only thing that counted for her when she assessed student writing – "Well there's a lack of depth of analysis, which is what I think you're really looking for. Like looking at the facts really carefully, looking at the law really carefully, and putting it together. I don't think I really think about anything else". This, she agreed, was different from other kinds of writing.

The other academic participants were unambiguous, though, that legal writing was different from good writing in general. They offered a range of reasons for believing this. P1 explained it as follows:

> it's different because law has a language of its own. So, you can't…even if you are good at writing stories, for example, your ability to compose a response to a legal problem can't just take that sort of writing of a story. Your approach to legal writing has to be different, also taking into account that law has its own method, has its own learning.

When asked to elaborate, she explained that even though some structural elements may be the same – such as an introduction, body, and conclusion in an essay – legal writing requires specific legal terminology and greater formality of tone. Again, this could be explained in the light of the strong grammar of law.

P4 explained the difference, like P3, in terms of conceptual depth and legal accuracy:

> Mm…no, they are different. I have marked students whom, you know, when I read this paper, I'm like, oh my word! Like really reading a very nice written story, or whatever you know. But at the end of the day when I have to award a mark, I was like, but there was nothing here.

She went on to contrast this nice but empty storytelling with students who do not present with traditionally good writing ability but grasp the legal principles: "And then sometimes you come across another student who can barely construct a sentence but hell no, they've got it". She explained this by saying that good writing won't get you far in law; "what will get you far is your ability to identify legal issues". And, for P4, "of course" the second student, who could “barely construct a sentence”, would be awarded a much higher mark than the empty storyteller.

P5 strongly believes that good legal writing is different to good writing in general, particularly in Procedural Law. She used the example of the writing in Procedural Law textbooks: “The textbooks in Procedural Law are very practical, down-to-earth, use very clear, precise language, we break down every procedure down to its fine points, and we avoid the use of Latin terminology where possible”. Speaking more generally about legal writing she explained:

> So legal writing, and the key words about legal writing, it doesn’t have to be elegant writing, but it has to be clear and concise writing. So, we choose descriptive words which describe the law in a basic fashion rather than elegant, good English or flowing English, as such. So, it doesn’t have to be flowing English, it doesn’t have to be even grammatically correct English, but it has to be able to express the meaning of that point of law in clear and concise language. So, you can put a…you don’t have to conform to the traditional verbs and adjectives or negatives or positives, whatever, as long as you can convey the meaning of the law in a clear fashion.

P5 went on to explain the implications of this understanding for her subject: “And that’s what we teach our students, how to properly use the tools of law to produce pleadings which are clear and precise but not necessarily grammatically correct”. Here, as for P4, legal clarity and accuracy are valued as good writing over grammatical accuracy – confirming the first finding about revised orientations to legal writing as well as the fifth finding about the grammaticality of a subject influencing conceptions of good writing.

What stands out is that, for some academic participants, elegant rhetoric, or what might be regarded in other contexts as “good writing”, is seen as a liability rather than an asset. P1 and P4’s dismissal of “good story writing”, discussed above, is one instance of this. P4 further commented that: “They can write, obviously many of them are from private schools, they write very well in terms of ordinary writing, but for legal writing they are really lacking”. P3’s discussion of a sample of student writing revealed this position most strongly. Here, the student failed to understand what the lecturer would value in legal writing and relied on ways of writing that may have been valued in other disciplines. P3’s response to the opening paragraph was to describe it as “nicely written” and “sort of pretty” but then went on to explain how it was “not really what you want to know if you want to know whether it’s okay for the guy to get arrested". She went on to use the phrases "nicely written" and "pretty" several times, as well as descriptions like "rhetorically appealing" and "it's very articulate and well expressed". However, these were expressions of dismissal rather than praise; the student did not do well in the assignment. P3 explained that what she felt was wrong with this kind of writing was "this student likes to make speeches and does it very well... but this is not the appropriate speech at this point".

Like P1 and P4, P3 felt that legal writing must be much more precise in terms of content than other good writing: "I'm looking for specific stuff, and if I don't get it then I'm…I'm not giving fantastic marks". She made an interesting point about generalities vs specific information later in her discussion of the same writing sample:

> What I said to you about Constitutional Law is that you can get quite a lot of marks through just generalities. But the specifics of say, 11(2) and so on, that's where they're going to distinguish from one another. And this student is good at those generalities and does it very beautifully.

What is implied, though, is that the student is not good at specifics, so that – although she was awarded some marks for generalities – she will never do well without the specific legal detail, no matter how beautifully and well the generalities are expressed. P3 described this piece as "unsuccessful writing" because the student "hasn't grappled with the detail of the facts".

All the opinions expressed here reinforce Finding 1: that a largely revised orientation to legal writing means that traditional writing strengths such as grammatical correctness, fluency of expression, and elegance of sentence construction are valued less than the ability to accurately identify the relevant law, and to apply it in a detailed, nuanced manner. These two criteria – identification of the relevant and correct law or legal issue, and the ability to apply it to the detail of the facts coherently – are the most clearly "legal" writing criteria identified by academic participants and should have been probed in more detail.

This chapter has provided an account of the most significant findings, from phase one of the research, on legal academics' conceptions of legal writing, and the relationship of these to conceptions of legal education and legal knowledge. I now turn to phase two of the research: the interviews with legal practitioners involved in some aspect of vocational training. The next two chapters echo the structure of the last two: as chapter four did for phase one, chapter six will present an overview of the data analysis from practitioner interviews. As this chapter did for phase one, chapter seven will provide an account of the most significant findings from the data analysis of phase two.

# CHAPTER 6: PHASE TWO DATA ANALYSIS: AN OVERVIEW OF DATA FROM INTERVIEWS WITH LEGAL PRACTITIONERS

In this chapter and the next, the thesis shifts to a focus on phase two of the research: the data generated from interviews conducted with legal practitioners who are involved, in various ways, in vocational training of candidate legal practitioners. This chapter presents an overview of the analysis of interviews with legal practitioners, per participant, organised using the fields of legal education, legal knowledge, and legal writing. Although similarly structured to chapter four, the reader will notice that there is no analysis of conceptions of legal writing as they relate to a specific writing sample, as there was in chapter four, due to ethical concerns raised by practitioner participants about sharing work product. The analysis of each practitioner participant's conceptions therefore concludes with a brief overview of general writing criteria used in the interviews, not related to a specific writing sample.

## 6.1 Participant Six (P6): Attorney, Advocate, and former Judge (trains for LEAD and at the Bar)

### 6.1.1 Legal Education

P6's views on the role of education were, perhaps unsurprisingly, wholly oriented towards legal practice. She consistently expressed views that reflected an inclination towards legal practice or legal skills [LS=8] but none that reflected the academic-philosophical view [Aph=0]. For example, with reference to the courses she runs, she explained

> I'm focussed now on imparting usable skills. It's about skills transfer. So, if you come to my course, when you get to your office, you're able to work using those skills. It will improve the way you practise, your service to your client will be better, you want to be more successful in court.

With regard to legal education at university, she also reflected an inclination to legal practice:

> You need to look at the subjects, your core subjects, and work out which of them are relevant to the outside world they practise in. You are not looking at the LLB curriculum to create academic lawyers. You want to create lawyers who are useful out there in the commercial world.

She repeated this idea a little later in the interview when she suggested that the best way to evaluate the relevance of a legal education curriculum is to ask, “How relevant is this to a graduate who walks out of this university into articles or into a bank or into a clinic or company?” Significantly, P6 recognised that law graduates are likely to work in commercial and professional spaces other than “strictly legal” ones.

P6 extended her argument about relevance to legal history: “You don’t have to teach people what Voet and Grotius said about unjust enrichment in the 15th century. That’s all nonsense, it’s not relevant anymore” and “When you get into the workplace you need to know something that’s useful. You’re not going to tell the interviewer that, well, you read Justinian on this. But who the hell is Justinian?” Interestingly, P6’s awareness of these legal philosophers reflects her own academic-philosophical education, but she does not seem to associate her success in the legal profession with this aspect of her education.

Regarding the state of legal education in South Africa today, P6 assented unequivocally to the notion of crisis [IC=4]. Her statements about crisis all applied to university legal education. In response to the question “do you agree with the claim that legal education in South Africa is in crisis?” her response was “Yes. Certainly”. Later, she asserted (speaking about the four year LLB) that “it’s a crisis of relevance” as well as a “literacy crisis”.

More frequently, P6 described a range of ways in which legal education is in flux [IF=18]. This sense of flux applied both to professional legal training [IF=8] and to university legal education [IF=10]. P6 claimed that a significant change in professional legal training is that there is much more of it, and it is offered in a more systematic way. When P6 did articles, “we hardly had much training. As far as articles were concerned, you learned it on the job. There was no law school” (here she refers to the Schools of Legal Practice that assist articled clerks in preparing for the Board examinations). In speaking about her time doing pupillage, she observed, “The Bar did have training programmes then. They were not very good…But I think they got better recently. It seems to be more structured and formalised”. Overall, P6 believed that professional training has become better and more structured over time. She also described a change in the uptake of ongoing professional training after candidate legal practitioners qualify:

> Once they’d passed the Bar exam and started practising there was no longer any incentive to go for training, and no one did. Then you had the attorneys…once they

> passed their Board exam, you couldn't get them to training. Now I present up to 30 to 40 training seminars a year.

P6 suggested that a major change in vocational legal training was that it had become more formalised since her own training – "They brought in a person to teach us accounting. That's the only formal training we had. The rest of it you learnt on the job, and then it depended on what you did on the job". She also observed that assessment of pupils and candidate attorneys "has to change. You need to know if this person has grasped the concept and is able to apply it."

In general, P6 believes that the changes in professional legal training have been positive. By contrast, the perceived changes in university legal education were described with a high degree of certainty, and in terms that are more negative. For example, "now I'm not saying the current lot are stupid, but the quality of education has deteriorated. I mean, no one is going to dispute that". No statements about legal education not being in crisis [NIC=0] and no statements regarding the stability of legal education [S=0] were made.

The reasons that P6 gave for the state of flux and crisis were varied. The most frequent reason was changes in curriculum [cu=11]; 7 of these instances related to university curriculum and 4 related to the curriculum of professional legal training programmes.

She felt strongly that the LLB curriculum now tried to do too much:

> there are so many modules, which basically amount to little vignettes of subjects, that they want to cover everything…we didn't have to do all of that. I don't think you really achieve anything by getting a student over four years to just about cover everything.

Later she expanded on this critique of curriculum and argued, "they need to evolve and specialise; that has to start at university already". P6 also argued that the legal education curriculum at universities was outdated and needed to become more relevant: "You have to teach the subject based on the current law. Your lecturers need to look at what's in the law reports, what's the common law, what is it doing, not twenty years ago, what's it doing now?" She did not elaborate on why she believed that lecturers are not currently doing this, something I should have, as researcher, probed. By contrast, academic participants such as P1, P3 and P4 asserted that current law is being taught well.

Another frequently mentioned reason for legal education being in flux was the increase in student numbers at universities [sn=6] and the related issue of resource constraints. For example, she felt that “the four-year LLB I think contributed to the size of the classes” and “you cannot answer those questions before first answering the resources problem”. She also contrasted the size of her final year LLB class – fifteen – with current class sizes: “and now you’ll have 300”. Increased access, increase in student numbers, and the resultant pressure on university resources are all understood to be part of the changing nature of legal education.

Related to this and echoing P4, the perceived funding model at universities was seen as a reason for changes in legal education at universities [f=3]: “the Law Faculty has become a cash cow for universities… you cannot believe how many people are studying law for the wrong reasons”.

Changes in higher education [HE=4] and changes that are being introduced through the Legal Practice Act [LPA=4] were also discussed. P6 felt strongly that the Department of Higher Education was not open to input from the profession: “I must tell you we did approach the Department of Higher Education some years back to say bring back the graduate degree. We were accused of being anti-transformation and counter revolutionaries and we were shown the door”. With regard to professional legal education, P6 felt that “what the Legal Practice Act is going to change, and I hope it does, and that is to make continued professional development, CPD as we call it, compulsory. And to bring in a points system”. She went on to say that the introduction of compulsory CPD would “make a huge difference” to the education of legal professionals. She also felt that, due to the requirements of the LPA, “training will continue but I think the focus needs to shift”.

Single instance reasons offered for changes in legal education were the changing relationship between staff and students – “the onus is on the lecturer to pass 300”; issues of pedagogy – “you need people who understand how to teach”; a drop in standards – “the quality of the education has deteriorated”; changes in the law itself – “There are changes in the law, cyber law or something we never heard about”; and a rapidly changing legal profession – “the whole legal profession is undergoing changes. Within the next five years it will be unrecognisable. It’s been deregulated, lawyers are competing with other professions. Whereas in the past we didn’t”.

### 6.1.2 Legal Knowledge

P6 had less to say about legal knowledge than any of the academic participants. It may be that the nature of her work places less of an emphasis on critical reflection on the nature of knowledge and focuses more on the practical application of it. Nonetheless, the approaches to legal knowledge that she did explore were fascinating.

P6 made some apparently contradictory statements on the state of legal knowledge. She both asserted that it was stable [KS=2] and, more frequently, that it was partially contested [KpC=9]. With regard to stability, she stated that legal knowledge is both “the rules and the case law” as well as “how to read the case, what to get out of it, and how to use it in solving a legal problem”. She later characterised this stable legal knowledge as being divisible into two parts: academic knowledge and practical knowledge, congruent with Ryle’s (1979) “knowledge that” and “knowledge how”. However, she went on to offer some observations that suggested some underlying contestations to this approach to knowledge. In reference to the academic-practice divide, she observed, “academics have been arguing about this for a long time”. She also stated that “legal knowledge is not about covering everything”, suggesting there was contestation between a generalist approach to legal knowledge vs a specialist approach: “it is no longer possible to be a general practitioner…they need to evolve and specialise; that has to start at university already”. Two other roots of contestation could be identified, both of them grounded in the concept of relevance. Firstly, P6 questioned whether the way universities approached legal knowledge was relevant to a profession that was increasingly practising not just in legal but commercial contexts. Secondly, she asserted that the inclusion of legal history and legal philosophy was irrelevant legal knowledge: “that’s all nonsense, it’s not relevant anymore”. P6 did not approach any of these partial contestations through a critical or decolonial lens.

With regard to knowledge boundaries, at first P6 indicated that legal knowledge has clear and necessary boundaries [BC=2; BN=2]. She conceived of these boundaries as applying to any body of professional knowledge, and – as mentioned above – conceived of the boundaries as existing between academic and practical knowledge:

> You know, you have to split this into two parts. And if you look at education generally, it’s not restricted to law. Legal knowledge. You can say medical knowledge or an engineering knowledge. The knowledge needs to be split into two

> parts. There's the academic knowledge, the theoretical knowledge, which you must have as a background. That's what the universities do. They give you the theoretical knowledge. Then the other side of this is the practical knowledge, or the practical application. Practical application is knowledge. Legal knowledge is equivalent to practical application.

Interestingly, although she seemed to accept the boundaries between academic and practical knowledge, and saw them as necessary, when it came to summing up her approach to legal knowledge, her summary reflected only one part, the practical application: "practical application is knowledge. Legal knowledge is equivalent to practical application". This suggests that P6 may understand academic knowledge, even knowledge taught in law schools, as valuable but not part of legal knowledge. Comments made further into the interview reinforce this idea.

P6 went on to offer some ideas on legal knowledge that suggested that the boundaries between academic and practical knowledge were less clear than she first indicated, and that these boundaries may be both weakening [BW=5] and limiting [BL=6]. Consider the following statement: "Firstly you still have academics who are firmly rooted in this idea that they teach law. The professional will sort you out after your degree. There are some problems with that". Firstly, P6 suggests that academics are wrong; that what they teach is not in fact legal knowledge. (This is congruent with her earlier assertion that legal knowledge is equivalent to practical application). But then she goes on to problematise the notion of leaving practical application (i.e., true legal knowledge) to the profession. Referring to the university she attended, she explained:

> they introduced this thing called Practical Legal Studies, where they tried to now bring the law students into the realm of practice... It was inadequate but at least it was something. You got taught how to write a letter, for example. They had this Law Clinic that they established so that we could go in there and meet real clients and their problems, and how to deal with them. So that was very good, but it was still an academic institution.

Here, even while she explores the idea that boundaries between academic and professional knowledge are limiting, and perhaps weakening, and applauds efforts to weaken the boundaries, she problematises the idea of an academic institution teaching practical application, perhaps suggesting that the boundaries between academic and practical knowledge should remain. However, a little later on, she again describes the boundaries as limiting but weakening. Describing how she had been part of a panel of professionals who approached Law Deans to encourage increased practical application in the LLB degree, she said:

> Initially we were told to get off their turf and mind our own business. But some of the deans were very progressive and listened to us... Open-minded, but I can't say the same for all the others (*laughs*). So, we didn't get anywhere. So, it's not something I'm involved in anymore, but I'm told that they're more open to talking to the profession now.

In summary, P6 presented with a traditional-positivist [TP=2] approach to legal knowledge, making no statements that reflected a general-constructivist or social realist approach [GC=0; SR=0]. She conceived of legal knowledge as recent, relevant legal rules, particularly case law. For example: "what's in the law reports? What's the common law, what's it doing, not twenty years ago, what's it doing now?" She included the practical application of these rules as part of legal knowledge but did not acknowledge other kinds of knowledge from other disciplines as part of legal knowledge, nor did she see legal history or philosophy as a relevant part of legal knowledge. Arguably, she did not even believe that academic conceptions of law are part of legal knowledge. Interestingly, and this will be explored in more detail in the next section, she did speak about both "cognitive skills" and "literacy skills" as part of the conversation about legal knowledge.

### 6.1.3 Legal Writing

P6 initially presented a traditional orientation to legal writing [TR=6] in that she spoke about the need to make English a compulsory subject in the LLB, and how universities need to encourage a culture of reading, in order to improve students' writing. She spoke several times about the importance of "literacy skills". For example:

> Literacy is number one. You cannot be a lawyer with poor literacy skills. I mean, that's stupid. It's like saying, you're going to be a carpenter, but you can't have any tools. You've got your hands, that's good enough, go and make cabinets. It's the same thing with law, you can't do that.

This focus on language and words as tools is congruent with a traditional orientation to writing. Her plain language values – in which short sentences, short documents, and clear, precise language are valued – are also congruent with a traditional orientation to writing. However, later in the interview, P6 made several strongly worded statements that reflected a revised orientation to legal writing [Re=8]. The first instance of a revised orientation occurred as part of the discussion about getting students to read. Here she said: "But if you can get them to read a book a month, you're going to start winning. That is the answer. *That's where the cognitive skills come from. The ability to write…*" (my emphasis). What is of interest is not simply the idea that students' ability to write develops from reading. The words in italics show that P6 equates the ability to write with cognitive skills – a revised orientation to writing. She reiterated this in different ways later in the interview, largely as part of a conversation about how we were all (universities, the Bar, and the Board) "getting it wrong" in terms of teaching legal writing. She introduced this thread of the conversation in the following statement:

> You concentrate on teaching people how to write, so you teach them some grammar and plain language, and you say you must use paragraphing and headings and all of that stuff you teach. That's of no use. Because they know how to do that. And you can show them how to do that in ten minutes. Where it fails is, *you are teaching them how to write, but you are not teaching them what to write* (my emphasis).

Here, P6 rejects traditional ways of teaching writing as being "of no use" and goes on to emphasise the "what" of writing, rather than the "how". She goes on to explain this "what" as being the "content of what you're writing" – reflecting the revised orientation to writing. She elaborates on this revised orientation, explaining that legal writing is the ability to analyse facts, and the ability to apply them to the law:

> Now I'll start off by showing them how to analyse the facts. I spend a lot of time on fact, before I spend any time on writing. You cannot write as a lawyer if you didn't understand the facts. You can't write as a lawyer, if you don't know how to apply those facts to the law.

P6 repeated this idea in several ways before concluding: "the law schools must start teaching that writing is about thinking. Writing is not about simply putting words on a paper or making a speech in court. Writing is about thinking" – a statement wholly congruent with the revised orientation to writing, as well as with most of the academic participants' orientations.

P6 framed legal writing firmly as the kinds of writing required by the profession [LWPro=4; LWAc=0]. She was at pains to contrast this with academic writing, and to show why she asserted that academic writing – even about the law – was not legal writing. For example:

> Whenever you put pen to paper as a lawyer, the first thing you ask yourself, why am I writing it and for whom, for what purpose? That's legal writing. What you see in the textbooks that's academic writing. It's necessary, and it has a place. The academic writing gives guidance to the practising lawyer to understand the concept. And then he has to apply that concept to a particular set of facts. When he starts writing then, that's legal writing

and

> if you read a piece that a lawyer wrote and you don't understand it, does it serve any purpose? If you write particulars of claim and a judge reads it in court and doesn't understand what the cause of action is, it serves no purpose. So, when you talk about legal writing, you're talking about purpose. You have to achieve an objective. You're not writing there because, well, you have an interest in a particular concept and you're going to write an essay or you're going to write a paper on it. Now when people do that, that's brilliant. We need people to do that. Because those are the thinkers, but they are thinking…their thinking is confined to the concept…That's academic writing, it's writing about law. But for a practitioner that's not legal writing, because that serves no good purpose at all. The only purpose it serves is that if this practitioner doesn't understand something, that he could read that, and it will tell them.

P6 was adamant that this understanding of legal writing as professional writing would be shared by her colleagues [LWA=2]. When asked if her colleagues would agree with this distinction between legal writing as being done by legal professionals, for the profession (as opposed to academic writing about the law) she replied "Oh, certainly! Oh, absolutely!" She also felt that her understanding of legal writing as requiring plain language ("good legal writing means plain language writing") was shared by most of her younger colleagues. Referring to precedent-driven, complex, jargon-intensive legal writing she remarked "the good news is, the younger generation are breaking away from it". However, she showed how some older colleagues contested the plain language understanding of legal writing [LWC=1] by telling a story of a young attorney she had encouraged to write in plain language:

> Recently I was in Durban and an attorney came up to me and said, you know you told me to write in plain language. I said, ja. He says, I did it. And I said, and? He said, my clients were very happy. I said, so, what's the problem? He says, well, I got a call from the senior partner, and he said, what is this, it doesn't look like a lawyer wrote it. He insisted I use the practice's old precedent. There's the problem.

Although anecdotal, this is congruent with the literature that suggests that the nature of legal writing may be changing and one's position in response to this may affect one's understanding of legal writing (Schiess, 2009; Glenn, 2010; Sobota, 2014).

P6 went on to explain some ways in which she believed legal writing is unique, largely as part of the conversation about differentiating it from good academic writing [LWU=3]. However, she also asserted ways in which good legal writing was the same as good writing in general, mostly when speaking of plain language principles [LWS=3]. This recognition that good legal writing shares elements with good writing in general is in contrast to most of the academic participants' positions on this matter, who saw it mostly as being quite different, although they too used some writing criteria that could apply to a range of academic writing types.

With regard to the state of legal writing, P6 was very clear that legal writing was a problem [LWP=10] both for university students [LWPU=6] and for pupils and candidate attorneys [LWPP=4]. She insisted that these problems were different from when she was a student [LWDP=6] – all statements about the new problems related to university students and the four-year LLB). She made no statement to indicate that legal writing was not a problem and one statement that problems were the same over the years [LWNP=0; LWSP=1].

As shown above, P6 characterised legal writing as involving both literacy and cognitive skills. She attributed a decline in such writing to the four-year LLB and the related problem of large classes:

> If you look at what happened since 1994, initially the LLB was a postgraduate degree. When someone graduated with an LLB, there were two things you could take for granted, the one is they had literacy skills. And secondly, they had the ability to use cognitive skills… But now you'll have 300 in final year. Most of whom have been pushed through the last three years. No literacy skills. And you cannot assume a certain level of knowledge with that. Now I've been teaching since going back to '94,

> then if I presented a course, I could assume a certain level of knowledge. You can't now. You have to assume that there is very poor knowledge, poor literacy skills, and then you have to manage that.

She also believes that the pressure to pass students when "they know they shouldn't pass them" is "why we have LLB graduates today who can't read and write". Also, in reference to the four-year LLB, she commented

> It certainly fast-tracked people, but they were left with no skills" and "in removing those barriers they also removed the language requirements. If you look at the Act, they wrote out Afrikaans and Latin, no one complained. Okay? Then they said, well what about English then? So, they wrote that out. Now you cannot produce law graduates who don't have really powerful literacy skills.

All of these statements further reflect a firm agreement that there is a problem with law graduates' legal writing; that it is different from when she was a student; and that it is related to declining focus on language at university level. They also are congruent with some academic participants' convictions (like P3 and P4) and the hypothesis presented in chapter two, that understandings of legal writing are located within the broader challenges and contestations of legal and higher education.

Interestingly, P6 extended her claim that legal writing was a problem for students, to pupils and candidate attorneys, as well as young professionals. For example, "the attorneys still look for a precedent. The reason they do that, they don't know how to draft on their own" and – a little later in the interview:

> So the attorney now, or the young advocate, needs to start drafting. And they're stuck. They're stuck. It's like a student at university writing an assignment. They've read all the stuff in the library, now they want to start with introduction, and then they stare at the page, they don't know what to do.

She extended the claim that legal writing is a problem to pupil advocates. This is the context in which she made her single statement that problems in legal writing had stayed the same over the years: "we've had writing courses going back decades for lawyers. Didn't work". She went on to note, however, that during the late 1990s, passing the Bar examination for the legal writing course was a particular obstacle for Black lawyers:

> We had a crisis at the Bar, you might remember around 1998/9, suddenly we had Black people coming to the Bar. We had no Black people at the Bar back then. When I went to the Bar, I was one of only three. There were no Black people. And of the three, only one was African, the other two were Indian. Now we had Black people coming to the Bar. They couldn't pass the legal writing course, which was compulsory; you fail that, you fail. It's a five-hour open book writing exam. And then the allegations of elitism and racism started coming up. One of the pupils took the Bar to court, and so on. The Bar Council called me in and said, listen, can't you help these guys? So I ended up with a class of only Black pupils. We didn't announce it to everyone. Only Black pupils would attend, and I'd see them at four o'clock to about six in the evening. And then I worked out why the Bar's course wasn't helping them. In fact, it wasn't helping the White pupils either.

Here, P6 described the problem with passing the Bar legal writing course, particularly for Black students. She further problematises the way in which the legal writing course was failing to assist any of the pupils to learn how to write as an advocate. This is interesting as it extends the location of the problems of legal writing – and teaching legal writing – from universities to vocational training.

Criteria that P6 used that were shared by academics in the phase one interviews were relevance of evidence [rel=1]; depth of application [applic=3]; thoughtfulness [th=3] and application of the law to the facts [applic=3]. A number of new criteria, different to ones identified by academic participants in phase one, fell under the umbrella of plain language writing: no jargon or foreign words [jarg=8]; brevity (both of sentences and the document as a whole) [brev=3]; and not using precedents when not appropriate [prec=2].

P6 also used other new criteria including persuasiveness [pers=2]; achieves purpose [purp=2]; that the writing is easily understandable [und=2]; that the writing reflects good literacy skills [lit=2]; that the writer has understood the cause of action [caus=1]; and that the writer has understood the facts [fact=1]. Although some academic participants identified being able to apply law to the facts as a criterion, the nuanced understanding of the facts themselves was sufficiently different an approach to facts to warrant a separate coding.

The reasons for this state of legal writing were mostly attributed to students not reading [SDR=6] followed by the problems associated with large student numbers in the LLB [SN=6]. P6 also attributed legal writing difficulties with English not being the home language of many students [EL2=3]. Another reason was associated with poor basic education [BE=3]. Here, however, the basic education did not refer to schooling but poor teaching at law school, such as the argument that "universities are teaching legal writing wrong". Finally, the LLB now being a first degree [LLB=1] and the removal of the language requirement for the LLB [LR=1] were suggested as reasons for law graduates' poor writing capacity.

**Participant Six: Summary of main codes:**

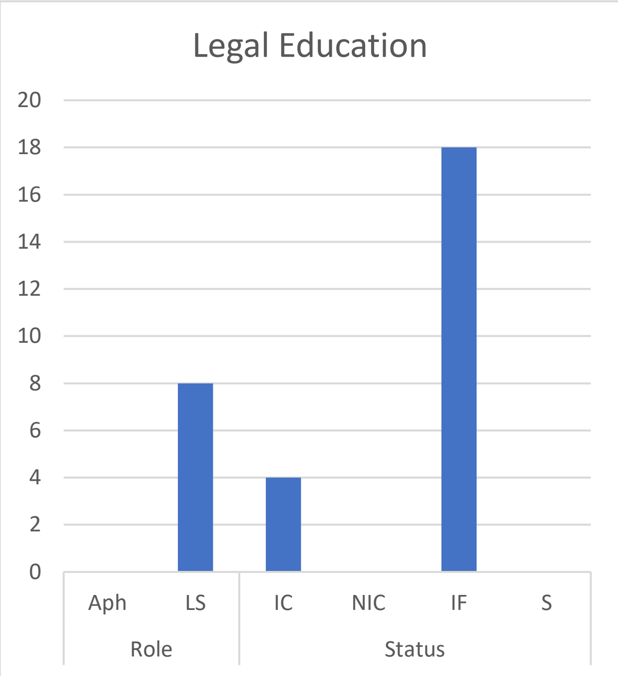



**Diagram 33: Legal Education (P6)**

Unlike most of the academic participants, P6 views the role of legal education to be purely to prepare students for legal practice, which may explain her opinion that legal writing is only writing that is done for and by the legal profession. This may also relate to her approach to legal knowledge, which is traditional-positivist.

P6 asserts strongly that legal education is in flux, and in some ways, in crisis. This may relate to her very strong conviction that the state of legal writing is both a problem, and a different problem from when she was a student.

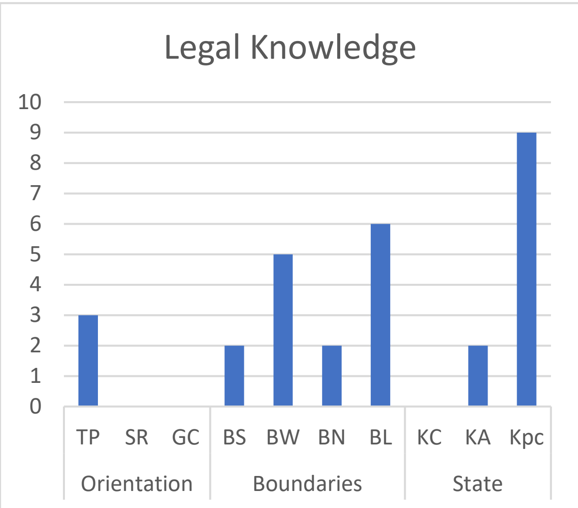
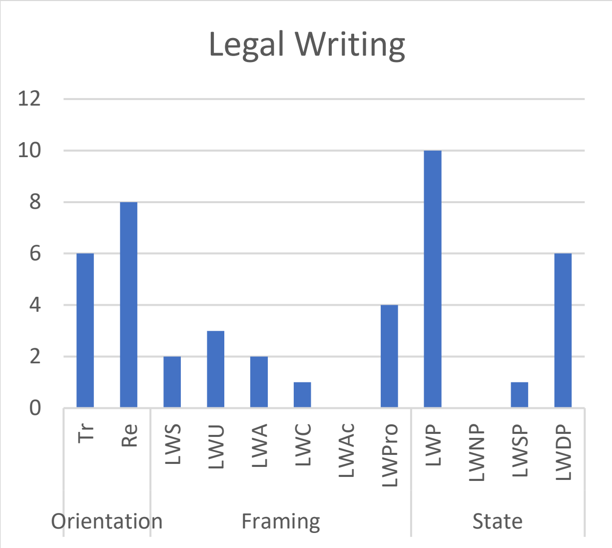



**Diagram 34: Legal Knowledge (P6)**

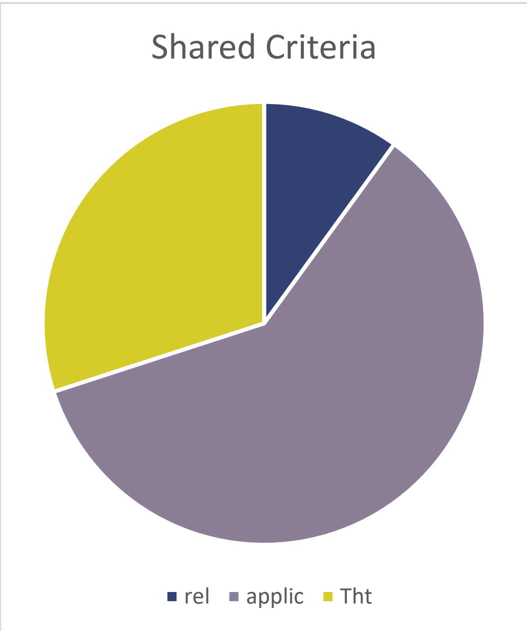
The ways in which P6 understands knowledge boundaries to be weak and limiting are very different from most academics' conceptions. P6 made all of these statements with regard to changes in the profession, not contestations to the knowledge itself. All statements about its state being partially contested are also in regard to changes in the profession.




Interestingly, these perceived changes do not lead to a related change in understanding of what it means to write in law. P6 sees graduate legal writing as a problem, and once which is fairly recent. She further sees legal writing as something done for and by the profession, with a slightly more revised than traditional orientation to writing.

**Diagram 35: Legal Writing (P6)**

**Summary of main writing criteria:**



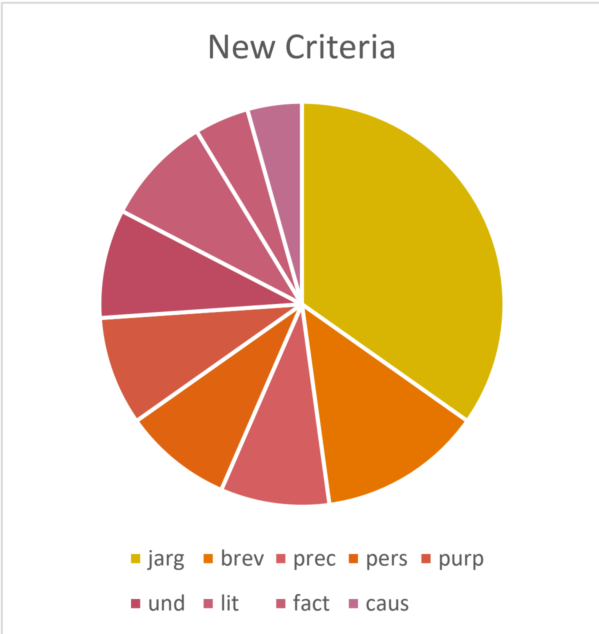




**Diagram 36: Shared (P6)** **Diagram 37: New (P6)**

These diagrams show that P6 draws largely on revised writing criteria when talking about what she values in legal writing. In common with academic participants, the writing must draw on relevant legal principles and – most importantly – the writer must be able to apply these principles effectively and thoughtfully. P6, however, also draws on a range of criteria not mentioned by academic participants. While some of these are revised, there are also some more traditional criteria, most notably the repeated reference to the importance of basic literacy in legal writing. This is consistent with the mixed orientation to legal writing seen in diagram 36 above.

## 6.2 Participant Seven (P7): Advocate and teacher of writing at the Bar

### 6.2.1 Legal Education

Like P6, P7's views on the role of legal education were wholly inclined to the legal profession: [Aph=0; LS=4]. When explaining the "serious problems" she saw in legal education, and whilst acknowledging the difficulties of dealing with these aspects in the LLB, she explained:

> I think the one is that people are not practically equipped to deal with legal practice. So…and I'm not sure how easily that can ever be fixed, quite frankly. Somewhere you have to make the divide from studying to actually practising. And that middle ground will always be a difficult transition for people. But people aren't practical enough about problem-solving

and a little later "I keep coming back to practical aspects, but practical writing skills and practical skills in related disciplines".

With regard to the status of legal education, P7 did not assent to the notion of crisis [IC=0; NIC=4]. Three of these statements related to the LLB, and one to the changes in the training of pupils at the Bar. With regard to the LLB, P7 pointed out the problems of describing it as a crisis:

> I suppose it's a matter of personal perspective and approach. I don't, you know, like to easily go into crisis mode. So, I probably won't describe it that way myself, but I mean, there are certainly deficiencies and things that need to be addressed. Crisis is perhaps…you know, it's counter-productive to call it a crisis, you know, because the problem with looking at something as a crisis is you over-react, you try and make short-term gains. Which just makes it worse.

However, she did agree, “there are serious problems that really need to be addressed as soon as possible”. In reflecting on the probable impact of the LPA on legal education at the Bar, P7 again resisted the notion of crisis: “So… again I won’t say, oh, it’s helped create a crisis”.

P7 made no statements about the stability of legal education [S=0] either at university or at the Bar and made several statements about legal education being in flux [IF=5]. Of these statements, only one was made in relation to the LLB; the other 4 were made in relation to training at the Bar. Unlike P6, P7 did not engage in a discussion of the perceived changes in the degree between when she was a student and now. Rather, she focused on the changes in legal education at the Bar, and largely characterised these in positive terms. Like P6 she felt that her experience of being a pupil has been, “very different… like chalk and cheese” to the training pupils receive now and also attributed this to the training being more structured. She observed:

> And we had lectures in basically all the topics that we were examined in, but you know, they were mostly collections of war stories, they were not…you know, there was no educational plan behind it if I can put it that way. You had to just mostly find your own way.

More than this, though, she discussed how the training is now longer and “more intense”. She attributed these changes in training to “a realisation that it’s necessary” and a recognition that pupils “don’t have a uniform background”.

In reference to the impact of the LPA, she said “it’s perhaps rather created an environment where people realise, we must revaluate various things. And I think in that sense it’s useful, it’s important”. As an example of this she explained:

> our Bar Council has now basically created a dedicated sub-committee to look at how to change and adapt the pupillage programme, the training programme. So more deliberative, reflective, let’s evaluate, what can we change separate from that? So, you know, it’s getting that level of recognition and I think, you know, it’s certainly as a result of the change in environment because of the Act.

Although P7 largely spoke in positive terms about the changes and potential changes, she also acknowledged the uncertainties inherent in this time of flux, particularly regarding the collegial, voluntary nature of how pupils are currently trained: “It’s in jeopardy and I don’t know how it's going to change…And those uncertainties really just…. ja, we don't know where that's going".

The main reasons given for P7's views about the state of legal education fell into three categories: lack of student preparedness [sp=9]; concerns regarding the LLB curriculum [cu=6]; and the impact of the Legal Practice Act [LPA=7]. Interestingly, these reasons fell into a much narrower range of categories than any of the other participants offered.

With regard to pupil preparedness for the Bar, P7 felt that it had become necessary to intensify the training because pupils "don't have the uniform background" and "you need a way of getting everyone up to a certain minimum standard of forensic work". Her sense was that the majority of pupils who come to the Bar are "totally, not only ill-equipped, just totally unequipped for the job… 90% of the time" – a strong statement on lack of pupil preparedness. P7 further explained that she felt that pupils were "unequipped" both "in terms of writing skills and legal knowledge".

A little later in the interview, P7 expanded on lack of student preparedness, with reference to the LLB. Her first concern was that "people are not practically equipped to deal with legal practice" and that "people just do not really understand the law after four years of LLB". She was clear that this lack of preparedness was not limited to graduates from particular universities: "it's from everywhere… I think overall people are really not very knowledgeable". An issue that was of major concern to P7 was that "people are misguided as to what legal research entails" and that, in particular, "there's a failure to appreciate the role of electronic sources" which, she felt, had given rise to increased plagiarism when pupils were asked to do research.

Related to student preparedness, but shifting towards curriculum concerns, P7 acknowledged, "it's not clear what the reason is for people not being equipped when they start" (at the Bar). She therefore wondered, rather than asserted, "is it a matter of how they are taught law?" before deciding "I do think that…practical skills should be developed more from an earlier point. That much I'm pretty convinced of". Later, she elaborated on her concerns about the LLB curriculum and suggested there is "a narrow focus and over-focus on particular areas, which does not help you broadly with practice" and "they don't learn enough, basically"– in interesting contrast to P6, who felt that the LLB curriculum is too broad and general. Her final observation on curriculum was made in relation to the issue of graduates not being equipped to be competent and ethical legal researchers:

> there needs to be more practical stuff. Because ultimately, once you understand the concepts of a particular area of the law, you can find your way into the finer detail if you understand how to do that. So, research methodology is pound for pound, worth far more than knowing particulars about contract law. At least from a litigator's perspective.

Finally for this section, the impact of the LPA on training at the Bar was offered as the main reason for legal education at the Bar being in flux. Speaking about the likely implications of the LPA for training, P7 highlighted the uncertainty as well as the probable need for greater uniformity, nationally:

> Ja, it's difficult to predict, also because it's not clear yet how the Council will view the goals on the one hand, and the responsibilities from the other, you know, who will do what? So…you know, the Bar's position in all of that is not clear. And that makes it difficult. But I think what is clear is that the whole training process will be quite…will be a bit more structured and uniform on a wider base. Because just from a Bar perspective we do some things specific to the X Bar. It's not done the same way at any of the other Bars. You know that kind of thing will probably have to change.

She went on to explain that national standardisation of training would be difficult to achieve, largely due to the differences in size of the various Bars: "so it's difficult to replicate the same thing everywhere. And those will be difficulties that will have to be tackled." P7 later shifted from the practical changes that were imminent to the idea that the whole environment was in flux. Speaking about the impact of the LPA she observed that "it's perhaps rather created an environment where people realise, we must revaluate various things." She further identified some specific, practical challenges arising from the LPA that were contributing to the sense of flux or uncertainty:

> I think a big challenge is capacity. You know, because it's…at least from the Bar's perspective, a voluntary scenario, that we're all single practitioners, capacity is a big deal. So having something akin to LEAD is difficult for the Bar. To have people employed for the purposes of training people is a challenge. And it's not just a financial challenge but it's also a structural challenge, which, you know, can of course be overcome. But it's also a matching issue because someone who has the practical knowledge that you really want to impart on people, quite frankly just won't take a

> full-time job as an educator or a trainer in whatever faculty is created. That's the reality of it.

Arising out of the challenges she describes above, P7's last observation on the impact of the LPA was that it placed the collegial, voluntary nature of pupil training "in jeopardy" and that "we don't know where that's going".

### 6.2.2 Legal Knowledge

P7 had little to say about legal knowledge. As with P6, it may be that teaching a practical component of the Bar training programme, as opposed to academics who teach a particular body of knowledge, does not lead to the consideration of legal knowledge as much as "legal skills". In the words of P7 "it's really more about the skill of written advocacy than the substantive content of any legal area". It could also be that there is less philosophical reflection on the nature of knowledge encouraged in a professional context than there is at a university. Interestingly, though, what was said reflected a distinctly different conception from P6's, particularly with regard to approach to knowledge, which was generally social realist, with one statement that seemed closer to the general-constructivist approach. In contrast to P6, P7 felt that that legal knowledge was wide and, in some cases, inter-disciplinary, as opposed to P6's call for increased specialism.

On the state of legal knowledge in written advocacy, P7 felt that it was generally accepted [KA=2] – "I won't say contestations in the proper sense" – and that any minor contestations [KPC=2] related to people questioning how the programme is run – "do we need this…should we do that?" and "people feel things can be better, can be different". She was quick to add that "no one comes up with a real proposal" and "nobody wants to get too excited about what's wrong because then they have to take up the challenge of fixing it". P7, therefore, saw contestations as minor. She did, however, acknowledge the difficulty in defining legal knowledge, commenting "I suppose that's a bit like asking how long is a piece of string".

On the boundaries of legal knowledge, P7 at first echoed P6's assertion that legal knowledge is practical: "from a practitioner's perspective, it's a very practical issue. So legal knowledge is really, I think, about the living law" [BS=1; BN=1]. This statement also reflects a traditional-positivist approach to legal knowledge [TP=1]. However, P7 went on describe legal knowledge as "a wide thing... the knowledge of how to practically resolve legal problems, it's not only understanding the substantive aspects but also how they translate into effective relief". She elaborated on this notion of wideness a little later by explaining:

> Look, you know, from a Bar perspective, you need well-rounded people. So, you don't want people really to be too focused too early on a very narrow field; of course, the Bar has specialists, that people will specialise but if you hone in on too narrow an area upfront you don't get the perspective that you need for effective litigation because problems do not arise nicely packaged. You know, you don't say, ooh, ooh, I've got this little nice administrative law point on this and now I can nicely work with it. It doesn't happen like that in real life. So, you need that broader…exposure.

Here, P7 introduced the idea that strong boundaries to legal knowledge can be limiting in her field [BW=2; BL=4], an idea that she illustrated a little later in the interview:

> many people come to the Bar and it's just constitutional law this way and constitutional law that way. And the problem is, those people then don't understand why they do not get briefed to run a commercial trial. I would imagine it's pretty obvious why not. You know, you just don't have the skill set…practical knowledge.

Here, P7, like P6, equates legal knowledge with practical knowledge or "skills". However, her conception of skill goes beyond the law and is thus broader than P6's.

P7 extended the idea of legal knowledge needing to be wide and broad to the idea that it is also inter-disciplinary [GC=1]:

> What really is in short supply is cross-disciplinary skills, because if you can't read a balance sheet, or understand up to a certain level of accounting, you are going to battle dealing with commercial matters. It's all good and well to say, ooh, I did contract or advanced contract law, fancy contract law, but if you don't understand the business mechanics behind that contract, you are at a disadvantage in litigation.

This is similar to P4's reflections on legal knowledge, which stressed the importance of knowledge of other disciplines for the effective use and application of legal knowledge.

P7 concluded her observations on legal knowledge by saying "I firmly believe…and I see it with people, that over-focus is detrimental to people's development at the Bar." Although it was difficult to code P7's approach to knowledge, I believe it can be argued that her comments reflect an overall social realist approach to legal knowledge [SR=4] as she sees legal knowledge in her field as systematically revisable, influenced by the context and the particular demands of the case, and yet objective.

The reasons offered for these approaches to legal knowledge have been mostly discussed descriptively, above, but they can be categorised into three main reasons: that law is practical [A/Pr=4]; that law is stable [ls=2] and that law is wide or inter-disciplinary [id=3].

### 6.2.3 Legal Writing

On first analysis, P7 presented a largely revised orientation to legal writing [Re= 6]. Early on, she made statements like "you can't divorce writing from the substantive content of the law" and spoke of legal writing as being about how pupils needed to "understand…to deal with problems…so that they can apply them" – all congruent with a revised orientation to writing. A little later she explicated her understanding of what legal writing means in a litigation environment, which also largely reflected a revised orientation:

> you must understand the substantive law, you must understand the facts, you must understand the procedural aspects and the evidential aspects, and you must bring it all together, you must see the bigger picture.

Later still, she observed that "making people think about things is a prominent element of the legal writing course… so we start with reasoning…. You have to get your thinking right" – all reflective of a predominantly revised orientation to legal writing. However, much later in the interview, she made a range of statements that suggested that she drew as much on a traditional orientation to legal writing [Tr=6]. These included "then also you must be able to master the language" and a range of other statements that characterised writing as "language skills".

When it came to framing, unsurprisingly given her context, P7 framed legal writing as professional kinds of writing [LWPro=6; LWAc=1] although she did not, as P6 did, explicitly exclude the kinds of writing that legal academics do as legal writing. Rather, she acknowledged that it could be "quite wide and I think legal writing for me is really any written application of legal skills" but went on to qualify that "of course we focus narrower at the Bar where legal writing is really limited to forensic writing. So, you know, pertaining to or in anticipation of litigation". She went on to elaborate that this was "about effectively communicating your client's case" and provided examples of "pleadings, affidavits, matter-specific writing". She felt that her colleagues would agree with her understanding, although with less certainty than P6: "I would imagine, yes, I would expect so" [LWA=1; LWC=0].

At one point, P7 offered a very interesting comment that introduced some ambiguity with regard to whether legal academic writing counts as legal writing [LWAc=1]. This statement also offered a fascinating difference in point of departure, so is set out in full here:

> You know, it's difficult…look, I mean, academics approach legal writing with a different perspective…They approach it from a topic…a problem that is actually shorn of an actual matter. Okay, there's a new case in the ConCourt, it's based on a particular fact, but you focus on the question behind it. Whereas a practitioner, as I mentioned earlier, start with…there's a particular problem that a person brings to you. So just that is a different perspective to the writing.

Unlike P6, P7 acknowledged that the writing of academics is a kind of legal writing, but that it is different. P7 characterised the difference in terms of starting point: academics start with a theme or topic, whereas the practitioner starts with the problem or facts.

P7 offered roughly balanced statements on the ways that legal writing was unique [LWU=5] and how it shared common principles with good writing in general [LWS=4]. Her first statement was about legal writing's "peculiarity": "writing in a litigation environment which is really what the Bar is about, is *peculiar* because you need to combine a particular case with the law, within a particular framework, the rules and directives, and still effectively try to get a goal. So, you need to bring things together here". She later used the same word to claim its uniqueness: "But it's different because it has its *peculiarities*. So, it's not a totally different thing, but it's specialised, because of the particular needs of what you're doing, and the particular framework that you need to write in". However, she acknowledged that legal writing also draws on many of the same principles as good writing in general: "I think it's the same in terms of many writing principles" and "general writing principles are applicable. I'll use little nuggets that well-known writers would have said, interviews or whatever, to make a point." She went on to give an example of one of these general nuggets: "things like…when you want to use an adjective, think twice, and then don't use it".

With regard to the state of legal writing, P7 felt that it was a problem at the Bar [LWP=3] although she did not focus extensively on the problems. She made no statements to suggest that it was not a problem, nor did she explain whether she thought the problem was new or different [LWNP=0; LWSP=0; LWDP=0]. She identified four main reasons for the problems in legal writing: English is not the majority of pupils' first language; a lack of focus on language skills in the LLB; some universities simply produced graduates with better or worse language skills; and pupils' prior work experience. P7 first explored the problem in the following statement:

> Look, I mean, the reality is that we write in English. That fact already is a problem because it's the first language of the minority of pupils. So there immediately you have a problem. So, I think the fact that there is little focus on actual language skills as part of the LLB is a problem. You know, I'm not saying you must go back to where you had to…you couldn't get your LLB unless you passed English and Afrikaans, and Latin.

Although P7 did not advocate a return of the language requirement, as P6 did, she did recognise the lack of it as a problem. She, however, went on to explain:

> And, you know, I'm the last person to now venture into the area of decolonising education and everything else. But the reality is we work in English. So you need to be able to effectively communicate as a litigator in English. And those written skills are not up to standard. That's the reality. And there is a distinction between where people receive their LLB degrees when it comes to those skills, that's the reality.

She then showed an awareness of the impact of the quality of prior education and, arising from this, just how difficult it is for some pupils to master legal writing in this statement:

> It's also where they receive their education. Absolutely, ja. The reality is that the usual suspects just produce people with better language skills. it's unfortunately just how it is. And that's a big problem. Because, you know, that next level of fine tuning your writing skills and making it specific to legal writing, you can't get to those if you battle with the basic stuff.

P7 also observed that where pupils had worked previously also had an impact on their legal writing. She explained it like this:

> the reality is, someone who was an attorney at a big firm for ten years, versus someone who was a legal advisor at a parastatal for ten years, their ability to write

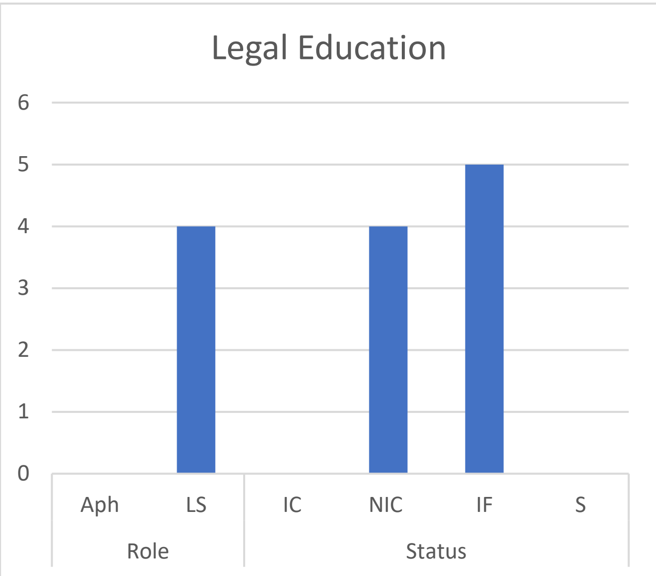
legally are vastly different. The one just, you know, has been exposed to it; even if they don't do it themselves, they see it more often, and it's more part of their focus.

Finally, P7 qualified her comments on the problems of legal writing by saying "You know, I mean it's not terrible, don't misunderstand me, but for people who make a living from communicating it's not where it should be".

Writing criteria that P7 used in common with academic participants included the importance of working out the correct structure [struc=5]; selecting the correct legal method [m=2]; synthesis of sources; and application [synth=2; applic=2]. Ethical writing [pl=3] and correct citation [cit=3] were also valued. Awareness regarding the role of context was acknowledged [ctxt=2] as was correctness of language [gp=2]. Coherence was mentioned once [co=1] as was quality of evidence, argument, and meeting formal requirements. [co=1; ev=1; arg=1; fr=1].

Writing criteria that were new (or shared with other practitioner participants) included: communicating your client's case [communic=3]; writing with your purpose and reader in mind [purp=3; aud=1]; avoidance of jargon; the need for brevity; and understanding the role of definitions [jarg=1; brev=1; defn=1].

**Participant Seven: Summary of main codes**




Like P6, P7 believes that the role of education is to prepare students for legal practice and mostly that legal writing is writing done in and for the profession. Unlike P6, however, she refutes the notion that legal education is in crisis, although she strongly agrees that it is in flux, both at university and in the vocational training space. P7 agrees that legal writing is a problem for graduates entering vocational training.

**Diagram 38: Legal Education (P7)**

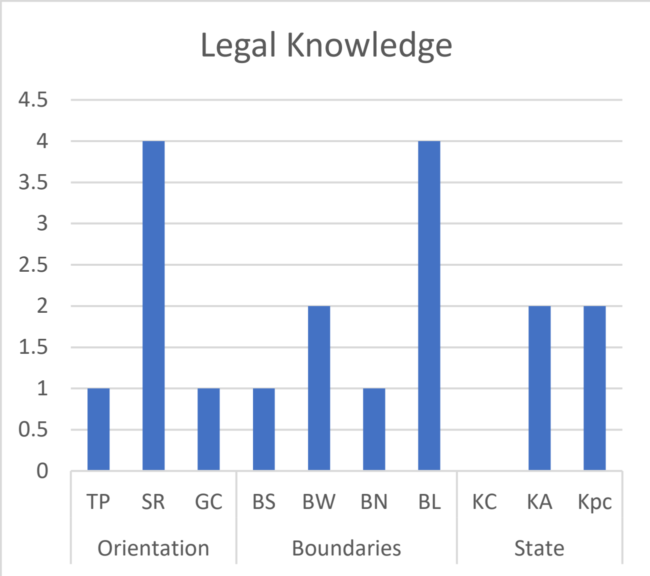



**Diagram 39: Legal Knowledge (P7)**

Unlike P6, P7's approach to legal knowledge is strongly social realist, in that she consistently acknowledges that knowledge is both objective and emergent from social context. This may seem incongruent with her conceptions of knowledge boundaries being limiting. Here, though, her conceptions of boundaries relate to the necessity of knowledge of other fields, in order to be a good advocate. This reflects her sense that legal knowledge is stronger in relation to other forms of knowledge.
P7 generally feels that legal knowledge is accepted. Like P6, any sense of partial contestation of knowledge is rooted in changes to the profession.

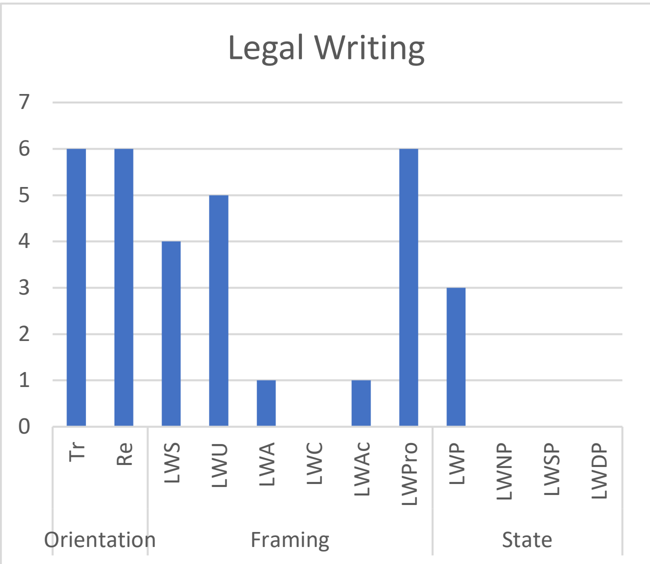
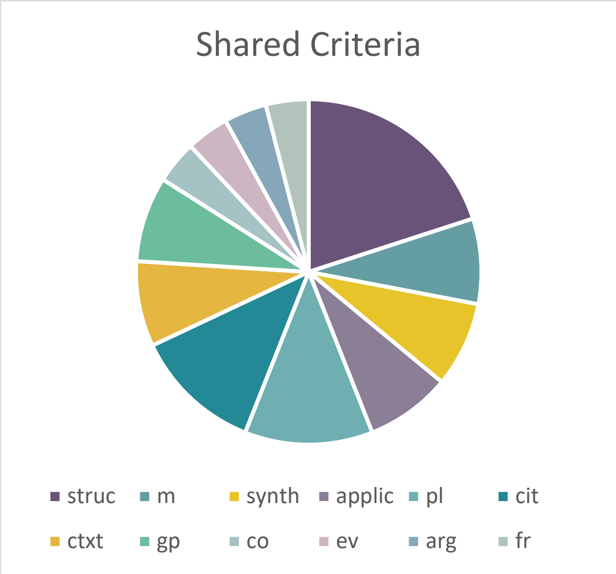



**Diagram 40: Legal Writing (P7)**

P7's orientation to legal writing is an equal balance between traditional and revised, indicating that traditional writing criteria appear to be more valued amongst these practitioner participants than amongst the academic participants. This may reflect the professional reality that writing is, in practice, the main work product, and is therefore judged on both style and substance. It could also reflect the strong grammar of law in practice.

**Summary of main writing criteria:**



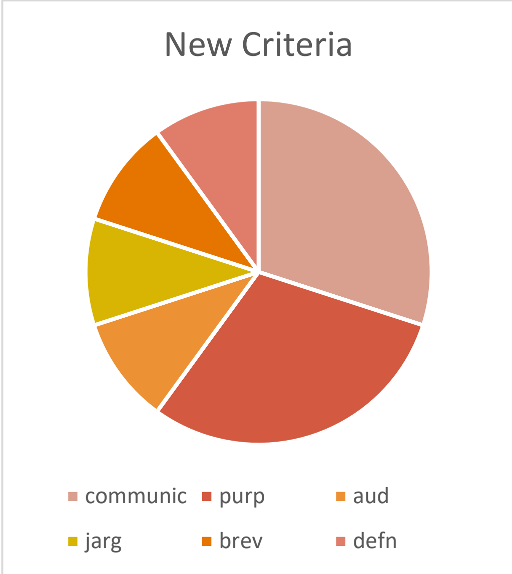




**Diagram 41: Shared (P7)**

**Diagram 42: New (P7)**

Here, it can be seen that P7 shares a range of criteria with the academic participants, with structure, correct citation and ethical writing being particularly valued. Like P6, P7 values brevity and writing with a clear purpose in mind, without using jargon. A very strong new criterion is the ability to communicate the client's cause effectively.

## 6.3 Participant Eight (P8): Advocates; trainers for the Bar and an alternative Bar

*Note: two advocates were present for part of the interview. This data therefore reflects both advocates' perspectives on legal writing. The second advocate did not comment on legal knowledge or legal education.*

### 6.3.1 Legal Education

With regard to role, like P3, P8 recognised both perspectives on legal education [LS=8; Aph=7]. Unsurprisingly, her comments about training at the Bar were wholly aligned with preparing pupils for practice. More notable was some of her comments about the role of the LLB. For example, while comparing South African legal education to British legal education she said "the craft of being an advocate, a lawyer, not just law, legal education, the craft itself is taught in their final year or when they're doing LLB. And I think that's what we must have". She later commented "the other thing I would do, I would really, really focus…when people are doing LLB, do it as we do with pupillage. Do more practical work". This clearly shows that she believes the role of legal education, even at universities, is to prepare students for practice, and – like P6 and P7 – believes that more of the LLB should prepare students for practice [he=2].

At the same time, she strongly believes that the LLB should be a second degree because "I think a better lawyer is a lawyer who's been taught law after understanding other things in society" and "you'll emerge more knowledgeable", statements that suggest the academic-philosophical view. However, like P3, P8's discussion of the value of a broader academic education did not seem to be included in her idea of legal education.

Although she contextualised her remarks to include education more generally, P8 observed "I think universities have also lost what pedagogy is about, what education is about". She explained this more fully, which reflect similar views to P4, P6 and P7:

> the administrations are making sure that they keep themselves financially viable and students are trying to pass. And in the process, we've abandoned what I call the production of knowledge. The essentials of the production of knowledge. One of the weaknesses I see when pupils come here is that they have spent time at university just trying to pass, get a degree. And the university pushing them out to pass or drop them out. And there's very little time spent on, let's call it, vocational training. And I think if we did that when people are at university, we would have a much sharper workforce.

Although P8 echoed P6 and P7's calls for a greater practical or vocational focus in the degree, it is for very different reasons.

P8's position on the state of legal education was quite unlike any of the other participants', largely due to the decolonial lens through which she views both society and legal education [dc=9]. This meant that her reasons for claiming stability, for example, or refuting crisis, tended to be both fascinating and different. For example, six statements regarding the stability of legal education were made [s=6]. However, stability was used, in these instances, to refer to the state of legal education remaining unchanged, not in a positive way, but in the sense of holding on to old ways of being. For example, referring to the Bar, she explained "it has developed its own cultures, and its ways of doing things. Some of them you can change, but most of them you can't". In response to this "stuckness" of legal education at the Bar she said that they decided to "stop telling other structures to become what you want… let's create something new". The reasons for perceived stability tended to be mostly relating to an unchanged pedagogy [p=2] and unchanged curriculum [cu=10].

Similarly, her reasons for refuting a state of crisis in legal education [IC=0; NIC=2] drew on a decolonial lens:

> I don't think it's a crisis per se, I wouldn't single it out. I think it's in a state that every aspect of our life is at the moment currently trying to find itself, trying to be relevant in a Western environment, trying to satisfy the majority of its people. And so…I don't think it's just law. I think to find relevance, to adjust your degrees to be relevant in society is just difficult. I think engineers will tell you the same thing, so I wouldn't single out law to be the crisis.

Here, it is not so much that she is uncomfortable with the concept of crisis, as P7 was, but that – if there is a crisis – it goes much wider than just in law and legal education.

Despite asserting stability (meaning the intractable nature of legal education) P8 did agree with the idea that some aspects of legal education were in flux [IF=7]. Four "in flux" statements were made about legal education at the Bar, specifically in relation to the alternative Bar that she had helped to form, that would offer a new vision for – among others – legal education:

> And so, we're creating a Bar that's going to be a place where a Black person, a Black woman, a White woman, a gay man, a lesbian, can work without being judged, and can get work without people thinking they're on the periphery. And that's what we're doing. And the next bit about it is we're trying to create a Bar that has a formal school that teaches people, and it has its director, it has lecturers, judges are lecturers, and that's what we want to create.

The other three "in flux statements" were made in relation to legal education at universities, one a critique about the changes in curriculum wrought by the introduction of the four year LLB – "it opened access but it reduced knowledge" – and the other two related to the flux associated with transformation – "it's this period of trying to reimagine your country" – suggesting again that the changes that P8 observed were broader than in legal education alone.

### 6.3.2 Legal Knowledge

Like P2, P8 offered a complex, nuanced range of conceptions of legal knowledge, partly because she explored both what she termed "narrow" and "wide" conceptions of the term. This dual conception contributed to, at times, apparent contradictions. For example, she described the state of legal knowledge in terms that indicate both that it is accepted [KA=2] and, more strongly, that it is contested [KC=8]. The statements that knowledge is accepted were both in relation to the narrow conception, and were framed in terms of what is, rather than what should or could be: "At the moment, we accept that the Western way, the way we do it, is the right one". She explained:

> That's what legal knowledge is, it's me understanding the fundamentals of South African law. Its origins from Roman Dutch Law. And that it borrows a great deal from that, and that in all aspects of law, largely contract and other, it borrows from that. I need to master that first in order to interpret a lot of what is called law in South Africa. That in the narrow sense is legal knowledge…and if you are in a different environment, it really doesn't matter, your legal knowledge is understanding that environment.

The above two statements reflect a recognition that laws are stable [ls=1] as well as a recognition of old, established laws [oe=1]. (It is interesting that she accepted the necessity of knowing the old laws, unlike P6). However, even as she recognised this, she hinted at the contestations she would explore through phrases like "*at the moment*, we accept…" and "what is *called* law" (rather than what is law) introducing some uncertainty. P8 went on to explore the ways in which legal knowledge is contested. She started by offering her broader conception:

> broadly speaking, at a philosophical level, legal knowledge for me is an understanding of what makes legal systems of different communities. And what constitutes a just society in different environments. You know, people tell you that there's one universal way of judging society, a democracy, *and all its pretences*.

Not only does this statement suggest that legal knowledge is different in different contexts, and that justice itself is contextual, she critiqued the notion that there is one way of judging any society – and appears to critique the notion of democracy itself. The reasons for these opinions about the law are rooted in the notion of contextual differences, as well as contested assumptions about the universality of legal principles – reasons which are drawn on later in the discussion as well [pc=8].

P8 suggested that, by understanding both narrow and broad conceptions of legal knowledge "you will be able to critique the law you're practising rather than to swallow it, as it is". This acceptance of critique as being part of legal knowledge [ct=1] accords with P2's conception of legal knowledge but was not seen in any of the other practitioners.

P8's dual conception of legal knowledge may also account for her position on the boundaries of legal knowledge: She made one statement that suggests legal knowledge boundaries are strong [BS=1] – quoted above "we accept the Western way" but made more statements that suggest that boundaries are weak [BW=3] and limiting [BL=4]. She made no statements regarding the necessity of strong legal knowledge boundaries [BN=0]. Speaking about the impact of the Legal Practice Act (in relation to legal knowledge) she observed: "what it does, it creates an opportunity for us to think outside the box, to think of new ways of practising law. How can we make ourselves more accessible?" and shortly afterwards "the decoloniality project needs to be infused into how we practise". Here, P8 seemed to equate practising law with legal knowledge (like P6 and P7) and saw the weakening of boundaries as a positive.

What is perhaps most interesting is the approach to legal knowledge that can be understood from her statements. P8 presented a largely general-constructivist approach to legal knowledge, with some elements of a social realist approach [GC=7; SR=3; TP=0]. This is noteworthy as none of the other practitioners drew on a general-constructivist approach, and only one academic participant (P2) had a similarly strong general-constructivist approach to legal knowledge.

I will explore the elements of a social realist approach first. P8's narrow definition (above) included both the law, and the context in which it operates, as legal knowledge. She repeatedly added "and its environment" when speaking about different legal systems. This acknowledgement, that knowledge develops within a particular context, and is systematically revised over time, is congruent with a social realist approach. However, in other statements, P8 did not allow for objectivity, rendering her overall approach incompatible with a social realist approach. For example, she said: "And so this myth, you call it the myth of neutrality, it's quite true. It's that in every environment there's a particular way the law works, and there's a particular way of practising it". This leads to the general-constructivist elements of her approach to knowledge. Congruent with her desire to "infuse the decoloniality project" and “critique” (discussed above) into legal knowledge, P8’s general-constructivist approach is reflected in her final statement about legal knowledge: “So for me it’s all of those aspects, understanding the law is to understand the community, the legal environment, and understand the prejudices in law. Gender, race, class, all of those prejudices found in law.” Here she confirmed that she approaches legal knowledge far more broadly than it simply being the law and the contexts in which it operates – it is also critique of the law and commentary on the prejudices she believes are inherent in law, as well as inclusion of legal knowledge that may not, traditionally, be seen as part of legal knowledge. An example of such is when, referring to an example she had drawn on earlier, she agrees “absolutely, yes” that legal knowledge includes “in KwaZulu-Natal, knowing the right idioms, knowing the way in which to address the chief”.

### 6.3.3 Legal Writing

P8’s orientation to legal writing was difficult to code and analyse, as her focus was so very different from the other participants. Although she spoke to some of the same issues, it will be evident from Diagrams 45, 46 and 47 at the end of this section that this was not her main focus. One of P8’s major themes was the impact of the hegemony of English in a multilingual society, and particularly the implications for power, freedom, identity, and the ability to fully develop one’s professional capacity as a lawyer when forced to work in a language that is not one’s own. This theme will be explored descriptively once the usual categories have been analysed. Another theme was the “myth of neutrality” – P8 problematised how language for law is presented as neutral and given and showed how language conventions are very different in different contexts. This too will be explored descriptively. Lastly, P8 explored the theme of simplicity in language, as a tool for social justice – but pointed out that this was not commonly seen at the Bar.

P8’s orientation to legal writing was clearly revised [Re=7]. This is reflected in the criteria she used to value writing – quality of evidence [ev=11] and conceptual depth [cd=10], for example, were her two most commonly used criteria. She also acknowledged how traditional criteria were valued by the profession, such as clarity and precision [cp=9]. However, she consistently problematised this and showed how, by contrast, in a different legal context such as customary Zulu law, the use of idioms and metaphorical expression was valued. P8’s revised orientation is particularly seen in her equation of legal writing with “intellectual engagement with subject matter” and “the production of knowledge” – in this context, calling writing “a by-product. It’s very easy to polish something that is already better. But to try and polish something that lacks the right foundation, the pedagogic foundation, right at the beginning, it’s very difficult”.

With regard to framing, P8 framed legal writing as the kinds of writing required by the profession [LWPRo=4; LWAc=0]. For example, she said

> Legal writing has to be persuasive writing because you write to a judge or a judicial officer to say these are my submissions on the points of law. And these are my reasons. So, you write in such a way that even if you are unable to address them, they can read your heads of argument, which is a concise form of argument to direct the judicial officer as to what you’ll be basing your argument on. So, with legal writing it’s the skill of being able to set out the case in the briefest of forms.

This definition not only confirmed a strictly professional orientation to legal writing, it drew on the criteria mentioned above [ev and cp] as well as criteria of being persuasive [pers=6] (also referred to elsewhere) and developing a concise argument [brev=3; arg=5]; also criteria referred to a number of other times in the discussion. At this point in the conversation, she apparently accepted the requirements of the profession, and shared her nuanced understanding of its demands, rather than argue that it should be decolonised. Later, she restated some ideas from this definition, summing up that legal writing is “persuading a judicial officer to accept your conclusion on the law and the facts of that case in the briefest of forms”. To illustrate this point about brevity, she offered the example that the Supreme Court of Appeal and Constitutional Court have a fifty-page limit on all heads of argument submitted. Of interest, is that – unlike P6 – P8 did not limit what she values as evidence to the most recent primary legal sources. She included “previous cases, academic papers, and so on” as valid authority to base your propositions on, which suggests that she regards academic commentary as a valid kind of evidence.

Of great interest was a new criterion that P8 introduced, in relation to fact and argument. I have termed this [LWTF] – lead with the facts. She drew on this criterion twice [LWTF=2]. She observed that something that pupils find very difficult when learning to write as an advocate is that they want to argue the law prematurely – which she suggested gives your opponents an advantage as they know your arguments before they need to. She explained:

> Before heads of argument, just the pleadings, because it's a legal document people tend to want to argue law before it's time to argue law. So, you find people in their affidavits, in their pleadings, do not only make allegations that are legally cogent, they begin to want to argue the points of law then. And if you do that, which often happens, you have bound yourself to legal submissions prematurely. And then the others know how to counter them.

She went on to explain that it is all about knowing

> what to write when. You have your pleadings, you will argue. So, you put as little law as possible in your pleadings because it's facts there. But you know the law, but you've allowed yourself the space to give the judge the facts and what is legally cogent before you argue it.

This understanding of when facts are valued, and when legal argument is valued, and how to use each strategically, she regarded as part of being persuasive and using evidence appropriately. This also flags the question of how, and with what, to start a piece of legal writing, as important – it has already been shown how academic participants differed on this and here there are further differences emerging. For example, P7 noted that practitioners start with a legal problem while academics start with a topic; here there is the distinction between when to lead with law and when to lead with facts.

Another criterion that P8 drew on, as part of the bigger criterion of persuasiveness, was elegance of rhetoric [ELR=2]. Unlike P3, P8 saw this as necessary and not a weakness in legal writing, especially when writing for court: "the flair of language…knowing how to articulate it… because you succeed on your powers of persuasion". She felt that this was a particular challenge for Black pupils, as they were not operating in their own language [Eng=4] – something that she referred to several times.

P8 further framed legal writing as different from other good writing [LWU=3; LWS=0] but was at pains to point out that it was different, not better. In fact, she went so far as to say that becoming proficient at legal writing had "killed" other kinds of good writing:

> You know I…somehow there's a way of writing I can do because I'm a lawyer, there's legal writing…but there's writing that I used to have because I'm an English major, I'm a Political Scientist, that type of writing died since I came here. I can no longer write for society; I can write for a court.

Here, although she clearly framed legal writing as being different from other types of good writing, she associated this with loss (in the same way as she raised loss of identity later, in relation to the use of English). She explained that

> the discipline of being a lawyer dominates how I write, and that's not how society reads. Society wants the beauty of language, the expressions. Law wants this happened, that happened, the law is this, therefore this.

Later in the interview, she further problematised legal writing as a unique type of writing, and emphasised that she did not believe it to be superior – although she felt it is generally framed by the legal profession in that way:

> the problem with lawyers, we think…our science is superior, and it's not. There are other forms of writing that are superior. The fact that I write like a lawyer, does not mean poetry is backwards. Does not mean literary analysis is backwards.

She also made the point, in relation to the criterion of writing for a particular audience [aud=2], that the particular judge for whom one is writing, depending on their background, may or may not appreciate your writing style.

P8 did not feel that colleagues would necessarily share her orientation to legal writing [LWA=0; LWC=1] and attributed this to having a different professional background to many of her colleagues. This statement both illustrates this point, and further shows her general-constructivist approach to legal knowledge:

> No, because…there may be differences. I'll tell you what, each system produces its own people, you know, and what I'm telling you is probably because this is not the only place I've been. But the system teaches you to conform, to comply with it, so that it reinforces itself and it recurs. It doesn't teach people to critique it. And that's one of the disadvantages of law because when I go to court, I go to argue what the law is, not what it should be.

P8 acknowledged that she saw problems in students' writing [LWP= 3; LWNP=0]: "The pupils? I think it's only weaknesses I see". She felt these were fairly recent problems which she attributed firmly to the shifts in and failures of the higher education system [LWDP=3].

Significantly, P8 did not simply regard students' legal writing as a problem; she saw legal writing itself as a problem. As seen earlier, she was troubled by its insular nature; that it is for court, for judges, and not for society. She elaborated on this idea in this statement: “The system reinforces its own values…it doesn’t write for others; it writes for itself” and in her observation “So this whole idea that we write to make things clearer is a pretence. We don’t write to make things clearer for society. We write things to make things clearer for ourselves”.

P8 drew on a range of criteria when talking about legal writing. Apart from the highly valued use of evidence, clarity and precision, and conceptual depth, already identified above, she also identified the following: the importance of using correct legal terms [ll=1]; and the ability to correctly identify the legal issue [Lii=1]. These are all criteria also used by academic participants. Like P6 and P7, P8 highlighted the importance of trying to avoid the use of jargon [jarg=1]. P8 used two new criteria: Lead with facts not law [LWFNL=2] which has been explored above and simplicity [simp=3] which is explored at the end of this section.

P8 spoke eloquently and poignantly about the deep impact of having to constantly work and think in a language that is not one’s own. I have included lengthy quotations in this section, as the language and idiom she used to express the impact on identity, on freedom and on power is powerful in itself and I do not wish to detract from it by editing her insights. She began with a personal account of the experience:

> decoloniality…it’s the biggest thing actually, we don’t realise…you have to be Black to know. You know when I go to court and my opponent is any senior White silk…ja…people take it for granted that because we are schooled in South African universities and we can speak English to some extent, they don’t realise how hard it is to be smart in a language that’s not yours. They don’t really understand what it takes me to go to the highest court in the land and try and be eloquent against someone to whom it comes naturally. I have to leave who I am. I have to leave [P8’s name] behind in order to excel. I have to think of concepts that don’t exist in my life, in my language. And I’m going to be judged on how I express myself in a language that’s not part of my upbringing.

She then explored the “dual character” of language; she understood language to be both a means of communication and as a “carrier of culture”. She highlighted the burden that even the most proficient of speakers carry, when having to work in English as an additional language:

> We all think once people can speak English eloquently what's their complaint? We don't realise how much they have to jump culturally and otherwise just to be in the space where my learned friend who's my opponent is. It's natural, it comes naturally to him. The wit, the joke, the nuances of language, and when the judges say, or people say, my opponent, oh, he's very clever, he's eloquent, I wish I could speak in my language because they would say so about me.

The last line, in particular, captures the painful identity struggle and the deeply rooted alienation experienced even by this very erudite intellectual advocate, in having to speak, work, and express herself constantly in a language that is "not from home".

Later, P8 described her determination to "take a matter where I'm going to argue in my own language in the Constitutional Court and see what South Africa will say". Here P8 takes the issue beyond identity to one of freedom and power: "for as long as in your own country your language is not the language of power, is not the language of law, you're not free. Not fully".

Finally, she articulated one of the aims of the alternative Bar, and the formal training centre for pupils, as being to claim space for multilingualism in the legal system:

a lot of us speak different languages. I speak eleven. And one of the things we want to deal with in this school is not just the craft of speaking in the English language, which is dominant…it is to take up cases where we could go with a community that is landless, and in our pleadings, we tell the court that the language we will use in our pleadings is Sepedi. And we will see. Finally, on this point, she acknowledged the practical difficulties of attempting to shift the hegemony of English, but nonetheless articulated the necessity of trying:

> We don't have the answers as how we're going to do it, because our entire legal education is in English. But when we practise it's something we want to do. I'm going to do it before the end of next year, personally, at some commission to go and address the place in Zulu and lead a witness in Zulu.

Related to the issue of English, P8 made a strong point that writing is not valueless and criticised the so-called neutrality of the premise that legal writing is required to be "dry and to the point". She referred to British advocates in the nineteenth century as an example:

> you will see that everything we are taught now was not the case then. Advocates were these flamboyant men, usually, gifted in the use of words of the English language.

> And so even this idea that, because we are lawyers, we write and speak succinctly, it is not valueless, it is a product of thinking of particular styles and cultures.

P8 applied this idea to the contrast between precise, concise legal writing and the expressive, idiomatic spoken language used at a traditional *lekgotla* (meeting), making the point that the latter is the better way to persuade the chief. She went further and suggested that if an advocate was sent to the rural Eastern Cape and drew on his or her usual repertoire of legal language the response would be: "he's smoking something, that's not how we speak". This point, that language norms are contextual, and that the kind of language valued in traditional legal writing is not universal, relates to P8's broader acceptance that the law itself is contextual.

Although P8 did not refer to the plain writing movement, she was as passionate as P6 about the need for simple language: "I think an advocate is someone who can tell you something that's complex and make it sound simple. And that's how we should write as well". However, she pointed out "I think there's a lot to be done about the simplicity". Here, she observed that this is often not how advocates write or speak; the point was that she thinks that this is how they should be training advocates to write and speak. She went on to link the resistance to simplicity with the point she made earlier about audience; that advocates are not writing for society, but for the legal profession:

> It's the art of turning the complex into simple. The best advocates are people who stand up, and without Latin, without anything, speak in five, ten minutes, in such a way that an old granny sitting there understands what this case is about, without them getting confused. And for me we don't necessarily teach that because we teach…we write for ourselves.

Lastly, P8 identified a new reason for some of the problems in students' legal writing, which had not been identified by any other participants. This was the problem of an intimidating environment, where prejudice or harassment causes anxiety and under-performance: "the environment becomes intimidating as well for pupils…so we want to create an environment that makes everyone know that they've come for a purpose, and they've been given the tools and ability to flourish".

**Participant Eight: Summary of main codes**

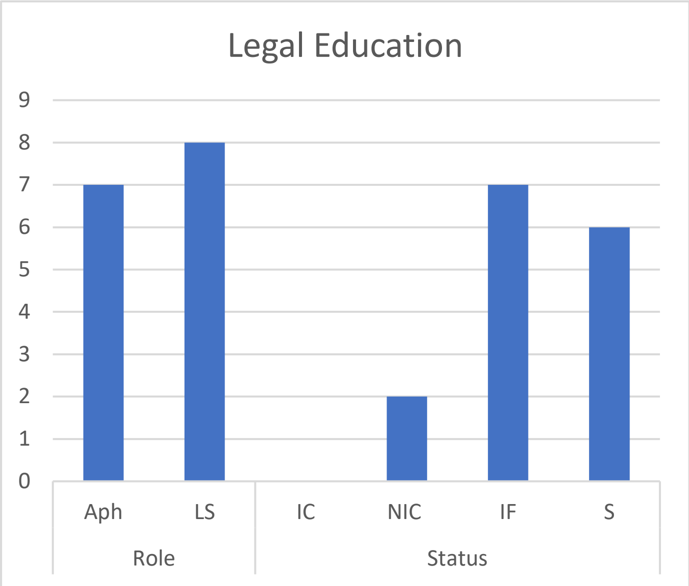


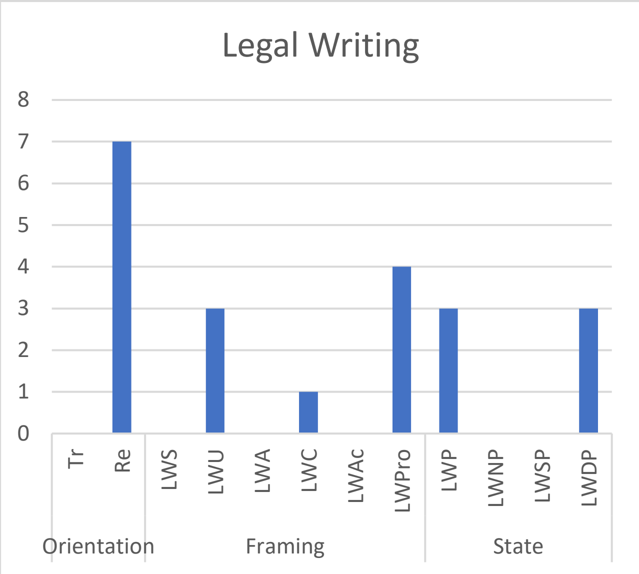

**Diagram 43 Legal Education (P8)**

P8 is the first of the practitioner participants to present with a roughly equal view of the role of legal education – that it is both to prepare students for legal practice, but also to engage them in broader, more philosophical debates. She is also the first to articulate views about the stability of legal education. This is unique in that it is a critical conception of stability; that it has failed to decolonise and transform. It is however, close to P2's view that contestation and change is positive.


**Diagram 44: Legal Knowledge (P8)**

She, like P7, rejects the notion of crisis although she strongly agrees that legal education – both at university and at vocational training level – is in flux.

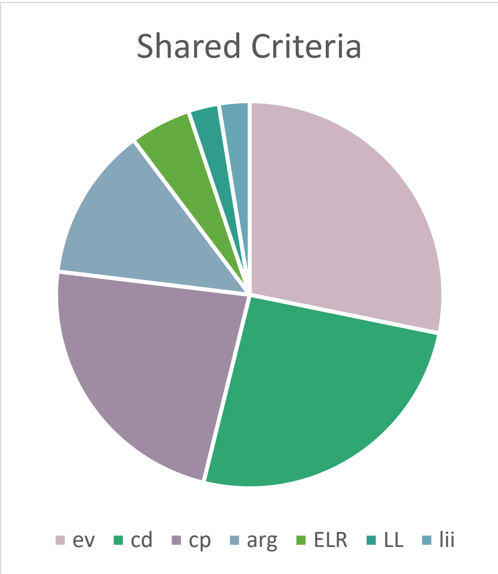
P8 presents a mostly general-constructivist approach to legal knowledge. Congruent with this general-constructivist approach, she regards knowledge boundaries as mostly weak and limiting, and knowledge as being highly contested.




P8 has a strongly revised orientation to legal writing. Somewhat surprisingly, given that she sees knowledge boundaries as weak and limiting, she nonetheless upholds boundaries for writing and believes legal writing to be unique, and different from other good writing. Like the other practitioner participants, she agrees that legal writing is a problem for students and graduates, which is different from when she was a student.

**Diagram 45: Legal Writing (P8)**

**Summary of main writing criteria:**



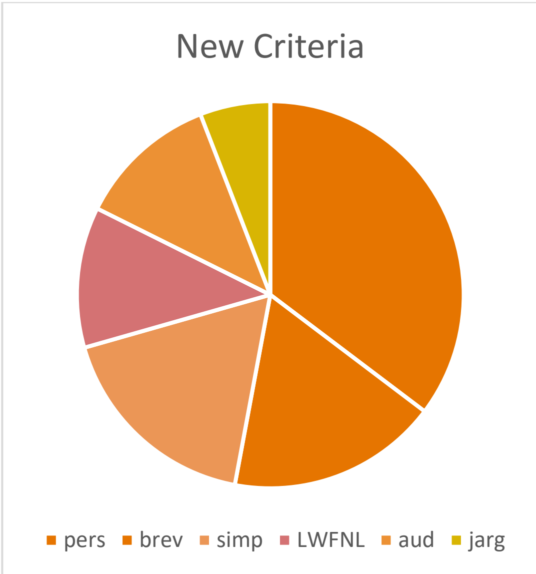




**Diagram 46: Shared (P8)**

**Diagram 47: New (P8)**

P8 draws on a range of similar criteria to some of the academic participants. Her orientation to writing is strongly revised, reflected in criteria like conceptual depth, use of legal evidence, and argument. However, some of the criteria in the first diagram reflects traditional concerns such as clarity and precision; use of legal language; and elegance of rhetoric. An interesting new criterion that dominates Diagram 47 is persuasiveness. Brevity is both highly valued and a criterion shared with P6 and P7, although simplicity is a criterion not used by either group.

## 6.4 Participant Nine (P9): attorney at a social justice legal NGO in charge of candidate attorney training; also teaches first year LLB students.

### 6.4.1 Legal Education

Although P9's views on the role of legal education were largely oriented to practice [Aph=1; LS=3] she acknowledged that "not all of them want to become attorneys" and that "I don't think we spend enough time talking about what else you can do with your degree". Here, her view seemed pragmatic; because so many LLB graduates do not end up working as attorneys or advocates, the degree should include exploring what the other career options are. She did not engage in any conversation about the value, or otherwise, of a broader academic education. At the same time, P9 felt strongly that the role of legal education is "preparing students for the working place" and that students should be given a "more practical experience in the working space". Her suggestions for change included "a more practical component" from first year, rather than waiting until fourth year and "I would also make assessments more practical". When probed, she explained that this could include job shadowing, to get a feel for the work, and that "more practical" meant more critical, not just "regurgitating from the textbook". She also asserted the value of more input from practitioners in the LLB degree: "I strongly believe that it shouldn't be just academics who teach but people who are practising… at least one or two guest lecturers who come in from practice to talk about how are things, what are the challenges of practice, how is it different from what you're seeing in the textbook".

With regard to the state of legal education, P9 rejected the notion of crisis both at LLB and vocational level [IC=0; NIC=3]. In contrast to most of the other participants, particularly the other practitioners, she asserted that, rather than crisis, she sees positive change: "Looking at the graduates that are coming out, I think they're more knowledgeable" and "I really get surprised at how much first year students know". She supported this with anecdotal evidence from a guest lecturer: "I think they're smart. I recently had a guest lecturer who said the same thing, damn, these kids are smart!" When probed, she was not sure what might have contributed to this positive change but suggested it could be a stronger basic education curriculum or the role that the media plays in making legal matters more visible (she used the example of the televised Oscar Pistorius trial).

However, P9 made no statements about the stability of legal education [S=0] and acknowledged that both university-level legal education and vocational legal education are currently in flux [IF=7; U=3, P=4]. With regard to university-level legal education, the main reasons given were pedagogical [p=2] and curriculum-related [cu=2]. One pedagogical comment was critical – "I am still very shocked how we lecture" – whereas the other was more positive: "it's good to see that now they're being taught from very early on how to write, how to read a case… there's been a change as a result of that". With regard to curriculum, she felt that some of the curriculum was now "quite sophisticated" – more so than when she was a student. However, she felt that there was not a strong enough focus on the Constitutional framework in the LLB (cb=1): "I'm not convinced we're teaching things from a constitutional lens the whole time ...I'm not sure it's emphasised enough".

With regard to vocational training of candidate attorneys, the two main reasons given for a sense of flux were shifts in relationship between principals and candidate attorneys [re =2] and related to changes brought about by the Legal Practice Act [LPA=2]. The main relational shift she noted, between principals and candidate attorneys, was that she felt that principals were busier than when she trained, and had less time to mentor candidate attorneys:

> I do think it impacts on the type of training. Because you are so busy that you're just getting things out, it's easy to miss that teaching in between. For example, there's less time now to go through a draft that a CA has drafted. It is very easy to miss going back and giving them feedback.

She acknowledged the contribution of the LPA to the sense of flux: "there's some uncertainty around what it [the LPA] means". However, like the other practitioners, she felt that the change was more marked for the training of advocates than for attorneys: "I think it changes more for the pupils". This flux, however, she did not see as significant, as reflected in comments like "People seem to be a bit confused… but everything is continuing as normal, to be honest".

### 6.4.2 Legal Knowledge

Like the other practitioners, P9 did not have much to say about legal knowledge and seemed to struggle to talk about it as a concept, except as it directly related to her work. However, the little that was said, reflects some interesting conceptions. Her initial response to the question "what is legal knowledge" was to say "knowledge of the law" – suggesting that, for her, the boundaries between law and other disciplines were both strong and necessary [BS=1; BN=1]. She immediately elaborated: “How it can be used. How it can be developed. And it’s not just knowing the law, it’s how to access the law, it’s how to apply the law” – suggesting that her conception of legal knowledge, like P6, incorporated both “knowledge that” and “knowledge how”.

She made no statements about legal knowledge that could be understood as traditional-positivist or general-constructivist [TP=0; GC=0]. However, a social realist approach to knowledge could be discerned (SR=3). P9 unequivocally accepted the Constitutional framework as the boundaries for legal knowledge in South Africa: “everything needs to be in line with the Constitution… even areas that would traditionally be classified under, say, private law”. However, within this accepted framework, she saw it as the role of her organisation to push the boundaries, in a systematically revisable way through strategic litigation, to “develop the law” by bringing different areas of the law together in ways that may not have been done previously. An example she gave was of a submission she was writing for the Constitutional Court. In this submission, she was arguing that a legal principle, the doctrine of common purpose, should be applied to crimes of sexual violence – an area of law that it had not been applied to before.

This led to some interesting inferences about boundaries. She saw a strong and necessary boundary between legal and non-legal knowledge but saw the boundaries between different areas of legal knowledge as weaker and in some cases, limiting [BW=2; BL=2]. This remained congruent with her social realist approach, in that she worked to extend the application of existing legal principles to other contexts, in a systematically revisable way, through the courts.

With regard to the state of legal knowledge, P9 made three statements that implied that legal knowledge was contested [KC=3]; one that it was partially contested [KPC=1] and one that it was generally accepted [KA=1]. Despite calling them a “group of really radical people” she was sure that everyone in her organisation accepted Constitutional supremacy and felt that “we often are on the same page” [ls=2]. She introduced a note of partial contestation in the statement “on the substance of the law, for the most part, we agree” but then went on to acknowledge that “we shouldn’t take it for granted that we’re all on the same page”. Using the example of the law on land rights she acknowledged “People have different positions… it’s controversial” and “we’re still trying to develop an institutional position” [ca=3]. Overall, despite the contestations in the legal sphere in which she worked, P9 saw law as a distinct discipline [dd=2] and inherently stable [ls=2].

### 6.4.3 Legal Writing

Overall, P9 presented with a largely traditional orientation to writing [Re=1; Tr=8]. Although she mentioned the importance of "knowledge and analysis" she went on to speak about writing as if it were different from knowledge or analysis. She defined legal writing broadly as "communicating the law" and included a wide range of audiences within her definition, both legal "your opponent" and much more broadly – "the general public". When she spoke about writing, she referred several times to "syntax", "grammar", "spelling errors" [gp=3]and other traditional writing criteria, which she felt were the "details" that made for good writing.

P9 felt that there shouldn't be a difference between good legal writing and other good writing [LWS=1] and that the criteria of clarity and accessibility applied equally to different kinds of writing:

> "I think there shouldn't be a distinction, because the difference is just the context…I would say what is good, is it accessible, is it easy to understand? Can you give it to anyone who's not necessarily part of that community and would they understand it?"

However, P9 conceded that it was unlikely that colleagues in law would offer a similar understanding of legal writing [LWC=1]. She explained that the likely differences in understanding depended respective roles within the legal fraternity:

> "There are researchers who when you say legal writing will think about strict academic legal writing. How to write a journal article. And then there's sort of advocacy people, issuing a press release on a case we've just won or we've just developed in this way. And then you'll get the lawyers who I think will think pleadings. So I think it depends on the role you play".

P9's awareness of these differences in understanding meant that she did not limit her conceptions of legal writing to either academic or purely professional kinds of writing [LWAc=0; LWPro=0]. Instead, she suggested that legal academics are more likely to hold academic conceptions whilst legal practitioners are more likely to have a professional conception, while she held both. Interestingly, although she is correct about the practitioners, several of the academic participants also held strongly professional conceptions of legal writing.

With regard to the state of legal writing, P9 did not offer any thoughts about whether the problem of legal writing was the same over time, or different. She did distinguish between candidate attorneys who had previous work experience (claiming that they tended not to have any problem with legal writing [LWNP=1]) and those who came straight from university (claiming that these candidate attorneys were more likely to present with problematic writing [LWP=4]). It was in this context that P9 made many of the statements that reflected a traditional orientation to writing: She felt that many graduates were strong on knowledge, analysis, and the ability to express their opinion, but had problems with writing: "the only weakness is just grammar, syntax, very basic…it's just the writing that is problematic".

P9 went on to explore the possible reasons for students' weakness in this area and identified two main themes. The first was similar to reasons put forward by other participants, such as P2, P5 and P6; that she felt that many students did not get a good foundation in primary and high school: "Maybe that's the first problem. The root cause, just the foundational education from primary to high school. Very basic stuff… that's where I think things may have gone wrong". She acknowledged that often "the person was very determined and driven…just smart and able to pick up content as he read" but that "circumstances, probably despite not a very good grounding in grammar" meant that the finer points of writing were not developed. The second reason she attributed to the way university lecturers mark, valuing content and ignoring the way an answer is written – an observation also made by P3 – and borne out by the revised orientations to writing seen in most academic participants.

> I believe it's something that should have been picked up during varsity… I think a lot of time in varsity you mark for content and you're not teaching students how to write, how to construct sentences. The student is brilliant, I mean their marks are brilliant, their contribution to the work is brilliant, it's just their writing that is problematic.

Here, P9 clearly conceives of writing traditionally; as something different from the underlying analysis, or argument. Other criteria that P9 referred to when discussing what is necessary in a good piece of legal writing are: the importance of structure [struc=5]; clarity [cp=4]; eloquent use of language or voice [ElR=3]; good editing and grammar [gp=3]; appropriate tone [ft=2]; the appropriate level of detail [rel=2]; appropriate legal language [ll=1]; and avoiding plagiarism [pl=1]. Interestingly, all of these are criteria also identified by the academic participants in phase one. They were also used by P7 and, to a lesser extent, by P8.

**Participant Nine: Summary of main codes**

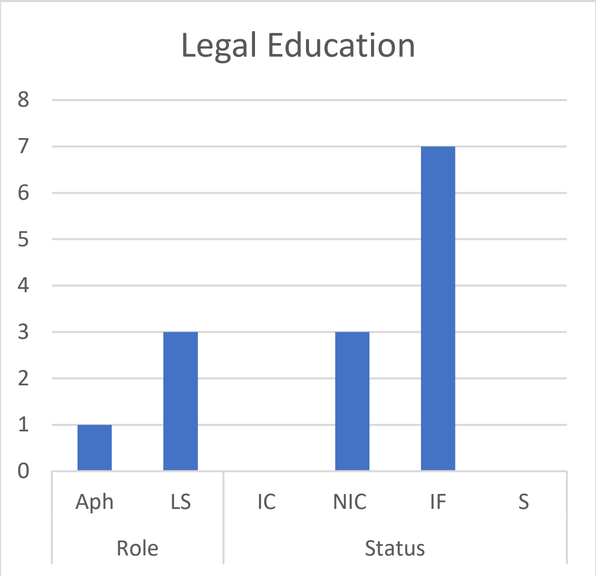



**Diagram 48: Legal Education (P9)**

Like P8, and unlike P6 and P7, P9 includes some reference to the broader academic view of the role of legal education, although her view remains – like the other practitioner participants – focused on preparing students for legal practice.

Like P7 and P8, she rejects the notion that legal education is in crisis, yet strongly agrees that it is in flux – both at universities and in vocational training.

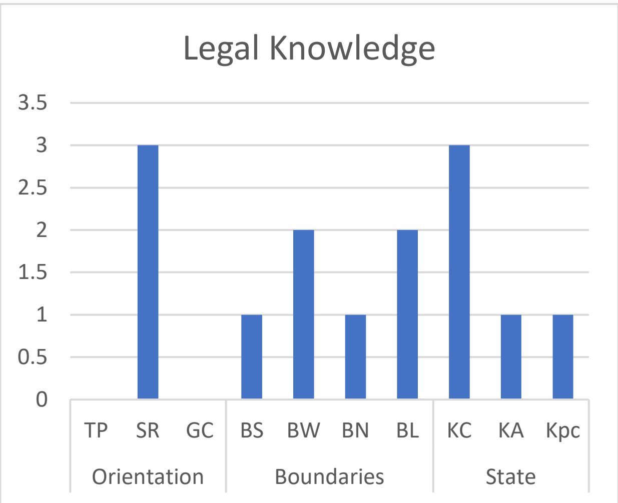



**Diagram 49 Legal Knowledge (P9)**

P9's approach to legal knowledge is strongly social realist. However, her position on knowledge boundaries is not, unexpectedly, only that they are strong and necessary. Unlike with P6 and P7, though, her statements about boundaries being weak and limiting are in relation to needing to push the boundaries between different areas of law, and not between legal knowledge and other forms of knowledge.

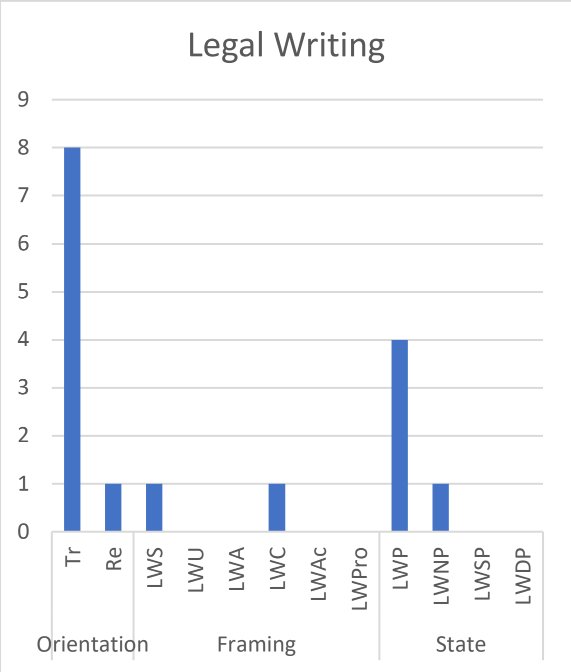



**Diagram 50: Legal Writing (P9)**

P9 presents with a strongly traditional orientation to legal writing – much more so than any other participant. She also agrees that legal writing is a problem for law students and law graduates – although she clearly means something somewhat different to the other participants by this, due to this strongly traditional orientation. Interestingly, she also sees some ways in which legal writing is not a problem, which is unlike other practitioner participants, and more like some of the academic participants. This could be because she is the only practitioner participant who also teaches a university course, and so her view may be affected by her experience of university teaching.

**Summary of main writing criteria:**

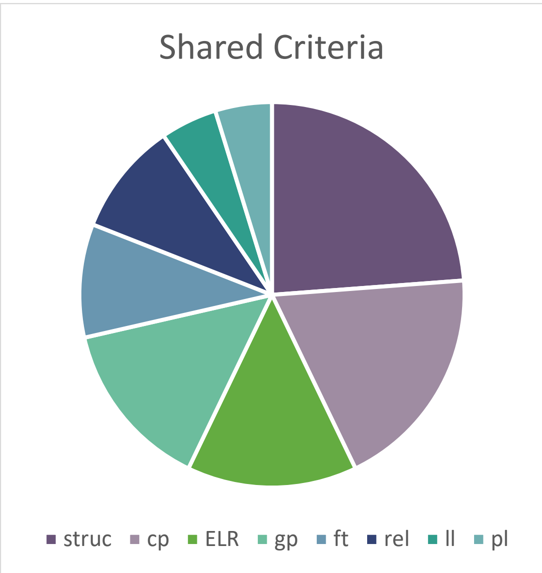



**Diagram 51: Shared (P9)**

P9 is the first practitioner participant who only uses criteria shared with the academic participants. Her strongly traditional orientation to writing is seen in the criteria like grammar and punctuation; clarity and precision; formal tone; use of legal language; elegance of rhetoric and avoiding plagiarism. However, the criteria of 'relevance of legal evidence' suggests that there may be elements of a revised orientation as well.

## 6.5 Participant Ten (P10): attorney who owns own small firm; trains for LEAD, SASETA and other large firms

### 6.5.1 Legal Education

Like most of the other practitioner participants, and some of the academic participants, P10 saw the role of legal education as being to prepare students for practice [LS=4; Aph=0] and said nothing to indicate a valuing of a broader or more academic role. This can be seen in statements about the LLB curriculum like "it needs to be more practical" and "it's one thing to have a degree but you don't know how it works in practice". She also made suggestions like "let's do court work, let's draft, at the degree stage. So that when they get to the CA stage at least you've got some kind of product that somebody can take in, that we don't see them as a risk".

P10 strongly assented to the notion of crisis in legal education, both at LLB level, and with regard to the training of candidate attorneys [IC=7; NIC=0; IF=0; S=0]. She described legal education as being "in absolute shambles" and "the calibre of students I've seen in the last ten years is just shocking to say the least". She qualified her view by saying "it depends where you studied and your environmental conditions" – and suggested that some students, who had a good basic education, and who had gone to some of the "top five or six" universities were still "brilliant". She was equally critical of the four-year LLB – "you can see the glaring difference between that one or two additional years, on the calibre of student and product you have" – and of the training programmes for candidate attorneys – "I said it to LEAD, come and look at what we're doing. Because we're just regurgitating what we have done in the LLB".

P10 offered a range of reasons for her sense of crisis. Mainly, that there had been a significant drop in standards [s=7] and that the LLB curriculum is not preparing students for practice [curric=4]. She identified the main difference between her generation and the current one as "the ability to think", claiming that "we were never spoon fed" and "we had excellent professors and lecturers who always taught us to think on our feet, and that is a critical skill that I think we lack now". Other reasons offered were broader changes in higher education [he=2]; changes in relationship between staff and students [re=2]; as well suggestions that the increase in student numbers [sn=1]; a decrease in student preparedness for the law [sp=2]; and a funding model that forced universities to accept and "push through" students who should not be graduating [f=1] were all contributing to the "shambles" in legal education. P10 also asserted that the training programmes for candidate attorneys were equally problematic. Here, although she criticised the curriculum once, P10 located most of the reasons for the problems within the students, rather than with the system or curriculum. She asserted several times that students had "no discipline", "no respect" that they made "no effort" and arrived with a "lack of interest". Although she qualified that these labels did not apply to all students, they were strongly and repeatedly made through the interview.

### 6.5.2 Legal Knowledge

Like many other participants, P10 struggled to articulate her approach to legal knowledge. As in other parts of the interview, she tended to tell stories about incidents in the profession, rather than directly respond to the question. The reasons she offered for her position on the state of legal knowledge were different from any of the other participants and are thus reported descriptively as it was not possible to categorise them.

Like P9, P10's understanding of legal knowledge included both "knowledge that" and "knowledge how":

> it's basically what you've studied but also the things that you read, and your practical application, what knowledge, what we grow, what we develop, how we change things, how we argue things, our heads, our practice notes… keeping abreast with the latest, getting my annual updates, the latest case laws…

Later in the interview, P10 – like P7 – also flagged "the ability to research… how to research" as an important part of legal knowledge. So although her understanding of legal knowledge is very much bound up in the law, it is not just the "what" of the law but the "how". Furthermore, keeping up to date with the latest changes and developments in the law is, for P10, an important aspect of legal knowledge. P10 did not expand on her conception of legal knowledge in enough detail to be sure, but her statements seem to reflect more of a traditional-positivist approach to knowledge [TP=2] in that knowledge of the law and professional rules are foregrounded in her explanation of what she understood legal knowledge to be. However, she acknowledged the importance of the most recent case law and including "the current changes in the environment that we're working with". By acknowledging the role of context in developing knowledge, done in a systematically revisable way, which in law means through the courts, a somewhat social realist approach could be discerned [SR=1]. Nothing she said could be regarded as general-constructivist [GC=0].

With regard to the state of knowledge, P10 assented vigorously to the idea that legal knowledge was contested [KC=6; KA=0; KpC=0]. Her understanding of the contestations was however, framed – as she put it – entirely "from a practical perspective". In other words, she understood the contestations to be around the work (and its underlying knowledge) that has traditionally been done by attorneys, that is now moving out of the legal sphere, and either being done by other professionals or being deprofessionalised. Examples she offered included Road Accident Fund work (which can now be done directly by claimants instead of through attorneys); wills and estates work (which can now be done by banks instead of attorneys); and immigration work. She consistently explained these contestations in terms of the profession of attorney being under attack or being undermined: "they want to be bad to attorneys…. And make us look like we're bad" and "they have literally taken away all of the wills and estates work by now banks doing it". Probing did not uncover who "they" were in her understanding. P10 also commented on these shifts leading to a mismatch between what candidate attorneys were taught about the law, and how it is changing in practice: "I do think there are a lot of question marks in these subjects I've lectured".

This practical approach to legal knowledge related to her understanding of the role of knowledge boundaries: she regarded boundaries as being necessary [BN=2] and wished they would remain strong [BS=1], but that – in practice – the boundaries between legal knowledge and other professional knowledge were weakening [BW=2]. Important here is to note that she did not believe they should be weakening; rather she was concerned that they were [BL=0]. Some of these conceptions were also expressed by P6, but not as vehemently.

### 6.5.3 Legal Writing

It was extremely difficult to get this participant to articulate her conceptions of legal writing, so this section will be brief.

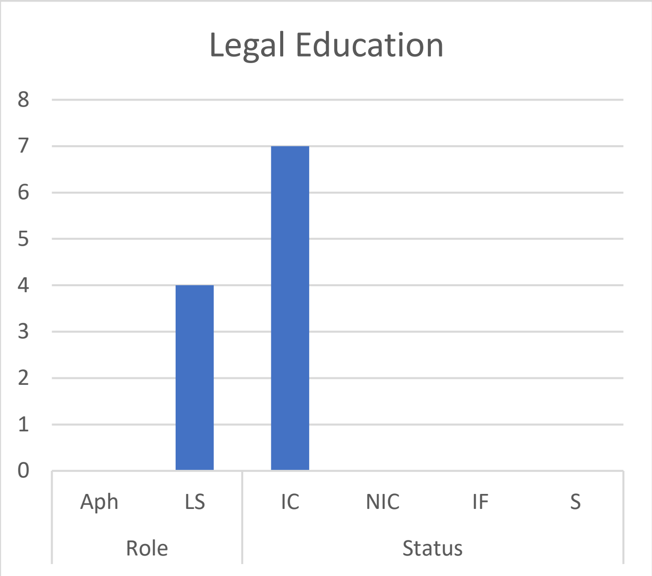
In line with her repeated concern that “students can’t think” P10’s orientation to writing was more revised [Re=4] than traditional [Tr=1]. Acknowledging that there are “different categories of legal writing”, her main explanation of what counts as legal writing foregrounded thinking processes; was very much about knowledge, analysis, and application of the law to facts:

> So, I get a set of situations and I get a set of facts and then I need to respond to it. That’s all legal writing – my compliance with laws and legislation, my knowledge, my ability to comprehend, how have I separated the merits from the facts, my ability to research and then respond… you dissect it. Analyse it.

Congruent with this understanding, she framed legal writing as writing done for the profession [LWPro=1; LWAc=0]. She felt that there were “subtle changes” between good legal writing and good other writing [LWU=1; LWS=0], but did not elaborate, despite the question probing several times. She felt that she “didn’t know” whether or not her colleagues would offer the same or different understanding of legal writing (but “I know they have the same opinion of our students... as practitioners we are just shocked”). P10 saw legal writing as a problem [LP=3] – claiming that “nowadays they just copy everything from somewhere else” and particularly that “they took the precedent banks at the firms they’re in”. In these two examples, this was seen as a new or different problem from when she was a candidate attorney [LWDP=2]. However, a problem that she felt was similar over time [LWSP=1] was that “very few of the candidate attorneys actually get to this level of drafting in their two years” so the idea is that they draft in the School of Legal Practice.

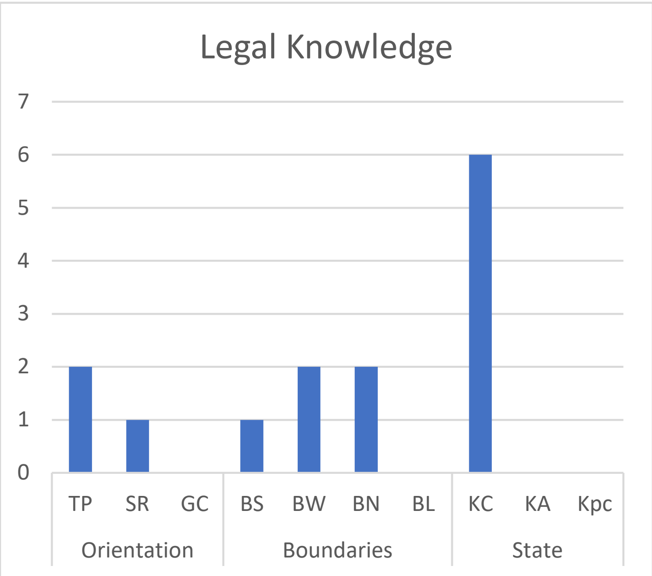
P10 articulated very few criteria for good legal writing. The ones she did identify were all also identified by the academic participants: relevance of evidence [rel=1]; structure [struc=1]; coherence [co=1] and adherence to formal requirements [fr=1] – in her example, making sure that contracts were initialled on every page. This latter aspect – failing to ensure that the contract was initialled and signed – she felt was not “the professional way” and, as it did not meet the requirements of a contract, initially proposed to penalise students who did not comply, heavily. However, she said she was persuaded that as they “had the basics” (that is, the relevant clauses) she could not fail them.

**Participant Ten: Summary of main codes:**



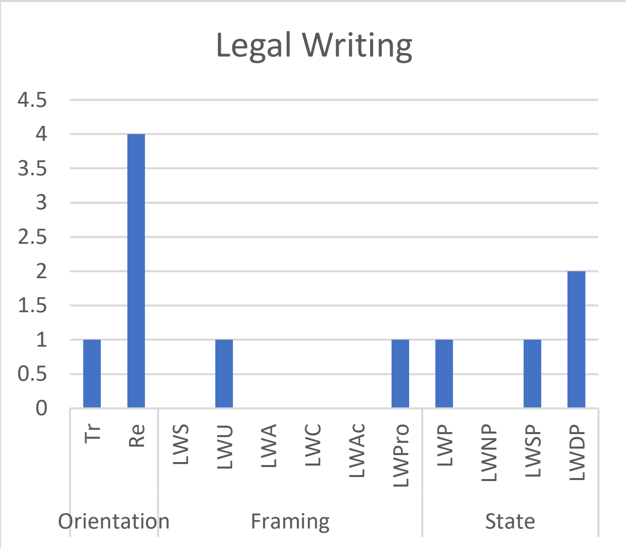

Like most of the other participant practitioners, P10 understands the role of legal education at universities purely in terms of preparing students for practice. She assents vehemently to the notion of crisis; the strength of this is reflected in her assent that legal writing is a serious and mostly new problem.

**Diagram 52: Legal Education (P10)**




P10, like several of the other practitioner participants, does not say very much about legal knowledge. Her strong assertion that legal knowledge is contested is, like P6 and P7, with reference to changes in the profession. She believes that much of what was previously regarded as legal knowledge is being taken over by other professions.

**Diagram 53: Legal Knowledge (P10)**




Like the other practitioner participants, P10 conceives of legal writing as being writing done in and for the profession. Unlike the other practitioners, she does assert that it is unique and different from other good writing. This may be associated with her revised orientation to writing, associating it with valued ways of thinking about and working with legal evidence.

**Diagram 54: Legal Writing (P10)**

**Summary of main writing criteria:**

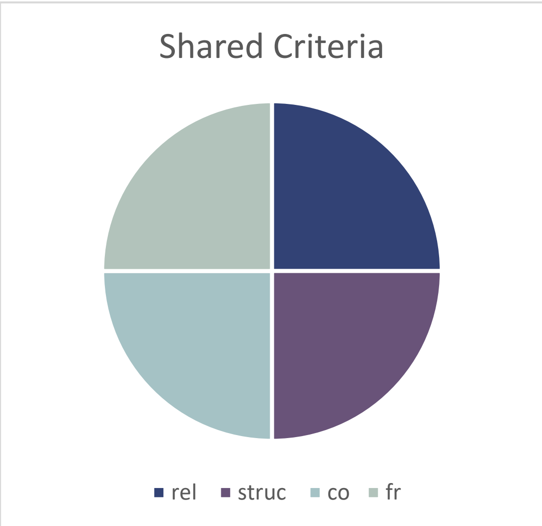



**Diagram 55: Shared (P10)**

Like P9, P10 articulates criteria that are shared with the academic participants. However, she does not identify as many. The criterion used by most participants – relevance of legal evidence – is used, as is structure and coherence. Meeting formal requirements is also identified as being important.

P10's last words on legal writing reflect an overall sense that legal writing is both important and a problem for students and graduates:

> I think it is the core of why we are what we are as lawyers. And we're not trained... I think it will be a major embarrassment for the profession in future.

In this chapter I have analysed the practitioner participants' responses, according to the fields of legal education, legal knowledge, and legal writing. I turn, in the next chapter, to presenting the main findings from this analysis, before discussing these findings, together with the findings from phase one of the research, in chapter eight.

# CHAPTER 7: FINDINGS FROM PHASE TWO DATA ANALYSIS (LEGAL PRACTITIONERS' CONCEPTIONS)

In this chapter, I set out the most significant findings about legal practitioners' conceptions from the analysis presented in chapter six. As in chapter five, due to the limited scope of this research, it is not possible to include or discuss all the discernible patterns. I focus on the findings that emerged most clearly; that could be compared to the findings in chapter five; and that speak to the research question. I have also tried to establish initial patterns of similarity and difference, between the phase one and phase two data analysis. These will be developed and discussed in more detail in chapter eight. This chapter concludes with a table summarising the main findings from chapters five and seven, in preparation for the discussion in chapter eight.

## 7.1 The practitioner participants have somewhat revised orientations to legal writing but draw on traditional orientations more than the academic participants

This finding speaks to Question 1.1 of this thesis' research question: *What do legal academics and practitioners value and what do they critique in student writing?* It also speaks to Question 1.3: *How similar or different are legal academics' and legal practitioners' conceptions of legal writing?*

Whereas academic participants mostly have a strongly revised orientation to legal writing, established in chapter five, this pattern is less pronounced amongst practitioner participants: Two have strongly revised orientations; two have more or less balanced orientations; and one has a strongly traditional orientation to legal writing (Chapter 6, Diagrams 35, 40, 45, 50 and 54).

Like the academic participants, the practitioner participants acknowledge that good legal writing is essentially about being able to think, analyse and apply the law. For example, P6's equating good writing with "cognitive skills" and P10's summary: "That's all legal writing – my compliance with laws and legislation, my knowledge, my ability to comprehend, how have I separated the merits from the facts, my ability to research and then respond… you dissect it. Analyse it".

However, most of the practitioner participants also emphasised the importance of good English or language skills; good literacy skills; and the importance of presenting a technically correct, professionally written legal document to clients or to a judge. Most of them see traditional writing skills as being essential to the practice of law. For example, P6's "you cannot be a good lawyer with poor literacy skills" and characterising the crisis in legal education as a "literacy crisis"; P7's "you must be able to master the language"; and P9's repeated reference to the importance of "syntax, grammar and avoiding spelling errors".

Overall, the practitioner participants spoke far more about the importance of good English; the difficulties for students and graduates for whom English is an additional language; and the importance of language in general. For example, P7 explains, "the reality is we work in English. So you need to be able to effectively communicate as a litigator in English. And those written skills are not up to standard" and P10's "I think there's a language barrier as well". P8 agrees with this position but problematises the hegemony of English in law: "We all think once people can speak English eloquently what's their complaint? We don't realise how much they have to jump culturally and otherwise just to be in the space where my learned friend who's my opponent is".

An interesting aspect of this conversation is how several practitioner participants (P6, P7 and P8) brought up the language requirements that used to exist in legal education in the pre-constitutional era. For example, P7 observed:

> I think the fact that there is little focus on actual language skills as part of the LLB is a problem. You know, I'm not saying you must go back to where you had to…but you couldn't get your LLB unless you passed English and Afrikaans, and Latin.

Similarly, P6 commented, in speaking about the changes in legal education:

> in removing those barriers, they also removed the language requirements. If you look at the Act, they wrote out Afrikaans and Latin, no one complained. Okay? Then they said, well what about English then? So, they wrote that out. Now you cannot produce law graduates who don't have really powerful literacy skills.

Although all were quick to assure me that they were not advocating for a return of the Latin or Afrikaans requirement and recognised it as a barrier to graduation for many, there also seemed to be a wistfulness for the time that the importance of language was formally recognised in legal education.

Lastly, for this finding, P9 identified two possible reasons for ongoing traditional writing challenges for students. The one she attributed to poor basic schooling; the other to legal academics' marking practices:

> I think a lot of time in varsity you mark for content and you're not teaching students how to write, how to construct sentences. The student is brilliant, I mean their marks are brilliant, their contribution to the work is brilliant, it's just their writing that is problematic.

This echoes P4's position and P3's comment that:

> a student who writes badly can certainly do well with me, if they understand what has to happen. And in fact, my friend [an attorney in practice] said one of her students wrote an opinion without a full stop and she thinks it's my fault. (laughter)… because I just think, the content's there…

There is an interesting and important distinction here between practitioner and academic perspectives. The practitioner statements above reflect the traditional orientation to writing, identified in law schools by Greenbaum (2004) but that no longer exist as strongly at universities, at least amongst these academic participants. If academics are not assessing writing using traditional criteria, and practitioners continue to use these criteria, this may account for perceptions in the legal profession – more strongly held than amongst the legal academics in this study – that legal writing and legal education are in crisis and failing to prepare students for practice.

Furthermore, legal academics who have a more revised orientation to legal writing apparently do not critique or "mark students down" for the traditional writing flaws that these legal practitioners identify as concerns. This leads to the inference that this might account, to some extent, for the legal profession's, or at least these practitioner participants', strong perception that legal writing is a serious and fairly recent problem. This could be possible if they are drawing on a traditional orientation to writing when they describe legal writing as being a problem, despite – in other parts of the interview – drawing on a revised orientation to writing.

## 7.2 Common criteria for legal writing are used by practitioner participants, and some of these align with academics' criteria

This finding speaks to Questions 1.1 and 1.3 of the research question: *What do legal academics and legal practitioners value and what do they critique, in student and graduate writing, respectively?* and *How similar or different are legal academics' and legal practitioners' conceptions of legal writing?*

Practitioner participants differed in their ability to explicate the criteria they used to evaluate good legal writing. This may be partly attributable to the fact that three out of the five did not bring samples of writing to discuss, so the discussion remained general rather than in relation to specific writing samples. Nevertheless, several common criteria for good legal writing were articulated. The main ones are notably like the academic participants' most commonly identified criteria: structure; quality and relevance of evidence; argument (including conceptual depth); coherence; application of law to facts; and clarity and precision (See Chapter 4, Diagrams 6, 12, 18, 24 and 30 and compare them to Chapter 6, Diagrams 36, 41, 46, 51, and 55). Other criteria that are commonly mentioned are persuasiveness, use of good English, correct grammar, and punctuation; correct citation, correct legal method and identification of legal issue (These too can be seen in the diagrams cited above). As noted in chapter five, what is interesting about this finding is how broad many of these criteria are – many could apply to good writing in general. This is congruent with some practitioner participants' (P6, P7 and P9) acknowledgement that good legal writing is like good writing in general, in some ways.

Criteria used by practitioner participants that were not used (or infrequently used) by academic participants include the following: leading with facts not law; appropriate use of legal language but not jargon; awareness of audience; elegance of rhetoric; the importance of plain language; brevity and simplicity; and originality rather than use of precedents. These are discussed in more detail in the next section.

## 7.3 Noteworthy differences in conceptions of legal writing between academic and practitioner participants include the starting point, the role of facts, and the type of language valued.

This finding speaks to Question 1.3 of the research question: *How similar or different are legal academics' and legal practitioners' conceptions of legal writing?* as well as to Question

1.1: *What do legal academics and legal practitioners value and what do they critique in student and graduate writing, respectively?*

Echoing finding 5.3 in chapter five, very different conceptions can be seen regarding how legal writing should begin. P7 suggested that a key difference between academics' conceptions of legal writing, and legal practitioners' conceptions of legal writing is the starting point. Academics, she suggested "start with a topic… there's a new case in the ConCourt, it's based on a particular fact, but you focus on the question behind it" whereas legal practitioners, especially advocates, "start with a particular problem that a person brings to you". This difference could account for some of the complaints that law graduates are not prepared to write in practice, if the way they have been structuring their legal writing throughout university is not valued in practice. However, given the frequency of "IPAC"-style assignment questions set in law schools – which are based on a legal problem – mentioned both in chapter two and by academic participants, the difference articulated may simply be between academic legal writing – such as research essays and journal articles about law – and professional genres such as pleadings or heads of argument.

P8 stated that good legal writing needs to "lead with the facts". This could reflect a similar understanding to P7's, articulated above. P8 observed that candidate legal practitioners want to argue the law prematurely, when it is actually necessary to start with facts:

> Before heads of argument, just the pleadings, because it's a legal document people tend to want to argue law before it's time to argue law. So, you find people in their affidavits, in their pleadings, do not only make allegations that are legally cogent, they begin to want to argue the points of law then. And if you do that, which often happens, you have bound yourself to legal submissions prematurely. And then the others know how to counter them.

She went on to explain that it is all about knowing "what to write when… put as little law as possible in your pleadings because it's facts there." This understanding of when facts are valued, and when legal argument is valued, and how to use each strategically, she saw as an essential part of good legal writing and a problem for most novice legal writers.

P6 similarly highlighted the important role of facts in good legal writing: "Now I'll start off by showing them how to analyse the facts. I spend a lot of time on facts, before I spend any time on writing. You cannot write as a lawyer if you didn't understand the facts. You can't write as a lawyer, if you don't know how to apply those facts to the law".

This crucial role of facts in good legal writing is something recognised by academic participants as well. For example, P3 described a piece of student writing as "unsuccessful" because the student "hasn't grappled with the detail of the facts". Whereas P4 described a piece of student writing as successful because the student "identified the correct law and excellently applied them to the facts". And P5, using her term "technical coherence" spoke of the importance of how you apply the answer to the set of facts, the way that you read the facts, and the way you interpret the facts. Clearly, facts have a very important role to play in good legal writing. This may warrant further investigation.

The question of audience may contribute to differences in understanding of the term "legal writing". Somewhat surprisingly, academic participants did not mention "audience" as a criterion. By contrast, several practitioners did. For example, P9, in her definition of legal writing as "communicating the law" specifies a wide range of audiences within her definition, both legal – "your opponent" and much more broadly – "the general public". At first, P8 concurred with this awareness of audience. Firstly, she described the audience for legal writing as being "the judge or judicial officer" and added that the best legal writers also write for broader society – "in such a way that an old granny sitting there understands". However, P8 went on to contradict herself on this notion of society as audience saying, "I can no longer write for society, I can write for a court". She concluded that the main audience for legal writers is "ourselves. We write for ourselves". On the other hand, regarding society as audience could explain the next finding: that practitioners spoke more about the need for plain language, and less jargon, as criteria for good legal writing.

P6, P7 and P8 all spoke powerfully about the move to plain language in legal writing, and how good legal writing requires using legal language correctly but getting rid of the unnecessary legal jargon. For example, P6's "good legal writing means plain language writing" and P8's "I think an advocate is someone who can tell you something that's complex and make it sound simple. And that's how we should write as well". This relates to the criterion, valued by all practitioner participants, of clarity and precision (and confirms P5's assertion that those who had been in practice were likely to value clbarity and precision, and use less jargon and "flowery" language than those who were "just" legal academics). Furthermore, two of the practitioner participants – P6 and P10 – also identified the use of precedents as a factor contributing to poor legal writing, which was not a factor mentioned by academic participants.

However, although these practitioner participants were clear that they valued plain language, this is not something necessarily shared by all practitioners. For example, P8's lament, discussed above, that "we write for ourselves" and P6's retelling the story of a young attorney who got into trouble with a senior partner for writing in plain language because "it doesn't look like a lawyer wrote it".

This confirms the literature that suggests there may be a conflict between those who advocate for plain language writing and those who continue to rely on precedents that may contain more archaic language and legal jargon, explored in chapter two (Schiess, 2009; Glenn, 2010; Hussain, 2019). The participants' views offer a slightly different angle on the conflict and suggest that the debate may be situated more strongly in practice than in academia. This may also be accounted for by the strong grammar of law in practice, discussed in more detail in chapter eight.

A related criterion that is used differently by academic and practitioner participants is what I termed "elegance of rhetoric" [ELR]. Academic participants were clear that this was not a valued criterion. For example, P5 suggested that good legal writing did not need to be elegant, and P3 used it often [ELR=12] in her critique of the less successful sample of writing she brought to the interview. Comments like "it's nicely written that paragraph. It's sort of pretty" were intended as criticism and was not included in her repertoire of what she valued in good legal writing. By contrast, two of the practitioner participants (P8 and P9) used elegance of rhetoric as a criterion that they associate with good legal writing, particularly in the context of the broader criterion of persuasiveness. (See Diagram 20 in Chapter 5 and contrast it with Diagrams 46 and 51 in Chapter 7).

P9 described this as the quality of "eloquence" while P8 felt that "the flair of language…knowing how to articulate it…because you succeed on your powers of persuasion" is highly valued in good legal writing, and – P8 felt – a particular challenge for legal practitioners for whom English is an additional language. Although the concepts of "eloquence" and "elegance" would have to be defined and interrogated more rigorously to be sure, these differences do raise an interesting question about whether academics and practitioners value these qualities differently, with a resultant difference in how good legal writing is understood by each group.

## 7.4 Beliefs about legal education have some impact on conceptions of legal writing

This finding speaks to Question 1.2 of the research question: *How do legal academics' and legal practitioners' conceptions of legal education and legal knowledge intersect – if at all – with their conceptions of legal writing?*

In chapter five, it is found that an inclination to legal practice in views of legal education is associated with believing that legal writing is a problem. Here, practitioners' strong claim that legal education is a problem may intersect with the strongly held opinion that legal writing is writing for and by professionals and that legal writing amongst students and recent graduates is a serious problem.

Unsurprisingly, given that they are all in practice, all practitioners strongly view the role of legal education as being to prepare students for legal practice. Although P8 also saw the value of a broader academic education he, like P3, did not seem to view this as part of legal education. Practitioners assented slightly more to the notion of crisis (with two strongly agreeing, and the others preferring to describe it as in flux). Interestingly, the sense of crisis and critique of legal education was mostly firmly directed at universities; although the LPA was causing some uncertainty about vocational training, all but one practitioner participant felt that vocational training was better, more structured, and more comprehensive than when they were a candidate legal practitioner.

It is worth briefly exploring the reasons for the strongly held view amongst practitioner participants that legal education at universities is in flux or in crisis. Notably, the only statements made about stability, by P8, are criticisms of unchanging (and restrictive) barriers to necessary change. A range of reasons were offered for practitioner participants' view that legal education at universities is worse, which are set out in more detail in chapter six. These include that the undergraduate degree is too narrow; standards are falling due to a failed basic education system and the pressure to pass students; the curriculum is outdated or irrelevant; the classes are too large due to problematic university funding models and related resource constraints; and that all gatekeepers – like the language requirements – have been removed. Other reasons are located in the attributes (or lack thereof) of graduates: criticism of both graduates' cognitive capacity – "graduates can't think" (P7) – and their character – "students are arrogant…lazy… have no discipline" (P10). Many of these perceptions are reflected in the literature in chapter two – for example, Motala (1996). However, the strongest criticism of legal education is its perceived failure to teach practical legal skills, which is explored in the next section. The term "legal skills" is used frequently but imprecisely in this data; sometimes synonymously with language skills but at other times as code for a wide-ranging perceived lack of skills in legal graduates. I should have probed more, in the interviews, to try and ascertain exactly what each participant meant by "legal skills" to be able to assess whether the term was differently understood by legal academics and legal practitioners.

A strange paradox can be seen in some practitioner participants' views on legal education: although they want the LLB to be "more practical", some suggest that legal academics are not equipped to impart "practical legal skills". For example, P6's comment: "they introduced this thing called Practical Legal Studies... It was inadequate but at least it was something…but it was still an academic institution". This implies a belief that practical legal skills cannot be taught effectively in academic institutions, which creates an untenable contradiction: practical legal skills need to be taught at university but cannot be taught well in an academic institution (or, by implication, by legal academics).

A further intersection between practitioners' views on legal education and conceptions of legal writing is rooted in ongoing inequalities in basic and legal education. Chapter two includes Godfrey's (2009) claim that that many Black law students graduating from HBUs are either not getting jobs or are not being retained by firms after they complete their articles of clerkship. More recently, Klaaren (2020) notes that this has shifted slightly, but that inequalities persist. This perception is echoed by several practitioner participants, who made the link between a perceived inferior legal education and poor legal writing skills. For example, P7 observed that "the usual suspects" – which I took, from the context of this statement, to mean HWUs – "just produce people with better language skills". A little later in the interview she elaborated: "…those written skills are not up to standard. That's the reality. And there is a distinction between where people receive their LLB degrees when it comes to those skills, that's the reality…" This intersection is also expressed by P10: "the calibre of students I've seen in the last ten years is just shocking to say the least… depending on where they've qualified. So, remember with LEAD you're not getting the [HWU] product or the [another HWU] product…." Here, P10's use of the term "product" to describe graduates reflects concerns about the commodification of higher education, raised by P8 and also explored in chapter one (Harley, 2017; Mbembe, 2018). Academic participants P4 and P5 also expressed concerns about the calibre of students getting worse over time.

All of the above suggests that practitioners' views on legal education have an impact on their conceptions of legal writing: where you studied and the lack of focus on developing "language skills" as part of the LLB contributes to law graduates' perceived poor legal writing. Furthermore, there is a strongly held view that the role of legal education is to prepare students for practice, with a related certainty that legal writing is the kinds of writing done for and by the legal profession. In short, the claim that legal education at universities is a problem, as is the state of graduates' legal writing, can be understood to mean that legal education does not prepare graduates for legal practice, and they cannot write in the ways valued and practised by the profession. This is discussed in more detail in the next finding.

### 7.5 Despite their different locations in the profession, practitioner participants' main shared criticism of legal education is that it does not teach sufficient "practical legal skills". This may be linked to their strong conception of legal writing as writing for the profession and their conception of legal writing as a definite and recent problem

This finding speaks to Question 1.2 of the research question: *How do legal academics' and legal practitioners' conceptions of legal education and legal knowledge intersect – if at all – with their conceptions of legal writing?*

Practitioners' main criticism of legal education is that it is not practical enough. All practitioner participants expressed this view. P6 asserted strongly that the purpose of legal education is to prepare students for practice:

> You need to look at the subjects, your core subjects, and work out which of them are relevant to the outside world they practise in. You are not looking at the LLB curriculum to create academic lawyers. You want to create lawyers who are useful out there in the commercial world.

She went on to criticise the failure of law schools to take advice from the legal profession although she acknowledged, "I hear they are more open to it now". P7 similarly, in response to what needed to change in legal education: "I keep coming back to practical aspects, but practical writing skills". P8 drew on legal education in other jurisdictions to make the point: "the craft of being an advocate, a lawyer, not just law, legal education, the craft itself is taught in their final year or when they're doing LLB. And I think that's what we must have".

She later commented "the other thing I would do, I would really, really focus on…when people are doing LLB, do it as we do with pupillage. Do more practical work".

Likewise, P9 felt strongly that the role of legal education is "preparing students for the working place" and that students should be given a "more practical experience in the working space". She also recommended that more practitioners should be invited to teach on every law course, to make it more applied. Finally, P10 made suggestions like "let's do court work, let's draft, at the degree stage. So that when they get to the CA stage at least you've got some kind of product that somebody can take in, that we don't see them as a risk".

P7 agreed that "people are not practically equipped to deal with legal practice" and "I do think that…practical skills should be developed more from an earlier point". However, P7 also suggested that "people just do not really understand the law after four years of LLB" and that "it's from everywhere… I think overall people are really not very knowledgeable", suggesting that she views the problem as a knowledge deficit as well as a skills deficit. P8 similarly asserted that the LLB should be more practical – but lamented graduates' lack of general knowledge and knowledge of other disciplines. This tension may speak to Allais' (2015) critique of employers' unrealistic expectations of what universities can achieve. Underlying this are the problems implicit in the broad and the conceptually conflated use of the term "skill".

In chapter five, it is found that an inclination to legal practice, in views on legal education, is associated with seeing legal writing as a problem and being clear about the criteria used to assess writing. (For example, see Chapter 4, Diagrams 3 and 5; and 21 and 23, read together). Unsurprisingly, an even stronger inclination to legal practice is seen amongst practitioner participants, as shown above. Four of the participants viewed the role of legal education as being to prepare students for legal practice whilst one – P8 – had more of a balanced view. A similarly strong, probably related, framing of legal writing as writing done by legal professionals can be seen. All except P7 made no statements that framed academic legal writing as part of legal writing, whilst making several that framed legal writing as writing done for and by the legal profession. (P7 only made one such statement, whilst making five more that framed legal writing in terms of writing done for and by the profession).

Furthermore, all practitioner participants strongly framed legal writing as a problem, with only P9 making one statement that suggested it was not a problem. P7 and P9 made no comment on whether the problem is different from their student days whereas P6, P8 and P10 framed it as a new or recent problem, different from when they were at university. (For example, see Chapter 6, Diagrams 33 and 35; and 52 and 54, read together).

As an aside, as exploring the implications of this goes beyond the scope of this study, a shared view that legal education at university has become worse whilst vocational training has become better in recent years, could be observed. For example, in relation to her experience of being a pupil advocate, P6 commented: “The Bar did have training programmes then. They were not very good…But I think they got better recently. It seems to be more structured and formalised”. P7 is similarly critical of her own experience as a pupil: “we had lectures in basically all the topics that we were examined in, but you know, they were mostly collections of war stories, they were not…you know, there was no educational plan behind it if I can put it that way. You had to just mostly find your own way” and suggested that – particularly due to the impact of the LPA – vocational legal training is now both longer, more intense, and more structured, as a result of planning that is “more deliberative, reflective”. These improvements are conceived, however, as being in response to unprepared legal graduates, in an attempt to get “everyone up to a certain minimum standard for forensic work” (P7). This perception of improved vocational legal training may be limited to training of pupil advocates, however, as P10 was equally critical of practical vocational training of candidate attorneys now, as she was of legal education at universities: “I said it to LEAD, come and look at what we’re doing. Because we’re just regurgitating what we have done in the LLB”.

## 7.6 Practitioner participants’ conceptions of legal knowledge are quite different to those of academic participants; the relationship between their knowledge and writing conceptions is likewise different

This finding speaks to Question 1.2 of the research question: *How do legal academics’ and legal practitioners’ conceptions of legal education and legal knowledge intersect – if at all – with their conceptions of legal writing?*

The analysis of practitioner participants’ conceptions of legal knowledge yields this main finding: that “knowledge how” is valued over “knowledge that” (Winch, 2010). In other words, the notion of “skills” tended to replace knowledge in discussions. As discussed in chapter six, although P6 at first recognised two types of knowledge – academic knowledge and practical knowledge – she went on to claim that “legal knowledge is equivalent to practical application". Similarly, P7 suggested that "from a practitioner's perspective, it's a very practical issue. So legal knowledge is really, I think, about the living law". P8 used "vocational training" as a synonym for her term "knowledge production". It is clear that these practitioner participants equate legal knowledge with practical legal skills.

P9's conception of legal knowledge is less exclusive of "knowledge that" but includes procedural elements: "legal knowledge is how law can be used. How it can be developed. And it's not just knowing the law, it's how to access, the law, it's how to apply the law". P10's conception is closer to P9's; mostly practical but with an acknowledgement of academic knowledge:

> it's basically what you've studied but also the things that you read, and your practical application… how we change things, how we argue things, our heads, our practice notes… keeping abreast with the latest, getting my annual updates, the latest case laws.

P8 – like P2 in the first phase – is to some extent an outlier. She drew mostly on a general-constructivist approach to legal knowledge and did not consistently equate legal knowledge with practical legal skills. Rather she recognised the plurality of legal knowledge, depending on context, and suggested that

> legal knowledge for me is an understanding of what makes legal systems of different communities. And what constitutes a just society in different environments. You know, people tell you that there's one universal way of judging society, a democracy, *and all its pretences*.

What is notable in the above is that practitioners use the term "practical" to mean quite different things. For some it means being able to access the law, through electronic research; others include the ability to apply the law as part of their conception of practical. In a wider understanding, P9 included professional skills such as keeping up to date practice notes or reading and staying aware of new developments in the law and submitting court papers on time. Clearly, the term "practical" means different things to different people – in much the same way that legal writing does. Although it is beyond the scope of this research to interrogate conceptions of "practical legal skills" in any detail, it may be worth doing so in future research.

Several practitioner participants expressed the opinion that students' aim is simply to pass university, and not to gain knowledge. (P9 is the exception: she sees current students as being more knowledgeable than in the past). Like P4, they believe that this is different from when they were students. This perception echoes literature on the neoliberal commodification of higher education, explored in chapter one (Lynch, 2014; Harley, 2017; Mbembe, 2018). For example, P8 observes "the administrations are making sure that they keep themselves financially viable and students are trying to pass. And in the process, we've abandoned what I call the production of knowledge". However, as shown above, how practitioner participants conceive of this knowledge that students are not gaining is quite different from academics' conceptions.

An interesting point about the data on knowledge boundaries can be discerned. One practitioner participant, P10, suggests – more strongly than academic participants – that knowledge boundaries are weakening. She also believes that legal knowledge is contested or partially contested. However, because of her different conception of what counts as legal knowledge, her view brings out an interesting dimension of the idea of knowledge boundaries used in the literature (Young & Muller, 2010) or by academics. For this practitioner participant, weakening boundaries are between law and other disciplines or professions. The contestations are about who gets to do the work traditionally done by the legal profession. P10 described these contestations as being "purely from a practical perspective" and gives numerous examples (see chapter six) on how work traditionally done by attorneys has been deprofessionalised or is now being "poached" by other professionals. For example: "They did that with immigration. They're doing that with RAF. They've literally taken away all the wills and estates work from attorneys by now banks doing it".

This weakening of professional boundaries clearly influences the boundaries of legal knowledge and is a theme that can be discerned with other practitioner participants. For example, P6 spoke of deregulation and being in competition with other professionals: "the whole legal profession is undergoing changes. Within the next five years, it will be unrecognisable. It's been deregulated, lawyers are competing with other professions. Whereas in the past we didn't". These practitioner participants indicate that the weakening of boundaries places an increased knowledge demand on practitioners, through the blurring of boundaries between law and other professions, which is congruent with literature such as Susskind and Susskind (2015).

In chapter five, a relationship between knowledge boundaries and writing boundaries was established. (In other words, participants who drew on traditional-positivist and social realist approaches to knowledge set clearer boundaries for legal writing with a resultant narrower and clearer set of writing criteria. The one participant – P2 – who drew somewhat on a general-constructivist approach to knowledge used the widest range of criteria for good legal writing). Here, the relationship is not as clear. A similar balance between traditional-positivist and social realist approaches is seen amongst practitioner participants. What is not similar is the link between knowledge boundaries and writing boundaries – practitioner participants with strong knowledge boundaries did not articulate equally clear criteria for writing. However, a slightly different link can be made, that echoes the finding at the beginning of this section. In chapter five it was suggested that it may not just be approach to legal knowledge but an inclination to the profession that may affect conceptions of knowledge and writing. This certainly is observable in the practitioner participant data. Conceiving of legal knowledge as practical knowledge, or legal skills, may be associated with conceptions of legal writing as writing done for and by the profession.

It is thus clear that practitioner participants' knowledge conceptions are quite different to academic participants' knowledge conceptions. Although conceptions of knowledge and writing do not articulate in the same way as with academics, there seems to be a link between conceiving of legal knowledge as practical legal skills (albeit meaning different things by this term), and conceiving of legal writing as professional legal writing, with a greater focus on traditional writing criteria.

## 7.7 Practitioner participants' conflation of knowledge and practical skills leads to the paradox of wanting legal education to be both broader and narrower - but the link to conceptions of legal writing, if any, is not clear

This finding speaks to Question 1.2 of the research question: *How do legal academics' and legal practitioners' conceptions of legal education and legal knowledge intersect – if at all – with their conceptions of legal writing?*

This finding interrogates the implications of practitioner participants' consistent conflation of knowledge and skills, and further interrogates the term "practical". What is pointed out here is a tension in their suggestions: Although insistent that legal education should focus more on the practical legal skills that students need for legal practice, they simultaneously would like graduates to have a greater knowledge of other disciplines. For example, P7 suggested, “over-focus is detrimental to people’s development at the Bar” and:

> What really is in short supply is cross-disciplinary skills, because if you can’t read a balance sheet, or understand up to a certain level of accounting, you are going to battle dealing with commercial matters. It’s all good and well to say, ooh, I did contract or advanced contract law, fancy contract law, but if you don’t understand the business mechanics behind that contract, you are at a disadvantage in litigation.

In other words, business and accounting knowledge is valued but described as a “cross-disciplinary skill”, which may suggest that some of the “practical legal skills” desired by practitioners are actually forms of knowledge from other disciplines, which a narrower “law-only” education would not resolve.

Conversely, another tension is the identification of a lack of generic practical skills, such as conducting electronic research, as a knowledge gap. This was not identified by academic participants. For example, P10 flagged “the ability to research… how to research” as an important part of legal knowledge, and noted that, increasingly, not just knowing the law, but knowing how to find it quickly, is an essential part of legal knowledge that many graduates lack. P7’s position on this is very similar: she felt that “people are misguided as to what legal research entails” and that “there’s a failure to appreciate the role of electronic sources”. She elaborated on this within the broader frame of legal knowledge: “research methodology is pound for pound, worth far more than knowing particulars about contract law. At least from a litigator’s perspective”. Of interest for this research, is the link P7 made between lack of knowledge of electronic research data bases, and plagiarism in legal writing. She felt that failure to know how to use electronic research tools had directly led to the major increases in plagiarism in legal writing that she had noted. Given that other participants noted concerns about ethical writing and plagiarism, this may be a link worthy of further exploration

Overall, the practitioner participants’ use of the term “practical”, especially in relation to legal skill, is sometimes equated with knowledge and sometimes equated with a broad and differing range of generic practical skills. It was therefore difficult to discern any clear link to conceptions of legal writing in this regard.

### 7.8 "Legal writing is not telling stories – but reading stories will make for better legal writers": some practitioner participants agreed with academics' claim that legal writing is unique, but they focused more on the necessity of reading

This finding speaks to the main research question: *What do legal academics and legal practitioners mean by the term "legal writing"?*

In chapter five, section 5.8, it was shown how all academic participants, except P2, claim that good legal writing is different from other good writing. Section 5.8 goes on to explore how academic participants contrast understandings of legal writing with general good writing principles found in "telling stories". However, of the practitioner participants, only two (P8 and P10) believe legal writing to be unique; two (P6 and P7) present a balance of opinions and one offered no opinion on this (P9). P8 suggested that legal writing was unique – but not in a positive way. She observed:

> the discipline of being a lawyer dominates how I write, and that's not how society reads. Society wants the beauty of language, the expressions. Law wants, this happened, that happened, the law is this, therefore this.

P8 went on to critique legal writing in this way: "this whole idea that we write to make things clearer is a pretence. We don't write to make things clearer for society. We write things to make things clearer for ourselves". P7 accounted both for legal writing being different from other good writing – "it's different because it has its *peculiarities*. So, it's not a totally different thing, but it's specialised, because of the particular needs of what you're doing, and the particular framework that you need to write in" – but also similar: "I think it's the same in terms of many writing principles". However, she went on to explain that writing as an advocate is different because "of course we focus narrower at the Bar where legal writing is really limited to forensic writing".

On balance, practitioners seem slightly less likely to assert that legal writing is different from good writing than academics. Furthermore, they seem a little more critical and less convinced of the uniqueness of legal writing. However, practitioner participants do assert strongly that legal writing is writing done for and by the legal profession. This is, at first glance, contradictory: surely legal writing done for and by the profession is unique and different from other good writing? This apparent contradiction may be explained, to some extent, with reference to practitioners' traditional orientation to writing and their use of broad writing criteria: if good English, grammar, and punctuation are a stronger part of your conception of good writing, you may be less likely to see legal writing as being different from other good writing. Their valuing of a criterion such as elegance of rhetoric – as discussed in 7.3 above – could also account for practitioner participants seeing commonalities between good legal writing and good writing more broadly.

A slightly different angle on legal writing and storytelling emerged in the practitioner participant data: some participants suggested that students' and graduates' failure to read fiction contributes to why they cannot write well. This idea that better readers become better writers is explored at most length by P6 who asserted that what law students need to be told is "if you want to be successful lawyers, start reading". She goes on to describe a mentorship programme that she runs; the precondition is that all members read a book a month. She explains "Those who read a book a month absolutely thrived. It took me one year to turn them into really good lawyers". P8 also emphasised the importance of being widely read and explicitly rejected the notion that legal writing is unique (which she seemed to regard as a synonym for superior): "There are other forms of writing that are superior. The fact that I'm a lawyer…and I write like a lawyer, does not mean poetry is backwards. Does not mean literary analysis is backwards".

Lastly for this point, P9 saw a slightly different relationship between telling stories and legal writing: "One of the things I said to students is to get comfortable to speak in your own voice… tell me in your own words now". This could imply that learning to tell a legal "story" in your own words could lead to becoming a better legal writer.

This chapter has provided an account of the most significant findings, from phase two of the research, on legal practitioners' conceptions of legal writing, and the relationship of these to conceptions of legal education and legal knowledge. It has also attempted to identify initial similarities and differences between the findings in phase two and the findings in phase one. Before presenting the discussion of these findings, from both phase one and phase two of the research, in chapter eight, this chapter concludes with a table summarising the main findings from chapters five and seven. This summary is intended as a distillation of the main findings across both phases of the research, in preparation for the discussion that follows in the next chapter.

**Table 12: Summary of Findings**

| Main findings from Phase 1 (ch 5) | Main findings from Phase 2 (ch 7) |
|---|---|
| 5.1 The academic participants have largely revised orientations to legal writing, drawing on traditional orientations less than anticipated. | 7.1 The practitioner participants have somewhat revised orientations to legal writing but draw on traditional orientations more than the academic participants. |
| 5.2 Some common criteria for writing are used, but often mean different things. | 7.2 Common criteria for legal writing are used by practitioner participants, and some of these align with academics' criteria. |
| 5.3 Some differences regarding structural expectations are apparent, especially with regard to the role of the introduction and the usefulness of formats. | 7.3 Noteworthy differences in conceptions of legal writing between academic and practitioner participants include the starting point, the role of facts, and the type of language valued. |
| 5.4 Beliefs about legal education have some impact on conceptions of legal writing. | 7.4 Beliefs about legal education have some impact on conceptions of legal writing. |
| 5.5 The link between subject and conceptions of legal writing is less clear than anticipated but grammatical strength emerges as a factor. | 7.5 Despite their different locations in the profession, practitioner participants' main shared criticism of legal education is that it does not teach sufficient "practical legal skills". This may be linked to their strong conception of legal writing as writing for the profession and their conception of legal writing as a definite and recent problem. |
| 5.6 There is a link between conceptions of legal knowledge and conceptions of what counts in legal writing. | 7.6 Practitioner participants' conceptions of legal knowledge are quite different to those of academic participants; the relationship between their knowledge and writing conceptions is likewise different. |
| 5.7 Private law subjects are associated with stronger knowledge boundaries than public law subjects, with equivalently stronger boundaries for what counts as legal writing. | 7.7 Practitioner participants' conflation of knowledge and practical skills leads to the paradox of wanting legal education to be both broader and narrower - but the link to conceptions of legal writing, if any, is not clear. |
| 5.8 "Legal writing is not telling stories": most participants believe that good legal writing is different from other good writing. | 7.8 "Legal writing is not telling stories – but reading stories will make for better legal writers": some practitioner participants agreed with academics' claim that legal writing is unique, but they focused more on the necessity of reading. |

# CHAPTER 8: DISCUSSION OF FINDINGS

## 8.1 Introduction

In this chapter, I seek to answer the main research question in this study: *What do legal academics and legal practitioners mean by the term 'legal writing'?* To do this, the chapter first explores whether the strong claim in the literature that led to the formulation of this research question – that legal writing is a problem for law students and graduates in South Africa – is assented to by the participants in this study. The question of "writing as code" is briefly explored, followed by a short discussion on the impact of professional identity on conceptions of legal writing and claims that legal writing is a problem. Findings on participants' conceptions of what it means to write in law and particularly whether participants have principally traditional or revised orientations to writing are then discussed. Here, Bernstein's (1999a) concept of grammaticality is used to critique the dichotomy inherent in these orientations and to offer a different interpretation of some aspects of apparently traditional orientations.

Thereafter, the impact of views on legal education and approaches to legal knowledge on conceptions of legal writing is discussed. Some of the core criteria for legal writing that emerged from the findings – including the inconsistencies and contradictions – are then examined. This leads to a brief overview of a few notable patterns in what is valued and what is critiqued in students' and graduates' legal writing. Penultimately, the threads of similarity and difference, in academics' and practitioners' conceptions of legal writing, are brought together in section eleven of this chapter. Rather than present the implications of the findings solely at the end of the chapter, I attempt to discuss these implications as part of the discussion of the different findings. Nevertheless, the chapter concludes with a brief general discussion of some of the implications of these findings for legal writing development at universities in South Africa.

## 8.2 The claim that students' and graduates' legal writing is a problem

Much of the literature on legal education in South Africa, over the past twenty-five years, has characterised the state of legal education as being "in crisis" (Motala, 1996; Woolman et al., 1997; van Marle & Modiri, 2012; Dicker, 2013; Modiri, 2014). One of the strands of the conversation about this crisis is the state of law students' and law graduates' writing. This is similarly characterised as being a significant problem (Motala, 1996; Woolman et al., 1997;

o'Regan, 2002; Greenbaum, 2004, 2010, 2012, 2014; Swanepoel & Snyman-van Deventer, 2012; Broodryk, 2014; CHE, 2018). (Here it should be noted that these scholars do not all support the notion of crisis, but they explore the perception that there is one). This crisis takes place within the broader "crisis" of higher education, and debates about the articulation gap between schools and universities, particularly the lack of articulation between school and university literacy requirements (Pretorius, 2002; Greenbaum, 2004; Bitzer, 2009; Morrow, 2009; Greenbaum, 2012; Bangeni & Greenbaum, 2013, 2019; Quinot & Greenbaum, 2015). The imperative to decolonise university curricula (Badat, 2009; Gibson, 2015: Booysen, 2016; Mbembe, 2016); the effects of market-led restructuring and managerialism in higher education (Lynch, 2014; Harley, 2017; Mbembe, 2018); and debates about whether professional degrees adequately prepare graduates for work – or indeed whether they should (Allais, 2014, 2015) – are further contours of this higher education "crisis".

Overall, the findings of this research confirm perceptions that higher education is in crisis but do not reflect similar conceptions of a crisis in legal education. Only one out of the five academic participants assented to the notion of crisis in legal education, with two asserting that legal education is not in crisis, and one suggesting that this was true only to the extent that higher education in general is in crisis. This suggests that perceptions within this legal academic community may be quite different from perceptions presented in the literature. (There is too, it must be admitted, the frog in boiling water argument – that there is a crisis but for academics, this has become normal and unremarkable – but that is beyond the scope of this research). Similarly, only two practitioner participants agreed – vehemently, it must be said – that legal education is in crisis. Three did not regard it to be in crisis, and one asserted that if there was any crisis, it was symptomatic of a broader crisis in South African society, as it continues to struggle to emerge from its colonial and apartheid past. P6, who strongly assented to the notion of crisis, did suggest that the crisis in legal education was, in essence, a "literacy crisis". This reflects practitioners' stronger agreement that legal writing amongst graduates is a serious problem, discussed below. Academics' responses were more mixed. Overall, the strength of the claims presented in the literature, that legal education is in crisis, do not seem to be reflected consistently in these participants' responses.

Findings do show strong agreement across both groups of participants that legal education is in flux, and different from when most participants attended university. This could either imply that the difference is a matter of semantics (I say crisis; you say change) or that the scope and depth of the changes are not perceived to be as problematic by these participants as the literature suggests. Of interest is that there was a greater sense amongst the practitioner participants that there are serious problems in legal education at university, and that these extended to problems with students' and graduates' writing. This could suggest that the literature reflects practitioner perceptions more than those of academics.

Similarly, the mixed reaction to the question of whether law students' and graduates' writing is a problem is interesting: although most academic participants agreed that legal writing is a problem for students, two qualified their responses – P3 calling it "unremarkable" and P2's "I don't agree that law students cannot write". At most, P2 argued, the claim could be true for a small group of students. However, all of the practitioner participants assented strongly that legal writing among law students and graduates is a problem, with three agreeing that it is a recent or different problem from when they had studied. These findings not only suggest that these legal academics may have a somewhat more resilient view of legal education and legal writing than the literature led me to predict, but again, that the literature may reflect practitioner views more than academic views, if these practitioner participants' conviction that legal writing is a problem reflects a broader practitioner perspective. Equally, one could infer that academics may have become gradually desensitised to the erosion of standards or that they are not expecting students to write at the level expected by the profession.

A different inference can be drawn from these findings, however: different understandings of the term "legal writing" influence whether one sees it as a problem or crisis. In other words, different understandings of what it means to write in law could lead to differences in characterising such writing as problematic or not. These differences in understanding are discussed in the sections that follow. One of P2's statements poignantly captures the heart of the problem, so is worth re-stating here:

> You also have the problem of students who have great understanding and creative minds and who are thoughtful, and they can develop arguments, but the writing skills are not as developed, and I think that sometimes will obscure the quality of their thinking. If that is all that you are seeing, if that is bad writing, then…it's like a barrier to appreciating the conceptual abilities of the student.

This leads to the following question, which subsequent discussion will attempt to answer: do practitioner participants' stronger focus on traditional writing elements, or "skills" operate as a barrier to appreciating the conceptual abilities of students or graduates, with a subsequently greater tendency to characterise their legal writing as a problem?

## 8.3 Writing as code

One of the questions raised in some of the literature was whether participants would use the terms “poor writing” or “poor legal writing” as code for a failure to present the types of cultural resources and social networks that have traditionally been associated with academia and the legal profession. In other words, I wondered whether conceptions of “poor writing” would be associated with deficit perceptions about students’ background, previous education, general knowledge, social class, race, or gender. This question is located in some of the literature on legal education (Quinot, 2012; Modiri, 2013; Heyns, 2014; Quinot & Greenbaum, 2015); on transformation in and decolonisation of higher education more broadly (Universities SA, 2015; Gibson, 2015; Mbembe, 2016, 2018) as well as the academic literacies literature (Lea & Street, 1998; Lillis & Scott, 2007; Jacobs, 2007, Archer & Richards, 2011; Boughey & McKenna, 2016, 2021). This critique, broadly, raises awareness that students whose class, race, culture, sometimes gender, and educational background is not traditionally associated with academia, can be marginalised based on these differences. This made me wonder whether the term “legal writing” would be used to distinguish between students who have these traditional cultural and educational resources, and those who do not.

The data analysis suggests that this is not a notable finding. All academic participants reflect an awareness of some students’ struggles related to materially poor home backgrounds, inadequate basic education and the cognitive hurdles experienced by having to study in an additional language. All participants reflect, to a lesser extent, an awareness of the transformation and decolonisation debates and their relevance for their subjects (except for P2 and P8 whose awareness seemed to be notably deep and nuanced). However, academic participants did not regularly refer to these factors to explain problems with legal writing. In fact, they tended to characterise legal writing as being a problem across a range of students, and generally did not distinguish between traditional and non-traditional students. This finding, too, suggests a shift from Greenbaum’s (2004) findings in which she describes how many academics characterise problems with legal writing as a “language” or “second language” problem.

Amongst academic participants, P4, in fact, suggested that the bulk of students she taught were relatively privileged, attending private schools and writing well in the traditional sense. However, she felt that this in no way translated into being successful legal writers. P2, on the other hand, described how many of her students did not have traditional cultural and educational resources, but insisted that any equation of this with poor legal writing is to draw on a very narrow conception of writing, which she resisted. P5 is the only academic participant who spoke at some length about family and cultural resources as assets; and who suggested that, without these, it is almost impossible to become a good legal writer, and that it was virtually impossible to teach all of the elements of good writing at university. Overall, discussions about these factors were relatively minimal amongst the academic participants. When they did arise in the discussion, they tended to be associated with sympathetic and respectful attitudes to students who do not have these traditional resources to draw on, rather than characterising them as problems. These findings suggest that "writing as code" is not as prevalent as expected amongst this group, and that academic participants tend to make allowances for students who do not draw on traditional cultural and social resources, rather than use this as an exclusionary category. The question that remains is whether similar allowances are made in professional legal writing contexts, and whether this possible difference accounts for any differences in understanding of legal writing.

Amongst the practitioner participants, there was a greater emphasis on the problems in legal writing for graduates for whom English is an additional language, reflecting Greenbaum's (2004) findings. P8 explores the difficulties that such graduates experience in the legal profession, speaking about language as a "carrier of culture" and emphasising how hard it is for such students, especially those for whom English is an additional language: "I have to leave who I am… I'm going to be judged on how I express myself in a language that's not part of my upbringing". Importantly, though, P8 is not suggesting that this leads to poor legal writing – she includes herself, a successful, senior advocate with impeccable legal writing capacity – in this description. Rather, she showcases how unfair and difficult it is for anyone for whom English is an additional language, to work comfortably and optimally in the legal profession, where the hegemony of English operates largely unchallenged.

However, what was particularly notable amongst practitioner participants were the repeat references to the relationship between where students had studied and their capacity – both generally and with regard to legal writing. For example, P7 observed that "where they receive their education" is an important factor that affects legal writing and that "the usual suspects just produce people with better language skills". P10 described the calibre of graduates she trains as being "shocking… depending on where they've qualified". As she went on to name some HWUs – to clarify that the graduates she was talking about had not graduated from these kinds of universities – it seemed safe to infer that she was making an association between studying at a HBU and poor legal writing capacity. In other words, alma mater was used as code for poor legal writing. Practitioners, therefore, may be more likely to associate students who do not draw on traditional cultural and social resources with poor legal writing (if this group reflects a broader practitioner view).

## 8.4 Professional identity and consensus about legal writing

Institutional and professional identity appears to have an effect on how the term “legal writing” is understood. Both academic and practitioner participants, in different ways, endorsed the distinction between “academic” legal writing and “practical” legal writing, although P2 insisted that the former serves to enrich the latter. Unsurprisingly, practitioner participants agreed that legal writing i]s writing done in and for the profession, and some explicitly excluded academic writing about the law in discussing legal writing, which was different from the academic participant group, who mostly included both academic and professional types of legal writing in their conceptions of legal writing. Several academic participants also recognised that the writing done at university was markedly different from what was required in the profession. This presents a challenge to Campbell’s (2014) assertion that differentiating between “academic” and “practical” types of legal writing is a false dichotomy; the participants in this study uphold this particular dichotomy.

Conflicting views were elicited in response to the question of whether legal writing is unique or similar to other good writing. Amongst the academic participant group, there was stronger agreement that legal writing is unique and different than there was in the practitioner participant group, whose response was mixed. All except P2 felt that legal writing is different, claiming it is more specific and requires a depth of analysis and careful consideration of facts, or legal clarity and precision, not required in most other writing (P3, P4 and P5). P1 saw the difference in terms of law having its own language and method. They agreed that the elegance of rhetoric valued in much other writing did not have a place in legal writing (the opposite view was expressed by some practitioner participants). The academic participants who referred to themselves as lawyers – and who were or who had been involved in practice in some way – most strongly asserted the uniqueness of legal writing. It is interesting that the lawyers in practice themselves did not assert the uniqueness as strongly. Their view was that writers who were eloquent and had good language skills could transfer these skills to legal writing. This may correlate with the practitioner participant group holding a somewhat more traditional orientation to writing, in that the similarities they saw were located in criteria like good grammar, editing and eloquence. This is discussed in more detail in section five.

The majority of participants agree that “legal writing” is a misleading term and that there are different kinds of legal writing. This in itself is significant and suggests that attempting to explicate what these different kinds of writing are and how they differ, is a necessary undertaking. Accounts for the roots of these differences vary, and tend to echo the literature on professional and academic identity (Cownie, 2004; Campbell, 2014). Understanding law as being a series of specialised languages, as part of its horizontal structure, with differently stronger and weaker grammars (Bernstein, 1999, 2000; Breier, 2004) may be a conceptually useful way forward, in beginning to understand and account for different kinds of legal writing.

Academic participants seem not to have considered the changing nature of legal writing much, whether through technology (Glenn, 2010; Quinot, 2012) or the plain language movement (Tiersma & Solan, 2012; Sobota, 2014). P5 did make some observations about the use of plain language in Procedural Law textbooks, but this was the only reference to plain language. There was also only one reference to the impact of technology, in which P3 suggested that writing may now hold fewer errors in concord and spelling, due to online spelling and grammar checks. This suggestion that the availability of technology had improved students’ legal writing, at least on a surface level, is in contrast to some of the literature, which suggests that technology may have an adverse effect on writing in law. For example, Glenn’s (2010) suggestion that technology can lead to more automated legal writing.

This was different in the practitioner participant group: P6 spoke at length about the shift to plain language in legal writing, and how most younger legal practitioners had embraced this shift (whilst acknowledging resistance from some members of the profession). Some of the criteria identified by practitioner participants reflect a valuing of plain language; this will be discussed in further detail in section nine. Focusing on a different driver of change, P6 and P10 echoed some of the changes to the profession articulated by Susskind and Susskind (2015) particularly the deprofessionalisation of some of the work traditionally done by legal practitioners. However, no one considered the impact of this, or of technology, on legal writing in any detail and therefore this aspect of the findings cannot be considered significant, nor will it be discussed further, although it may be a fruitful topic for future research.

The general silence, amongst academic participants, on the implications of changes in legal writing in practice – such as the increasing acceptance of the need for plain language – is interesting. This may be a generative area for further research, particularly since the changes are clearly already being felt in the profession. This silence could imply that academic participants, or the academy more generally, have not engaged sufficiently with these implications. It does not necessarily imply, however, that academics believe that these changes are not important to consider. There could be other issues that are perceived as more urgent to focus on at university level – such as the articulation gap between school and university (Bitzer, 2009; Quinot & Greenbaum, 2015); and grappling with the implications of the changes in legal education, including transformation and decolonisation imperatives (Dicker, 2013; CHE, 2015; Quinot & Greenbaum, 2015) – all of which are concerns reflected in the academic participants' discussion. Perhaps grappling with the changing nature of legal writing in the profession is considered something that can be left for engagement once graduates are in that profession.

With regard to professional identity, several academic participants echoed Campbell's (2014) claim that academics who have been in practice would have a very different conception of legal writing to academics who had never practised law. Most practitioner participants agreed that having teachers at university who have not practised law was one of the problems contributing to the crisis in legal education. P4 suggested that different universities took different approaches to legal writing, depending on their histories, reflecting another of Campbell's (2014) claims that historical institutional differences continue to have influence.

Confirming the significance of academic identity, P2 conceived of the difference as being rooted in the difference between "interdisciplinary" subjects such as her own, in which writing is understood in similar ways to writing in the Social Science and Humanities, and writing in more "practice-oriented" subjects. This confirms P1 and P4's sense of difference was located more in the difference between legal writing and other types of good writing, such as "stories", rather than in the practice-academic divide. P5 further suggested that writing in procedural subjects is very different from writing in substantive subjects, which is again different from other kinds of academic writing. Significantly, all except P2 identified strongly as lawyers (referring to themselves as such) – confirming Cownie's (2004) finding that being a lawyer is a legal academic's primary identity – whilst P2 spoke about herself as much as a teacher and legal academic, as she did a lawyer, and also presented with a notable difference in understanding of how she saw legal writing.

The practitioner participants' different conceptions of legal writing – particularly their understanding of legal writing as being done for and by the profession – further confirms that professional identity is a factor contributing to the multiple understandings of legal writing. For example, P7, who trains pupils in legal writing for the Bar, repeatedly used the descriptor "forensic writing" for the kind of legal writing that she taught. P9, based at a social justice NGO and involved in training of candidate attorneys acknowledged that one's understanding of legal writing "depends on the role you play" and that, for her, important criteria are "is it accessible, is it easy to understand?" Both of these understandings reflect these participants' professional identity and location in the profession.

It is perhaps a weakness in this research that the practitioner participants – although situated in very different areas of practice – all worked with the training of attorneys and advocates. None worked in what Godfrey (2009) terms "the wider definition of the legal profession" – legal advisors in companies or in government departments. This dimension of professional identity, and whether it has an impact on understandings of legal writing, could thus not be explored. P7 observed that pupils who had been legal advisors generally struggled with the writing requirements at the Bar more than those who had previously worked as attorneys in big commercial firms. This suggests that those working in the "narrow" definition of the profession may have more of a shared understanding of legal writing than those working in the "broader" profession. This could also be a worthy of future research.

These findings confirm the initial hunch that drove this research, that there is a need to clarify and explicate the multiple understandings of the term "legal writing" in the academy, and in practice, both narrowly and broadly understood. They also confirm that studying legal writing in relation to institutional roles, location in the profession, and with regard to professional identity, is necessary to develop a nuanced understanding of what it means to write in law in South Africa.

## 8.5 Orientations to legal writing: traditional, revised or something else?

In this section, the differences in academic and practitioner participants' orientations to legal writing are explored, focusing especially on Rideout and Ramsfield's (1994) distinction between traditional and revised orientations to writing. Importantly, this dichotomy is critiqued using Bernstein's (1999a) concept of grammatical strength in specialised knowledge. The concept of grammar is used to show that, in some instances, apparently traditional orientations may more accurately be understood as a fidelity to the precise terms and ways of writing that accurately communicate the specialised knowledge of law and different kinds of legal processes.

Finding one, in chapter five, shows how academic participants draw largely on a revised orientation to legal writing. Quality and relevance of evidence and reasoning; argument and analysis; coherence and careful application of legal principles to facts are all elements of legal writing that are more frequently identified as being necessary for good legal writing than traditional elements like basic literacy, grammatical proficiency, and surface level polish. This recognition of the importance of the epistemic view by academic participants is significant, as it signals a shift from the perceptions that prevailed in South African law schools twenty years ago, which were strongly traditional (Greenbaum, 2004).

This shift in orientation is congruent with the academic literacies literature, outlined in chapter two. Interestingly, the seminal article in this regard, by Lea and Street, was written in 1998, a few years before Greenbaum's (2004) original 2001 study. The subsequent development and broader acceptance of their claims is echoed in the shift. The shift could also indicate that the work of scholars on legal writing in South Africa, such as Greenbaum (2004, 2012, 2014); Quinot (2012, 2015); Broodryk (2014, 2015); Bangeni and Greenbaum (2013, 2019); Clarence et al. (2014); Quinot and Greenbaum (2015); Crocker (2018); and Gottlieb and Greenbaum (2018) – all of whom draw on or advocate for the necessity of considering the epistemic view of legal writing – has had some impact on how legal writing is understood in the academy. This is significant, as it has implications for what is taught and what is valued in assessments. However, this again points to the need for much clearer explications of what is meant by "legal writing".

The revised orientation of academic participants is also congruent with much of Oates et al.'s (2002) discussion of what legal writing means – the importance of insight, judgment, the ability to construct a persuasive and sometimes original argument, and the ability to evaluate the relevance of evidence are all aspects of Oates et al.'s definition that are found in participants' conceptions. However, Oates et al.'s (2002) "well established formats" and "well established patterns of analysis" may refer to practical legal writing, as taught in North American law schools, rather than the kind of writing taught in South African law schools, as acceptance of formats is not supported by these findings. By contrast, there is disagreement about "well established formats" such as IPAC and the patterns of analysis that are valued seem to be less "visible" (Bernstein, 1975) or well established, than Oates et al.'s (2002) position suggests. Several academic participants expressed frustration with IPAC as a "shallow" and "frustrating" format that students used crudely. They were particularly dubious about its usefulness for senior law students. Likewise, P6 identified the over-reliance on precedents as a factor contributing to poor legal writing in practice, echoing this claim in the literature made by Schiess (2009) and Glenn (2010), amongst others.

This shift away from traditional orientations to writing could also have other implications. Academic participants described how they ignore or "read over" surface level writing errors and focus on the underlying arguments and quality and relevance of evidence. For example, P3 laughingly described how her friend, who is in practice, blames her for the law graduates she has to supervise when they do articles of clerkship, who write documents riddled with surface level errors. The friend argues that P3's failure to attend to traditional writing features has led law students, in the same way, to neglect these. This suggests that legal practitioners may draw more on traditional orientations, or regard traditional and epistemic elements of writing to be equally important or equivalent, when they speak of legal writing – a possibility confirmed by the difference in the orientations seen in the practitioner participants in this study. More compellingly, this can be explained by the practitioner participants' recognition that precise use of legal language is a function of the strong grammar (Bernstein, 1999a) of law and, as such, is not always about edit-level correctness but is sometimes about the necessity of using precise terms to accurately communicate legal concepts and processes. This is discussed in more detail, below.

Finding one, in chapter seven, shows that practitioner participants only have a somewhat revised orientation to legal writing. When articulating their revised orientations, practitioner participants' orientations echo Schiess' (2009) notion of legal writing as a form of expository writing as well as elements of Oates et al.'s (2002) definition. P6, in particular, strongly agreed with Venter's (2006) and Broodryk's (2014, 2015) emphasis on writing as thinking. P8 particularly valued persuasiveness and conceptual depth, which echoes the elements identified by Oates et al. (2002) as well.

Overall, the practitioner participants' orientation to writing appears to be far more traditional. They spoke at greater length about literacy, or "literacy skills". P6 went as far as to say "you cannot be a lawyer with poor literacy skills" while P7 repeatedly mentioned the importance of "language skills" whilst P9 referred to "syntax…grammar… spelling" as the "details" that made for good legal writing. Several mentioned, with regret, the loss of focus on language in the LLB. This can be understood in terms of Rideout and Ramsfield's (1994) observation, quoted in chapter one, that, "in law, language is not mere style; it is itself the law" (p. 43) as well as Bhathia's (1987) claim that "the relationship between the language used in law and its content is exceptionally close" (p. 231). In Bernstein's (1999a) terms, this means strong grammar. Terms and concepts are considered grammatically strong and particular when they are able to capture empirical phenomenon with greater accuracy. Or, when there is very little contestation about language used; they have a strong internal language of description (Bernstein, 2000). This may explain practitioner participants' valuing clarity, precision, and accuracy in language. It could be less about a traditional orientation to writing than a certainty that accuracy of terms is essential to communicate the specialised knowledge of law in practice. It is not pedantry; it is necessary for legal and professional accuracy.

This possible tension between academics' and legal practitioners' conceptions of language in legal writing is a question that deserves further research, as this mismatch has implications both for teaching and for successful entrance into the legal profession. Reframing apparently traditional orientations to writing as a knowledge imperative – as a function of the strong grammar of law – is a potentially powerful way of shifting the polarity of the traditional-revised dichotomy. It also may offer a persuasive rationale, for academics who focus solely on epistemic criteria, to re-examine their stance.

## 8.6 Legal education and writing

Several interesting findings emerge from the data analysis here. The first relates to the mismatch between changes in legal education and changes (or the lack of changes) in what counts in legal writing for academic participants. Finding four, in chapter five, shows how academic participants strongly assent to the notion of legal education being in flux, despite their general rejection of the notion of crisis. However, this strong sense of flux does not lead to an equally strong sense that legal writing is changing. On the contrary, the findings show that, for most academic participants, what is valued in legal writing seems unaffected by changes in legal education. It is possible that these legal academics retain strong writing boundaries as a way of managing or mitigating the flux in legal education as a means of maintaining some kind of stability. In other words, although the curriculum and classroom talk may be changing, criteria for writing are not. What may be occurring is that criteria for writing are, in practice, becoming more invisible. This echoes Young and Muller's (2010) scenarios for knowledge boundaries, explored in chapter two. There are changes in the curriculum, and perhaps a greater focus on criticality and knowledge contestation in the classroom. Students may assume related changes in what is valued as evidence in legal writing and include these contestations in their written assignments. However, it seems from this finding that, in many cases, only the law, as it is, is valued by the lecturer when assessing written work. A possible inconsistency between approaches to legal knowledge and writing may thus exist.

Therefore, what it means to write in law could have become less clear to students, due to the changes and flux in legal education, which could account for their failure to write in the ways that their lecturers value. Using Young and Muller's (2010) terminology, the boundaries of legal education are fluid. However, the boundaries of legal writing are being maintained by most academics, with a resultant dissonance between curriculum or classroom talk and legal writing. This is likely to be confusing for students, in their struggle to understand the discourse demands. Bangeni and Greenbaum (2013, 2019) describe how novice legal writers use tacit knowledge inappropriately and state what an expert legal writer (like P3) knows to be trite. However, unlike P3, P2 finds the inclusion of trite knowledge to be "understandable" in student writing, given what is discussed in the classroom. These findings show that there is not always agreement amongst these academic participants about what is trite, and what will be valued, in legal writing.

A complicating factor is that, during this time of change in legal education, there has been an increased focus on the teaching and development of legal writing. This is confirmed both by participants' observations and in the literature (Greenbaum, 2004, 2012, 2014; Broodryk, 2014, 2015; Clarence et al., 2014; Crocker, 2018; Gottlieb & Greenbaum, 2018). However, what is not clear is whether this focus and support accurately reflects what academics value when they assess student writing, or whether the changes in legal education have had a misleading impact on writing in this way as well.

Secondly, the findings show that participants' views on the purpose of legal education have a clear impact on their understanding of legal writing. The view that legal education is primarily to prepare students for legal practice – both amongst academic participants and practitioner participants – is associated with an agreement that the state of students' legal writing is a problem. For some participants, these views are associated with clear boundaries for what counts as good legal writing. However, this raises the question of whether these participants are drawing on the "cautious traditions of analysis" that reflect a "relatively strong faith in the precision, determinacy and self-revealingness of words and texts" critiqued by Klare (1998, p. 168). In other words, do these academics continue to work within the paradigm of traditional legal culture, described by Klare (1998) and Davis and Klare (2010) and further critiqued by Quinot (2012) and Quinot and Greenbaum (2015) whose work is explored in chapter two? This could facilitate another way of understanding the dissonance discussed earlier in this section: if curriculum and classroom talk are informed by transformative constitutionalism (Klare, 1998) and transformative legal education (Quinot, 2012), but orientations to writing continue to draw on more conservative – used in Davis and Klare's (2010) sense of the word – traditions of legal analysis, this may lead to a lack of alignment between what is taught in class and what is assessed in legal writing assignments (Biggs, 2003). These findings echo Davis and Klare's (2010) argument that these "cautious traditions of analysis" (which they argue are contestable) may conflict with the transformative project.

The findings show that several academic participants value a broadly academic curriculum, as advocated in the literature by the CHE (2015, 2018) and several participants in the Legal Education in Crisis Summit (2013). However, none except P2 drew on a similarly broad range of criteria to evaluate the writing in their subject. Some participants drew on a narrow range of legal criteria whilst others drew on criteria that were clear but could be applied to writing in a range of disciplines. Bernstein's (1999a) concept of strong and weak grammars, explored in chapter two, has relevance here. He argues that in disciplines with a "strong grammar" it is easy to know if one is writing within the discipline, as knowledge is seen both as different from everyday knowledge and distinct from other formal and systematic knowledge. The grammar is more explicit when the terms of reference are made explicit. In other words, a strong internal language of description should make it easier to learn to write in a discipline. However, if the internal language of description is weak, it is more difficult to learn how to write in the discipline. In law, it can be deceptive, because while the language itself may not seem very different from ordinary language on the surface, it is how legal writing in the legal profession is linked to substantive legal knowledge structures, procedural legal knowledge structures, and excellence and hierarchy in the profession (Ngwenya, 2006).

Bernstein's (1999a) conception of grammar can be used to make sense of this finding in two distinct ways: One, although the discipline of law has an apparently strong grammar, the grammar in some subjects may be weak or weakening, due to the contestations about the knowledge base in the subject. This is congruent with law having a horizontal knowledge structure (Breier, 2004) in which a series of specialised languages, with differing grammar, must be learned. Two, law has a strong grammar, which academics implicitly draw on, but neither the grammar nor the criteria are being made explicit to students.

Even where academics assent to the value of the broader academic curriculum, this does not necessarily translate into accepting a broader, more generally academic set of writing criteria. If one accepts the dichotomies outlined by Modiri (2012, 2013, 2014) and other interpretivist writers, this could be seen as problematic. If, however, one accepts the social realist position, and Bernstein's (1999a) concept of strong and weak grammars, then this practice of continuing to draw on criteria that are regarded as valid for law, may be a more conceptually coherent practice, not one to be contested as being "unresponsive" or "untransformed".

Regarding the practitioner participants, finding four in chapter seven shows that practitioner participants, as might be expected, all view the role of legal education as being to prepare students for the legal profession. Some recognised the value of a broader academic education but did not recognise this as being part of legal education, which contrasts with the CHE (2018) recommendation that the LLB itself needs to include more non-law subjects. Like the academic participants who view the role of education as being to prepare students for practice, this is associated with seeing legal writing as writing done in and for practice; and legal writing being a problem.

Practitioner participants held strong but conflicting views about early specialisation in legal education. P6 suggested, "they need to specialise – this needs to start at university". For P7, it was the opposite: "you don't want people really to be too focussed too early on a very narrow field… if you hone in on too narrow an area upfront you don't get the perspective you need for effective litigation" and "over-focus is detrimental to people's development at the Bar". This reflects a critique of a narrow "law only" curriculum. I could not establish a link between these views and views on legal writing, however.

The strongest criticism made about legal education at universities by practitioner participants, however, was that it did not sufficiently prepare graduates for the legal profession and that there was insufficient focus on imparting "legal skills" in the curriculum. This skills-related critique echoes much of the literature in which legal education and the four-year LLB is critiqued (ranging, in South Africa, from Motala, 1996 to Gravett, 2018). However, Nathanson's (1987) warning against an over-focus on skills-development in a law curriculum, on the grounds that there is no consensus about what "practical legal skills" means, has relevance here, as most of the practitioner participants could not articulate, precisely, what kind of skills these might be. (P7 was the exception, when she asserted that the skill of electronic research was one that was worth a lot more than any other). P6 bemoaned the lack of skills teaching and suggested that even the skills teaching that was done, for example, in law clinics, was inadequate, echoing Gravett's (2018) critique that universities have tended to focus on a very limited sub-set of legal skills actually needed by legal practitioners.

Allais' (2015) warnings about focussing on skills in education may have relevance here. In particular, given that the legal profession is both broad and narrow (Godfrey, 2009), her observations that there is no single employer perspective; that expectations about what skills can be taught may be unrealistic; and that employers cannot predict what skills may be required in the future, all have relevance for legal education. This is particularly so in the light of Susskind and Susskind's (2015) observations – echoed by P6 and P10 – about the rapidly changing nature of the legal profession.

As the term "skill" was often used as a synonym for knowledge, or as part of the knowledge conversations, particularly amongst practitioner participants, this warrants a turn to focus on what participants had to say about legal knowledge, and whether this affected conceptions of legal writing.

## 8.7 Knowledge and writing: academic participants' conceptions

The finding that approaches to legal knowledge amongst academic participants may have a substantial impact on conceptions of legal writing is significant. Here, though, Dhlamini's (1992) caution about legal education creating unnecessary dichotomies once again has relevance. I do not wish to create another divide, in which critical or constructivist positions on legal knowledge are uncritically associated with unclear writing criteria; and traditional-positivist or social realist positions are associated with clear, objective criteria. The link is not that simple. The concept of legal knowledge is far too broad to apply such distinctions. Rather, it is better to attempt to understand the strength of grammar (Bernstein, 1999a) of each subject in law, and how this translates into writing criteria in that subject. In other words, the concepts or legal terms in each subject may not be equally open for contestation, depending on the subject's grammar.

Finding five, in chapter five, shows that there is a fairly clear link in Civil Procedure and Jurisprudence between academic participants' approach to legal knowledge in their subject and their orientation to legal writing. In other words, clear knowledge boundaries (Young & Muller, 2010) in Civil Procedure are linked to clear writing boundaries; weak knowledge boundaries in Jurisprudence are linked to weak writing boundaries. However, the grammars (Bernstein, 1999a) of these two subjects are quite different: Civil Procedure has a strong grammar; writers are in no doubt as to what counts as procedural writing. On the other hand, Jurisprudence has a weak grammar; it is much harder for writers to know when they are writing "in the discipline" in Jurisprudence (or when one may be straying into political, moral or philosophical writing). A clear implication of this is that it may be useful to understand legal writing in terms of the internal grammar of different legal subjects being written about. Knowledge contestations in some subjects weaken the internal grammar and make writing criteria less clear, and vice versa. This suggests that law's disciplinary identity crisis, referred to in chapter two, has relevance for writing development, at least at university level. This speaks to the problem of treating "legal writing" as a single entity, as if the kind of writing that is valued in Jurisprudence would be equally valued in a subject like Civil Procedure. This also problematises treating a course like Jurisprudence as a "writing skills" course, as the kind of writing valued in Jurisprudence is unlikely to be valued in other law subjects.

In the other subjects, clarity concerning knowledge boundaries did appear to be linked with clarity regarding the boundaries of what is regarded as good legal writing. Here, however, it is important to question equating strong knowledge boundaries with positivism, and the implication that this is associated with a conservative, anti-transformative stance, as reflected in work like Modiri's (2013, 2014). Drawing on the work of scholars like Moore and Muller (1999) and Young and Muller (2010, 2013) I suggest that a social realist approach better conceptualises much of these participants' approach to legal knowledge. This approach recognises scientific knowledge as simultaneously objective and a product of its historical context. Thus, this approach allows a position in which clear knowledge boundaries are not automatically equivalent to insensitivity to social context, and related assumptions of political and educational conservatism. The findings are congruent with this approach: academic participants who held clear knowledge boundaries were often highly attuned to contextual issues. P3, in particular, was sensitive to these nuances, and yet still held firm knowledge boundaries.

In fact, drawing on Moore and Muller's (1999) conceptual critique of "voice discourse", I echo their challenge to the assumption that "voice discourses" are politically responsive and socially transformative, and "knowledge boundaries" are the opposite. Using this conceptual frame, to maintain knowledge boundaries, and thus maintain writing boundaries can be congruent with transformative and decolonial imperatives (Luckett, 2019). The Higher Education Transformation Summit's discussion document (Universities SA, 2015, p.2) – referred to in chapter one – conceives of transformation as the active removal of barriers. In this case, there may be a misidentification of knowledge boundaries as barriers. Knowledge boundaries may not need removal, in order for transformation to occur. Perhaps the barrier is that these boundaries in some subjects are being made increasingly invisible, with the effect that students are excluded from epistemological access.

I therefore refrain from the easy conclusion that, in order to embrace transformation, legal academics need to embrace weak knowledge and writing boundaries. Rather, it may be more useful for academics to explicate the internal grammar of each subject; what the boundaries are and why, in order to transform those that may merely act as gatekeepers or barriers to "powerful knowledge" but to maintain those that are necessary to teach and pass on "powerful knowledge". In other words, explication of knowledge and writing boundaries may be a more transformative method in legal writing and legal education than some of the positions in the literature that propose what Moore and Muller (1999) describe as translating knowledge relations into social relations.

In a somewhat different insight into the transformation conversation, the accounts in the literature of growing contestation of the Constitution (Heyns, 2014; Modiri, 2014; Sibanda, 2011, 2020) is shown to be regarded, in P3's words, as "marginal" by most of the academic participants. Only one, P2, had engaged with this critique in any kind of sustained manner. This raises the question of whether this critique is similarly perceived as "marginal" by students, and whether there is a gap between what is discussed in class (where there may be space for this critique) and what is valued in written assignments (where this critique may not be seen as valid or relevant). In other words, do academics continue to value "what is" and discount "what could be"? As above, this could be one of the "invisible contours" worthy of further discussion and explication.

Mark Twain is believed to have said, in response to a premature obituary in the newspaper, "the reports of my death are greatly exaggerated". This may apply to the demise of the private-public law distinction. Despite the impact of transformative constitutionalism, which brings all areas of the law in South Africa under the supremacy of the Constitution, these findings suggest that the distinction continues to be upheld, and that this distinction has implications for writing in private vs public law subjects. Private law subjects, or subjects with a stronger private law core, seem to be associated with stronger knowledge boundaries and related stronger boundaries for what counts in legal writing. Relevance of evidence is a particular criterion that counts here: private law subjects have a higher threshold for relevance of evidence, which must be a relevant legal principle. Public law subjects, on the other hand, have weaker boundaries and evidence that may not count in private law subjects, like critique of the law or alternative interpretations of a principle, may be permitted.

Here there may be a discrepancy between some of the literature (Bhana & Pieterse, 2015) on public-private law and what continues to occur in legal subjects. This too, may be an "invisible contour" that is worth explicating, to make epistemological access (Morrow, 2009) and access to powerful forms of writing a reality in legal education. This finding is echoed, to some extent, in the phase two findings: P7's assertion that an over-focus on constitutional law, for advocates, is fatal: "those people don't understand why they do not get briefed to run a commercial trial. I would imagine it's pretty obvious why not. You know you just don't have the skill set… practical knowledge". Here, P7 conceives of the "real" legal knowledge or skills, as pertaining to commercial law, echoing P3's stance on the need to hold the private law core "sacred".

## 8.8 "Skills" and writing: practitioner participants' conceptions

In phase two of the research, the practitioner participants generally struggled to articulate their approaches to legal knowledge and, when they did, drew extensively on the language of "skills" to articulate their conceptions. Although the practitioner participants acknowledged the need for cross-disciplinary knowledge more than the academic participants did, this did not translate into including this cross-disciplinary knowledge as part of legal knowledge, nor did it translate into a suggestion that more cross-disciplinary knowledge should be included in legal education. Rather, they recommended that legal education should focus much more strongly on legal "skills". It was not clear where this cross-disciplinary knowledge was therefore supposed to be learned. Perhaps this is congruent with the yearning, expressed by some practitioner participants, for the "old" LLB, which was studied after a first degree in which other knowledge was acquired. This may reflect Allais' (2015) observation that, too often, professions are unrealistic about what can be achieved in professional degrees and expect graduates to arrive with "skills" that can be more easily learned in the vocational training space. Certainly, to expect law students to graduate with greater cross-disciplinary knowledge as well as a greater range of "legal skills" may be an unrealisable expectation.

Most of the practitioner participants' approaches to legal knowledge did not reflect the interpretivist-positivist dichotomy described in the literature (Modiri, 2012, 2013, 2014; Heyns, 2014), suggesting that this may be a more of an academic dichotomy than one engaged in the profession. P8, however, drew strongly on a decolonial lens, and articulated a pluralist approach to legal knowledge: "an understanding of what makes legal systems of different communities. And what constitutes a just society in different environments". This reflects Himonga's (1997) articulation of legal pluralism. Examples provided by P8 included ways of addressing the chief in isiZulu at a *lekgotla* (traditional meeting); understanding that law is contextual; the critiques of law; and prejudices found in the law. P8 was thus the outlier – like P2 in phase one – who had a largely general-constructivist approach to legal knowledge. This related to her conception of legal writing somewhat differently, however. Rather than making the writing boundaries weaker, her critical engagement was with how to write in vernacular languages, and using vernacular idiom, within those existing boundaries: "in our pleadings we will tell the court that the language we will use in our pleadings is Sepedi – and we will see." Here, broader approaches to legal knowledge do not translate into broader conceptions of legal writing, as much as challenging the hegemony of English within a particular legal genre, that of pleadings.

Several of the practitioner participants equated legal knowledge with what they called "practical legal knowledge" or as mentioned above, "practical legal skills". They clearly drew on the academic-practice divide (Campbell, 2014; Greenbaum, 2012), with P6 suggesting that "practical application is knowledge" and that what legal academics teach is not law. Winch's (2010) observation that the two kinds of knowledge are not mutually exclusive and cannot be understood except in terms of each other presents an intellectual challenge to this position. Winch (2010) states that theoretical and practical knowledge are different types, but both are needed in professional education. He likewise recognises that some practical knowledge is best taught in the workplace whilst some can be simulated. Using his work to clarify what is meant by the term "practical legal skills" and to determine which of these can be simulated as part of university education could be an important step in bridging the academic-practice divide.

Practitioner participants' certainty about knowledge being practical did not translate into as clearly stated understandings about knowledge boundaries between law and other disciplines being strong or necessary, as it did with the academic participants. This may be attributed to the practitioner participants' awareness that law can only be practised in the context of "cross-disciplinary skills" and the recognition that "legal skills" are practised in contexts where knowledge from other disciplines such as commerce is necessary to be effective. Similarly, although all practitioner participants acknowledged contestation or partial contestation about legal knowledge, this was again not always in the same sense as the academic participants. Rather, for three of the participants, this referred to the deprofessionalisation of some aspects of legal work; the contestation was about who should get to do the work, rather than what "counted" as legal knowledge. For example, P10's comment about the banks now doing much of the "wills and Estates work" and P6's "it's been deregulated, lawyers are competing with other professions. Within the next five years it will be unrecognisable". In other words, the contestation is about the distribution of professional knowledge in occupations; knowledge that used to fall clearly within legal boundaries is now used and applied in other occupations. Because the relationship between this conception of knowledge boundaries and writing boundaries cannot be established in the same way as it was for academic participants, in the previous section, it will not be probed further. However, it could be a topic of interest for further study by social realist scholars in relation to the jurisdiction of occupations.

Finally for this section, although beyond the scope of this research, the work of Winch (2010) and Clarke and Winch (2004) on developing a more nuanced understanding of the term "skills", especially its relationship to professional competence, might be important for conversations about how "legal skills" are understood and taught, both at university and vocational training levels of legal education.

## 8.9 Core criteria: consistency and contradictions

Finding two, in chapters five and seven, shows that, across the participants in this study, some common criteria for evaluating student and graduate writing exist. Amongst the practitioner participants, although some criteria align with academic participants' criteria, some new criteria were identified that were not used by the academic participants in phase one of the study. Furthermore, some of the criteria used can be seen to mean different things to different participants. This section will thus discuss the consistency and contradictions that emerged in the use of writing criteria amongst participants in the study.

In chapter two, it was seen how Oates et al.'s (2002) definition of legal writing, as it moved from the simple to the complex, similarly moved from the generic to the specifically legal. However, many of the criteria identified by participants in this study apply equally to writing in the Social Science or Humanities, and do not reveal what is unique about writing in law. The limited articulated of law-specific criteria may support Jacobs (2007) and others' assertion that experts in a discipline find it difficult to make the implicit demands of their discourse explicit to students. This has implications for the teaching of writing, as the more visible and explicit it is possible to make criteria, the greater the chances are that students will gain epistemological access to the discipline (Morrow, 2009).

Amongst the academic participants, some of the most prevalent criteria are quality and relevance of legal evidence; the ability to develop an argument; nuanced application of law to the facts; effective topic analysis; structure; adherence to formal requirements; and clarity and precision in language use. Two criteria are specifically legal criteria: quality and relevance of evidence (including how students work with this legal evidence) and application of law to facts. Most of these criteria reflect the epistemic view (Rideout & Ramsfield, 1994), which suggests that an over-focus on teaching basic formats, such as IPAC, is misplaced. This finding is congruent with work by local legal writing scholars, such as Greenbaum (2004, 2010, 2012, 2014), Quinot (2012) and Broodryk (2014, 2015), who all advocate a focus on epistemic elements of writing.

However, the differences in what participants mean by these terms suggest that it is not only necessary to attempt to explicate the term "legal writing" but that it may be pedagogically useful to attempt to explicate and reach some kind of consensus, across academics, about what these criteria mean. Here it would be important to distinguish between criteria for writing powerful knowledge in the field of Social Science, criteria for writing powerful knowledge in law, and criteria – where appropriate – for writing powerful knowledge in specific subjects in law. This is congruent with Young and Muller's (2010) argument that boundaries are a necessary condition to acquire powerful knowledge. Making these boundaries – and what counts as good legal writing within each of these boundaries – visible and explicit could facilitate greater access to powerful forms of legal knowledge and legal writing in legal education in South Africa.

There may be limited usefulness in discussing legal writing as a concept on its own; it is only when discussed within broader views on legal education and approaches to legal knowledge that the patterns of difference in understanding become clearer. This has implications for the positioning of legal writing in the legal education curriculum: unless it is taught and explicated across a range of subject types, using criteria for assessment that are congruent with the purpose of the course, the grammar of the subject and the conception of legal knowledge underpinning the course, the teaching of legal writing will be generic at best, and most likely misleading and limited in its usefulness.

That the ability to construct a good argument is one of the common criteria amongst academic participants confirms Schiess' (2009) claim that legal writing is a form of expository writing. However, opinions varied on how an argument should be constructed, and what constituted valid evidence. For example, P2 explored a range of ways of presenting a persuasive argument, and she did not have any single framework for evaluating this, whereas P1 had a very clear structure in mind for the legal essay in her course, in which the traditional moves of academic introductions and paragraphing were important. With regards to valid evidence, some participants only gave credit for relevant legal principles whereas others recognised critique of these principles as evidence. Here, differing positions (underpinned by different legal knowledge positions) on the role of legal and non-legal evidence were particularly notable. This, apart from confirming the epistemic view of writing, signals the need to make sense of legal writing within conversations about what counts as legal knowledge. This does not imply that a consensus about what constitutes legal knowledge is necessary. Rather, it implies that making these conversations and contestations more visible to students may allow them greater "epistemological access" (Morrow, 2009) to the hidden implications for what is valued in writing, because of these differing knowledge positions and grammars of different subjects. This could clarify for students where the contestations imply related contestations in legal writing, and where they do not. In other words, debates on legal knowledge do not transfer necessarily into debates on legal writing.

The value of contextual information in general, and critical interpretations of the law, are seen to be contested and largely informed by academic participants' approaches to legal knowledge. Some of the dismissal of irrelevant information can be understood in terms of Bangeni and Greenbaum's (2013) findings regarding novice writers' use of knowledge that an expert legal writer would know to be trite. However, it is not clear whether there is agreement regarding what is trite. Davis and Klare's (2010) concepts of transformative constitutionalism, and notions of conservative legal culture, have applicability here, as do the critical positions of Modiri (2013, 2014), Heyns (2014) and other writers who draw on the interpretivist approach to legal knowledge. Apart from P2, academic participants seem to draw largely on a restricted jurisprudence (Douzinas & Gearey, 2005), although most positions could be understood as social realist rather than positivist. Nevertheless, the limited value placed on contestation about the law, and the value placed on the rules that did apply, when it comes to evaluating written assignments, suggests again that approaches to legal knowledge largely inform what counts in legal writing at university.

Turning to the findings on practitioner participants' criteria for good legal writing, findings two and three, in chapter seven, show that some of the criteria used by academic participants are also used by practitioner participants. The common criteria most frequently referred to were relevance of legal evidence; structure; and application of law to the facts. Other criteria in common across the two groups, though occurring less frequently, were argument, coherence, clarity and precision, correct use of grammar and punctuation, adherence to formal requirements, correct use of legal language, and avoiding plagiarism. The two most "legal" common criteria – relevance of legal evidence and application of law to the facts – are congruent with the process perspective (Rideout & Ramfield, 1994) in which judgment, analysis and knowledge construction is valued and reflect the shared revised view of legal writing. Interestingly, several of the other common criteria, such as correct use of grammar and punctuation; clarity and precision; and correct use of legal language reflect the traditional view of writing, with its focus on text production, clarity, and accuracy (Rideout & Ramsfield, 1994). Thus, although both groups presented with an overall revised orientation to legal writing, the traditional criteria should not be overlooked, particularly given the additional weight given to these criteria by practitioner participants. Meeting some of these traditional criteria may be a clear signal to many legal readers, of participation in the legal discourse community (Lea & Street, 1998; Greenbaum, 2004). Moreover, as discussed in section five of this chapter, insistence on apparently traditional writing criteria could more accurately be understood as upholding the strong grammar of law (Bernstein, 1999a); necessary in communicating specialised knowledge.

Two new criteria that were most frequently used by the practitioner participants were the imperative to avoid legal jargon, and the need for brevity. Avoiding legal jargon was mentioned consistently by the practitioner participants, and only a little by the academic participants – quite a noteworthy difference. This could suggest that the impact of the plain language movement (Tiersma & Solan, 2012) is felt more strongly in the profession than in the academy. This finding presents a challenge to Sobota's (2014) argument that plain language is not well-supported in the legal profession, as it can compromise precision and accuracy. These practitioner participants value precision and accuracy but make no connection between using plain language and compromising such accuracy. Some of the practitioner participants (P8 and P9) made an explicit connection between avoiding legal jargon and access to justice. It should not, however, be inferred from this that academic participants are not similarly interested in the access to justice imperative. Academic participants not drawing on this criterion so strongly can be explained in terms of the struggles that novice writers have with distinguishing between legal jargon and legal terms of art (Oates et al., 2014). It may be a criterion that is used with more experienced writers and those in the profession, as part of a scaffolded induction into the norms of legal discourse (Jacobs, 2007). Of course, the possibility also exists that some academic participants continue to draw on the "legalese" that Schiess (2009) critiques as being outdated, but this is not congruent with the rest of the criteria they identified, so is less likely.

The frequently-used criterion of brevity amongst practitioner participants is an interesting one – and can perhaps be seen as a professional imperative. For example, page limits to documents are imposed by the Uniform Rules of Court (Juta, 2009) as well as the rules of the Supreme Court of Appeal and the Constitutional Court. Although all the academic participants likewise imposed page limits on the assignments they brought to the interviews for discussion, brevity was not once mentioned as a valued criterion by the academic participants. However, they did identify clarity and precision – closely related criteria – as being important. Bangeni and Greenbaum (2013) note that writing with precision is a challenge for novice legal writers. In a further study (Bangeni & Greenbaum, 2019) they reiterate that novice legal writers struggle to be concise in their legal arguments. It is possible that academic participants therefore recognise law students as novice writers, for whom brevity is an ultimate, but not immediate, goal and so do not make brevity a priority amongst all the other competing criteria. This argument further supports my claim that writing criteria are better understood when seen as part of legal knowledge and the specific legal subject.

Two other criteria that were used frequently by several practitioner participants, but not academic participants, were awareness of audience and awareness of purpose. As someone who works with writing development, I found this to be quite a surprising finding, as these two criteria are ones that are foregrounded in most tertiary writing development work.

However, when I returned to the literature review in chapter two, I realised that the criteria of audience and purpose are not mentioned, explicitly, by any of the scholars whose work on legal writing I canvassed. This is an interesting silence and one that I had not noticed before these criteria were identified as being important by the practitioner participants. Given that the academic participants, like the legal writing literature, were silent on these two criteria, I wondered whether these criteria might be worthy of further interrogation. They seem simple and obvious – in all my first-year legal writing classes, I begin the introduction of every new genre of legal text to be written with the questions "Who is the primary audience of this text?" and "what is the purpose of the text"? But this focus is not similarly reflected in the literature or in the academic participants' criteria for good writing. Speaking to this silence, in different legal subjects in which writing may have slightly different audiences and purposes, may go a long way in making the "invisible contours" (Young & Muller, 2010) of writing in those subjects more visible. It may also be a step towards aligning (Biggs, 2003) conceptions of legal writing between university and the profession.

A third criterion used frequently by several practitioner participants, but not academic participants, was persuasiveness. Again, this seemed to be a surprising silence. In the literature, this criterion is a little more apparent, but not dominant. Of all the definitions of legal writing, only Oates et al. (2002) and Broodryk (2015) mention the need to be persuasive. However, the criterion of persuasiveness is closely related – and may work as a synonym for – the criterion of constructing a good argument, which was a criterion used by both groups. It is also closely related to the two most used criteria across groups – relevance of evidence and application of law to facts. An argument cannot be persuasive in law if it does not draw on the relevant legal evidence, or carefully apply the law to the facts being argued about.

Winch's (2010) observations about skills may have relevance here: if a skill requires "intentionality within a normative context" then teaching students persuasive strategies that are valued by the legal profession – the normative context – and which they can draw on intentionally, may be a principled way of applying the notion of skill to legal writing development. Equally, Winch's (2010) important point that the question should never be "has the skill be learned?" but "how skillfully have the skills been carried out?" has application here. If legal argument is the skill, then the criterion of persuasiveness may be the technique which is a sub-set of this skill (Winch, 2010), that can be used to assess how skillfully (or persuasively) the argument has been made.

As I argued about the criteria of audience and purpose, making explicit what it means to be persuasive in a particular area of law, or for a particular legal audience, and how this differs between audiences, purposes, and genres, may also make the boundaries of different kinds of legal writing clearer for law students. For example, in practice, persuasiveness usually arises from the completeness and the detail of the averments. The legal genres where persuasiveness is more prominent are the affidavits in motion court proceedings and heads of argument in a trial.

It has already been observed that some apparently shared criteria are, upon further discussion, found to mean very different things. This could be a consequence of what Pollman (2002) observes: "the slow acceptance of legal writing as a discipline deserving of study and respect has hindered the development of a language the legal profession could share to talk about writing" (p. 914). For example, the distinctly different understandings of the criterion "coherence" amongst academic participants in the findings in chapter five confirm the need to develop a shared language to talk about legal writing. It also confirms the necessity of making these different understandings more visible to students and explicit amongst teachers of legal writing. This likely applies to other criteria as well, including the criteria of argument and persuasiveness discussed above. However, there is an unresolved tension here: in wanting criteria to be more explicit and agreed upon there is a risk of making them generic. This is where the link between legal knowledge and legal writing, already established in this research, has relevance: criteria such as coherence, amongst others, will gain some specificity if defined per legal subject. For example, the criterion of coherence could be explicated quite differently in Procedural Law and Jurisprudence.

These different understandings of apparently shared criteria confirm the arguments made in the academic literacies literature in chapter two (Lea & Street, 1998; Lillis & Scott, 2007; Jacobs, 2007, 2013; Clarence et al., 2014) that writing needs to be taught in disciplines, not generically, so that the discourse demands within the discipline become visible and can be engaged with critically. The subtle meaning of criteria may mean something quite different in law, and in different subjects in law, than they do in other disciplines. These findings further show that the criteria may have slightly different and nuanced meanings even within the discipline, which confirms the need to engage critically with them (Lea & Street, 1998; Lillis & Scott, 2007) and the need for explicit discussion and teaching (Boughey & McKenna, 2016, 2021) of these differing expectations in different areas of law.

Clarity and precision of language; grammar and punctuation; and adhering to formal requirements were three common criteria used by both academic participants and practitioner participants. This confirms the literature that asserts the significance of language, and especially legal language, in legal writing (van der Walt & Nienaber, 1996; Greenbaum & Mbali, 2002; Ngwenya, 2006). Ngwenya's (2006) assertion that legal language uses vocabulary as well as syntax in particular ways, is confirmed by this across-the-board valuing of precise use of words and phrases in legal writing by participants. P5's explanation of how precise legal language does not always need to be grammatically correct, in Procedural Law subjects, confirms Ngwenya's claim. Furthermore, the practitioner participants' strong focus on avoiding jargon and the need for brevity, as discussed earlier in this section, further confirms that the term "legal writing" can only be understood by engaging with the range of participants in the legal discourse community (Clarence et al., 2014) to understand the range and type of criteria used to value and critique legal writing.

Despite many universities' increased focus on developing legal writing in recent years, the importance of linguistic precision and language development in writing is something that may have been neglected. The pendulum has clearly swung – both in the literature and in practice – from a traditional view of writing to a revised one (Rideout & Ramsfield, 1994). Whilst this may have been an important and necessary shift, it is possible that it has had the unintended effect of neglecting traditional writing criteria more than is wise in a discipline like law, where "the relationship between the language used in law and its content is exceptionally close" (Bhathia, 1987, p. 231). In other words, law has a strong grammar, in which terms are used to describe phenomena with certainty (Bernstein, 1999a). Focussing on the teaching and use of these terms is thus not necessarily about a traditional focus on surface-level elements of writing, for their own sake. Rather, it is about equipping students to communicate the specialised knowledge of law with precision and certainty and being able to participate successfully in the legal discourse community. The loss of focus on language development in legal education –a strong critique of legal education amongst the practitioners in this study – is discussed further at the end of the next section.

## 8.10 Further patterns in what is valued and critiqued in legal writing

The preceding section presented the main criteria used by participants in the study to evaluate student and graduate legal writing. However, certain patterns emerged in the findings that went beyond criteria, about what participants value and critique in legal writing. These include positions on structure and how to start a piece of legal writing; the role of facts; what counts as legal evidence; and positions on style and language. These are briefly discussed in this section.

Finding three, in chapter five, shows that academic participants differ regarding what constitutes good or necessary structure. Most question the usefulness of generic formats, which problematises, for South African academic contexts, Oates et al.'s (2002) and to some extent Greenbaum's (2004) characterisation of legal writing as having "well established formats". As mentioned earlier in the chapter, this characterisation applies more to professional legal genres rather than academic ones, at least in a South African context. The findings show that IPAC is regarded with suspicion, confirming Candlin et al.'s (2002) warning that tools like IPAC are more useful as an "analytical and organisational tool" (p. 303) to be used across a range of legal genres, rather than as a format or genre in itself.

However, practitioner participants were far more comfortable with the notion of "well established formats" (Oates at al., 2002; Greenbaum, 2004) – unsurprisingly, as their concept of legal writing is very much the kind of writing required in the profession, where clearly defined ways of structuring different kinds of legal writing, such as pleadings and heads of argument, exist. Here it seems that some academic participants' greater acceptance of a broader range of writing genres, congruent with their views on the purpose of legal education to be both academic and professional, leads to this difference between some academic participants and practitioner participants regarding necessary structure for legal writing. This reflects the CHE's (2018) views on legal education – as being both broad and narrow – as well as the tensions articulated regarding the four-year LLB being a first degree (Woolman et al., 1997; McQuoid-Mason, 2004; Dicker, 2013) and the impact of this on conceptions of writing.

An interesting difference that emerges regarding what is valued about structure is the stark difference in opinions regarding what is required at the beginning of a piece of legal writing. Finding three in chapter five shows that some academic participants expect students to provide a general introduction, with contextualising information, and award marks for this. Others see a general, or contextualising, introduction as unnecessary and only start to award marks in the assignment once students start to identify relevant legal principles. This difference can be explained, in part, with reference to genre. Broodryk (2015) distinguishes between legal problem solving and the legal academic essay, and it can be seen in these findings that the writing falling into the "legal academic essay" category, such as the Family Law essay, clearly requires a contextualising introduction. However, the essay in Jurisprudence had much less clear structural requirements, with P2 suggesting that there are many different ways of structuring an argument and that she had no single framework for an argument. The writing falling more clearly into the "legal problem solving" category also had complex and contradictory introduction requirements. P3 and P5 required no contextualising information at all, and only began to award marks once the relevant legal principles were being set out. P4, however, criticised answers that went straight to legal principles, and required more of an introduction. This is significant in that it suggests, again, that characterising legal writing according to type, or format, can be misleading, as there are contradictory expectations within each format. In other words, it is misleading to suggest that all legal problem solving or even all legal academic essays can be presented using one format. What is valued in, for example, a legal research essay may be different in differ/rent subjects, or even according to the preferences of the teacher of that subject.

Further nuance in what is valued at the beginning of a good piece of legal writing emerged in finding three in chapter seven. P7 suggested that, in practice, a good piece of legal writing will start with the particular facts or problem a person brings you, whereas, in academia, the writing starts with a topic, or the legal question behind the facts or problem. P8 concurred, particularly with regard to specific genres like pleadings and affidavits, in which facts – and not law – should be foregrounded. This is not just personal preference; it is a requirement of the Uniform Rules of Court (Juta, 2009). These structural differences, especially with regard to starting a piece of legal writing, suggest that it is valid to conceptualise kinds of legal writing as "practical" or "academic" although this divide has been described as artificial in some of the literature (Campbell, 2014). It may be more conceptually useful to be mindful of Greenbaum's (2012) warning that the academia-practice divide is complex, and to thus not over-simplify the differences or overstate the commonalities in ways of writing in law. However, understanding how and why good legal writing starts, and is structured, in different legal subjects, in different spheres of the profession, and perhaps differently in academia and in practice, may be another one of the "invisible contours" (Young & Muller, 2010) that should be made visible to law students and law graduates as they are inducted into what is valued in legal writing in that particular subject or sphere of the profession.

Both academic and practitioner participants made it clear that the role of facts is something that has a particular value in legal writing (see finding three in chapter seven). It is important to clarify that, in law, the term "facts" does not refer to the law. Rather it is the facts of the case – who was involved, what happened, when and where. Of course, both sides will have a different story – and hence different "facts" – but the facts that are accepted by the court are the ones that can be characterised, legally, as "facts" (Zhou, 2015). There may be an apparent – and false – simplicity to the idea of facts in law. However, both academic and practitioner participants spoke about the importance of working with facts in a good piece of legal writing, and how it is something that many legal writers struggle to do effectively. In addition to what has already been discussed about facts, above, P6 speaks about spending "a lot of time on facts" at the start of teaching all legal writing because "you cannot write as a lawyer if you don't understand facts". P3's critique of an unsuccessful piece of legal writing is similarly based on failing to "grapple with the detail of the facts". P5's criterion of technical coherence is all about facts – the way you read them, the way you interpret them, and the way you apply them.

This suggests that the role of facts falls – perhaps unexpectedly – at the more complex and nuanced end of Oates et al.'s (2002) definition of legal writing. They explain the final, most complex aspect of legal writing in this way: "at all times, legal writers must exercise judgment: They must know what matters most and what matters least, what is effective, what is persuasive, what is extraneous and what is just plain irrelevant" (Oates et al., 2002, p. xxxiii). Much of this applies to knowing what to do with facts – judgment must be exercised regarding which facts matter most and least, and regarding which are relevant, and which are irrelevant. Exercising judgment about facts in legal writing is, therefore, something that is highly valued in good legal writing and definitely worthy of further explication and better teaching. The critique of IPAC (Maisel & Greenbaum, 2002; Candlin et al., 2002; Zhou, 2015) has relevance here – it may contribute to an over-simplification of the role of facts in legal writing (as facts are either deemed unnecessary to include – hence IPAC – or they are seen as something to be summarised briefly at the beginning of a written answer.) This over-simplification neglects the crucial role that facts have to play in legal application and argument and may contribute to the critique that students do not know what to do with facts in legal writing.

Although this has been discussed in chapters five and seven, a brief discussion of what counts as relevant legal evidence is warranted here. Firstly, use of relevant legal evidence is one of the strongest, most commonly used criteria for good legal writing and, secondly, what counts is contested and differently applied in different legal genres and depending on underlying knowledge conceptions. Therefore, whether a piece of legal writing is valued or critiqued may largely depend on whether the writer has drawn on evidence that the reader deems, firstly, as "legal" and, secondly, as "relevant". However, it is worth restating here that what counts as "legal" and what counts as "relevant" is likely to differ. Many participants understood legal evidence to be strictly relevant laws; others (such as P2 and P8, who had the strongest general-constructivist approach to knowledge) included contestation and critique of law, as well as the student's voice and experience, as being valid forms of evidence to support an argument. However, others deemed such context, contestation, or critique irrelevant. This has two clear implications for the teaching of legal writing: Firstly, the importance of the evidence you use to base your argument on should be emphasised. Secondly, the boundaries of what counts as relevant evidence for arguments in a particular piece of legal writing, are not shared. Students should be able to understand that what counts as relevant evidence differs, and that clarifying this is an important building block of any good piece of legal writing. Doing this in the different areas of law could also help to address the struggle experienced by novice legal writers, identified by Bangeni and Greenbaum (2013, 2019) to understand what constitutes tacit knowledge in law.

Lastly for this section, it is worth briefly restating the importance of the role that style and language plays in determining whether a legal reader will value or critique a piece of legal writing. Despite holding, overall, a slightly more revised than traditional orientation to writing (Rideout & Ramsfield, 1994) the participants in this study – particularly the practitioner participants – clearly believed language and style to be important elements of a successful piece of legal writing. This is congruent with the literature that asserts the importance of language in legal writing (van der Walt & Nienaber, 1996; Greenbaum & Mbali, 2002; Ngwenya, 2006). It is also congruent with the strong grammar (Bernstein, 1999a) of law in practice. Several participants drew on the metaphor of a carpenter, for whom the correct tools are essential. Words and language, they argued, are the tools of a successful legal practitioner. Although several acknowledged the implicit challenge of this for some writers for whom English is an additional language – and P8 challenged the notion that good legal writing should necessarily mean writing in English – the value of precise, clear, accurate use of language remained constantly referenced throughout these discussions. It is possible, however, as discussed in the section above, that language has become one of the "invisible contours" (Young & Muller, 2010) in legal knowledge and legal writing; that it is still valued, but not taught nor its importance explained.

The need to make the value of language more visible in any legal writing development programme may be an important implication of these findings. This does not necessarily imply a return to generic or "language deficit" models of writing development (Boughey & McKenna, 2016, 2021) nor should this be incompatible with a transformative, decolonised approach (Boughey & McKenna, 2020; Luckett, 2019). Teaching powerful forms of language valued in a discipline, as well as critiquing the norms that underlie these, is congruent with the academic literacies approach to writing development (Lea & Street, 1998; Lillis & Scott, 2007; Jacobs, 2007; Boughey & McKenna, 2016, 2021). Such teaching is also congruent with the decolonisation imperative – particularly if it is done in conjunction with challenging the hegemony of English in academic and legal writing.

I now turn to considering Question 1.3 of this research – *how similar or different are legal academics' and legal practitioners' conceptions of legal writing*? – and attempt to summarise what has already been discussed above, in an answer to this question, in the section that follows.

## 8.11 Main similarities and differences in academic and practitioner participants' conceptions of legal writing

Broadly, the main threads of similarity and difference in academic participants' and practitioner participants' conceptions of legal writing, as discussed in this chapter so far, can be summarised as follows:

All practitioner participants strongly agree that students' and graduates' legal writing is a problem, which may be located in their general agreement that legal education at universities is a problem. They further agree that this is a new problem, or at least one that is different from when they were at university. The academic participants had more mixed responses, both about legal education and legal writing, with only two suggesting that it is a new or different problem. Most participants agree that it is a problem across a range of students and do not characterise it as a "language problem" or "second language problem" as Greenbaum (2004) observed was common twenty years ago. However, P6 did characterise the problem as a "literacy crisis".

Practitioner participants further regard legal writing as writing done in and for the profession, with some explicitly excluding academic writing about the law from their definition of legal writing. The academic participant group was more mixed, with only one drawing on a purely professional conception of legal writing and the others including a range of academic types of legal writing in their definition. An interesting difference is that three of the academic participants strongly agreed that legal writing is different from other good writing, with two suggesting it was both similar and different. The practitioner participants offered a slightly more balanced argument, seeing both similarities and differences. This could be related to their slightly more traditional orientation to legal writing, although both groups drew on an overall revised orientation to writing, valuing epistemic elements over surface elements in their conceptions of good legal writing.

All participants seem to agree that the term "legal writing" is unhelpful or misleading and that there are different kinds of legal writings. Practitioner participants have a stronger awareness of the changing nature of legal writing, particularly the move to plain language, although several of the academic participants drew on writing criteria that are congruent with valuing plain language. Practitioner participants also tended to associate the quality of graduate writing with the HE from which they graduate.

Lastly, for this section, the participants shared a number of criteria for good writing although some of these are general writing criteria, and not specifically legal ones. Practitioner participants also drew on several criteria for good legal writing that were not identified by the academic participants.

## 8.12 Implications for writing development

In the last section of this discussion chapter, implications of these findings for legal writing development, that have not already been discussed, are briefly explored.

Finding eight in chapter five – that legal writing is more than telling stories – comes as no surprise and reflects Schiess' (2009) assertion that legal writing is more than "self-expression" or "knowledge telling" (p. 2). The importance of argument, discussed earlier, also supports his assertion that legal writing is a form of expository writing. In finding eight in chapter seven, it is suggested that reading good stories will make for better legal writers. The link between reading and writing is well established (Archer & Richards, 2011) although it has not been a focus of this study. Nevertheless, this finding is a reminder that all writing development programmes should consider what it means to read well, as well as write well, in the different areas of a discipline. A clear implication of this is that anyone wanting to develop good legal writing should consider how to build in opportunities to develop and encourage critical reading capacity as well.

Quinot and Greenbaum's (2015) argument that "writing development plays an important role in knowledge construction within the discipline" (p. 40) is explored in chapter two. These findings both confirm this claim, but also offer a slightly different understanding of the relationship between knowledge construction and writing development. The findings of this research suggest that not only does writing development play a role in knowledge construction, but constructions of legal knowledge play an important role in writing development. In other words, if legal writing developers can make visible to students the hidden "contours of knowledge and learning" (Young & Muller, 2010, p. 19) and help students to distinguish between subjects with strong knowledge boundaries and subjects where knowledge boundaries are blurred or weakened, they can then also help students to understand the differences in what is valued in legal writing between these subjects. As Young and Muller (2010) observe, the invisibility of boundaries does not mean that they are not there; it simply serves to obscure what is required. A legal writing pedagogy that makes explicit these boundaries, and the implications of these boundaries for legal writing in different subjects, may thus serve to enable Morrow's (2009) epistemological access in ways that generic understandings of legal writing simply do not. This is congruent with the academic literacies literature explored in chapter two (Lea & Street, 1998; Jacobs, 2007; Lillis & Scott, 2007) and confirms the position that writing development should take place within the discipline, with reference to different subjects within the discipline, as development of knowledge and development of writing are indivisible.

Jacobs' (2007) argument, that discipline-specific academic literacies are not necessarily best taught by disciplinary specialists, as their knowledge is so tacit that they may struggle to teach this knowledge explicitly, was explored in chapter two. In particular, this argument raised the question of whether the participants in this study would struggle to articulate their deep, tacit knowledge as explicit criteria. The findings seem to support Jacobs' (2007) assertion, as not much has been revealed about what is unique about writing in law. This suggests that not only is discipline-specific writing development preferable to generic writing development but also that a collaborative pedagogy may assist disciplinary specialists to explicate the core knowledge and writing criteria for law.

A practical example of the implications explored above could be to develop a set of explications of the different conceptions of legal writing that could be drawn on before attempting to teach it, or when introducing writing assignments that draw on differing legal knowledge conceptions. For example, explicit criteria for writing assignments could include making explicit approaches to legal knowledge, and what this means for legal writing in this subject; views on the purpose of legal education, and what this means for legal writing for this subject. Each explication could have a set of guiding sub-questions that assist the educator to make explicit their views, and how this could be enacted in expectations of writing in that subject or assignment. This kind of explication could also be helpful in clarifying the differences in understanding of apparently agreed on criteria, such as "relevance of evidence" or "application" or "legal analysis". I would argue that, whether this occurs on an institutional or national level, this clarification of conceptions underpinning legal writing criteria would greatly assist in improving access to the complex discourse of law. Furthermore, I suggest that this explication would not just be helpful to students but also to academics, who put so much thought and effort into their teaching, and then are mystified and frustrated when students do not meet their criteria for good legal writing.

Another implication for writing development is the need to consider the differences that emerged between academic participants' and practitioner participants' conceptions of legal writing. Gravett's (2018) assertion that most law schools only teach a "limited subset of the skills that are of crucial importance in practising law" (p. 15) could apply to the teaching of legal writing: most universities may only teach a limited subset of the legal writings that are valued in practice. I do not believe that an implication is that universities should attempt to teach all of the practical legal genres – this would be to ignore Allais' (2015) critique of university curricula trying to teach all of the skills that the profession says are necessary, to the detriment of knowledge development. However, I do believe that, again, an explication and clarification of how legal writings are similar and different would go a long way in bridging this complex academia-practice divide.

An important implication for writing development programmes emerges from the practitioner participants' strong sense that legal education has ceased to value or teach language, and that law graduates' linguistic capacity is a serious concern. It may be that the shift to an epistemic view of writing has led to language being overlooked in university writing curricula and assessment practices more generally. Universities may need to re-examine their teaching of, and attention to, language in law. This need not imply a return to a traditional orientation to writing. Rather, it requires a recognition of the strong grammar (Bernstein, 1999a) of law and the need to teach students why precision and clarity of terms is necessary in communicating the specialised knowledge of law.

Having discussed the findings that are most relevant to the research question, I now turn to the final, brief chapter of this thesis. In chapter nine, I attempt to answer the research question; touch on matters of validity and reliability; and re-iterate the conceptual contribution of this research.

# CHAPTER 9: CONCLUSION

## 9.1 Answering the research question

This study has shown that, even amongst a small group of ten legal professionals, there are different conceptions of what it means to write in law, both amongst and between legal academics and legal practitioners. The main factors influencing this difference include professional identity, views on the purpose of legal education, and, most notably, approaches to legal knowledge. Amongst academics, definitional difference is also influenced by subject taught, and by the extent to which the private-public law distinction is upheld. Amongst practitioners, professional imperatives such as brevity; awareness of audience and purpose; and awareness of the changing nature of legal writing, especially in regard to plain language, drive their differing conceptions of what counts as legal writing.

There is agreement, however, that the term "legal writing" is unclear, and sometimes misleading, and that there are different kinds of legal writing. These academics and practitioners agree that it would be more accurate to speak of "legal writings". Differences in understanding are driven by drawing on the contested academic-practice divide (Campbell, 2014). They are influenced by whether one draws on a general jurisprudence, that understands law to be interdisciplinary, or a restricted jurisprudence, in which there are clear boundaries between law and other fields of knowledge (Douzinas & Gearey, 2005; Modiri, 2013, 2014, 2016). Although the legal literature characterises this latter position as being positivist, it is also congruent with a social realist approach to knowledge (Moore & Muller, 1999; Young & Muller, 2010, 2013).

Academics' conceptions of legal writing reflect a largely revised orientation to writing, with a focus on structure, argument, analysis and thinking, rather than a traditional orientation, which focuses on basic literacy and grammatical concerns (Rideout & Ramsfield, 1994; Greenbaum, 2004). The polarity of these two orientations is critiqued, however, in this research, using Bernstein's (1975, 1999a, 2000) concept of grammar. This concept reframes placing value on clarity and precision of terms as a function of law's grammatical strength. A discourse that has strong grammar is communicated through the certain use of specific terms to describe phenomena in that area of knowledge. Failure to recognise the role of language, specifically accurate use of terms and concepts, in communicating of legal knowledge may have led to the neglect of the development of linguistic aspects of legal writing at universities in recent years.

Nevertheless, this predominance of a revised orientation to writing reflects a significant shift from earlier research done on this subject in South Africa (Greenbaum, 2004), although my research drew on a significantly smaller sample size. Amongst practitioner participants, the traditional orientation to writing is stronger, although, on balance, their orientation is slightly more revised than not. The implication – that legal practitioners value linguistic elements of writing more than academics – may account, to some extent, for the practitioners' greater sense that legal writing is a problem for students and graduates.

That the term "legal writing" might be used by some as code for a failure to present with the types of cultural resources and social networks that have traditionally been associated with academia and the legal profession, does not seem to be prevalent. However, two participants strongly assert that conceiving of good legal writing as good writing in English may unfairly contribute to the general perception that student and graduate legal writing is lacking. Apart from one participant, it seems to be generally accepted – if problematised – that good legal writing is writing in English.

Overall, participants seemed to agree that legal writing is a form of expository writing, where argument must be coherent and persuasive. Understanding what counts as valid and relevant legal evidence to support legal arguments is seen as essential, as is being able to apply law to facts in a nuanced, thoughtful way. Understanding the role of facts in legal writing is seen to be both important and misunderstood in legal writing. Language and style – including clarity, precision, grammatical accuracy, and technical correctness – are valued, although the quality of eloquence, or elegance of rhetoric, is valued differently by different participants. The importance of structure is another agreed criterion, although understandings of such structure differ amongst academic participants. There are conflicting positions about what can be considered tacit knowledge in law, and different positions on the role of context, critique and voice in legal writing.

Approaches to knowledge appear to have a clear impact on writing conceptions, especially amongst academic participants, where strong knowledge boundaries tended to translate into strong writing boundaries and vice versa. Notably, academics whose subjects have weak grammars (Bernstein, 1999a) are more likely to have weak boundaries for legal writing whereas academics whose subjects have strong grammars were more likely to hold similarly strong writing boundaries. Views on education likewise appear to have an effect on writing conceptions, particularly views on the purpose of legal education. Those who believe the purpose of legal education is to prepare students for legal practice were both more likely to regard the current state of legal writing as a problem, and to have clear boundaries for legal writing.

Overall, although it is possible to identify some common criteria for the kinds of writing deemed to be good legal writing in South Africa today, and there is some overlap between academics' and practitioners' conceptions of legal writing, it is clear that differences, both between and among the groups, exist. Moreover, it is clear that approaches to legal knowledge, especially, and legal education, to some extent, do intersect with and have some effect on what counts as legal writing for these participants.

## 9.2 Validity and reliability

As mentioned above, the sample size for this research is small, and therefore the results must be read cautiously. It may not be possible or advisable to generalise these findings, or to assume that these findings hold true for a broader range of South African legal academics or legal practitioners. They may not even be a representative range of conceptions of the academics at the university where the research was conducted, or of other practitioners working at the sites of vocational training where the second phase interviews took place. As noted earlier, the practitioner participants were all from the "narrow" (Godfrey, 2009) definition of the legal profession, and all worked with attorneys and advocates in training. It is likely that the findings can also therefore not be generalised to the "broad" definition of the profession.

Moreover, the research was conducted at a time of particularly volatile change; institutionally, in legal education in South Africa, in higher education as a whole, and in vocational training as a result of sections of the LPA coming into effect. The timing of the research could thus have affected the reliability of the findings, which again suggests that these findings may not be generalisable or hold true in another five- or ten-years' time. The conceptual contribution of the research, however, should continue to hold true.

## 9.3 Pedagogical implications of the research

The limitations of this research are set out above. What the research does offer, however, are some categories for ways of thinking about the differences in conceptions of legal writing. These may be useful for anyone involved in legal writing development at South African universities and as part of the training of candidate legal practitioners, specifically, and for those concerned about teaching and learning in legal education more generally. Because if the teaching of legal writing is not congruent with how legal writing is understood and assessed in different subjects and spheres of the profession, it is unlikely that explicit teaching of writing alone will shift the state of legal writing amongst South African law students and graduates.

This research may be a useful starting point for the development of multiple, well-explicated categories of legal writing, which can be used to teach legal writing more effectively. Part of this could be the development of a set of core criteria for these different categories of writing. The criteria identified by participants could be used as a starting point for further discussion of what constitutes a valid set of core criteria for different types of legal writing in South African law schools and at sites of vocational training. This could greatly assist students and candidate legal practitioners in understanding the invisible boundaries of legal writing at university and as they enter the profession.

This research has also identified a strong swing from the traditional orientation to writing, identified at law schools across South Africa by Greenbaum in 2001 (Greenbaum, 2004), to a more revised, or epistemic orientation to legal writing, which is reflected in most current South African literature on legal writing development at universities. This may contribute to the practitioner participants' strong sense that legal education at universities no longer values or develops strong language capacity in legal graduates. An implication of this may be that teachers of legal writing programmes at universities may need to reconsider the place of language development within the programmes, especially in light of findings on the strong grammar (Bernstein, 1999a) of law.

Lastly, this research has largely confirmed the hunch that drove it: that interviewing five legal academics and five legal practitioners would yield quite different conceptions of legal education, legal knowledge and legal writing. It has also confirmed, to some extent, that views on legal education have an effect on conceptions of legal writing and, to a greater extent, approaches to legal knowledge and legal "skills" affect how legal writing is understood. This small-scale research could be used as a baseline study for wider research that includes a much greater number of legal academics and legal professionals, to find out whether any of these findings are more broadly generalisable. This could pave the way for a coherent and well-theorised approach to legal writing development at South African law schools, and at sites of vocational training for candidate legal practitioners, that takes into account both academic and professional conceptions (if such a distinction can be made) of legal writing.

## 9.4 Conceptual contribution of the research

The first conceptual contribution of this research is that it situates the analysis of what it means to write in law within broader scholarly conversations about legal education and legal knowledge. By bringing different bodies of knowledge together and explaining orientations to legal writing inferentially (in relation to views of legal education and conceptions of legal knowledge) this research offers a novel and nuanced conceptual framework for making sense of the factors that may affect conceptions of what counts as good legal writing in South Africa at this historical juncture.

The second conceptual contribution is that it offers a way out of some of the polarities that exist in South African legal education. More than twenty-five years ago, Dhlamini (1996) observed that legal education in South Africa was characterised by a set of dichotomies that did not need to exist. This observation continues to hold true today. This work has drawn on concepts from the sociology of knowledge – in particular from the work of social realist scholars – to disrupt some of the generally accepted dichotomies found in South African legal education literature. I used these concepts to develop a novel conceptual framework for the discipline of law in South Africa, which has the explanatory power to shift the polarities in discussions about legal education, knowledge, and writing.

The first dichotomy exists between so-called positivist and constructivist approaches to legal knowledge. I showed how this dichotomy can be disrupted and reframed by drawing on a social realist approach to specialised knowledge. Legal literature's use of the term "positivist" has largely negative connotations. These include being reactive or politically conservative, and resistant to transformative and decolonial change. Social realism challenges this in several ways: Firstly, social realist scholars show that this characterisation of positivism is something of a caricature; one that is based on flawed and outdated notions of science (Moore & Muller, 1999). Secondly, they show how approaches to knowledge that are characterised as positivist can often be more accurately described as social realist. A social realist approach to knowledge conceives of knowledge as objective; systematically revisable; and arising from but not reducible to the contexts in which it is produced (Young & Muller, 2007, 2010). Importantly, a social realist approach to knowledge, in which strong knowledge boundaries are held, is not automatically reactive, or politically or educationally conservative (Moore & Muller, 1999). Furthermore, a social realist approach to knowledge is compatible with liberatory and decolonial intentions (Lucket, 2019; Muller & Young, 2019). The distinction between powerful knowledge and knowledge of the powerful is, in fact, a valuable conceptual tool that can guide decolonial curricular decision-making. Social realism helps to distinguish between what is necessary for legal knowledge and what is negotiable and changeable.

The second dichotomy that social realism disrupts is that of traditional vs revised orientations to writing (Rideout & Ramsfield, 1994; Greenbaum, 2004). The limitations inherent in this dichotomy were not immediately obvious to me: at the beginning of this research, I accepted it and used it to code and analyse some of the data. During the analysis of the data, it became clear that social realism offered another concept to disrupt an accepted dichotomy. This time it was Bernstein's (1975, 1999a, 2000) concept of grammaticality.

Knowledge in some subjects requires accurate expression more than in other subjects – this is strong grammar. This is true of many subjects in law, and particularly true of law as it is practised. The accuracy of language is an important value that contains legal knowledge and keeps it specialised. It is about how language links to knowledge structures and how accurate expression links to social standing and participation in the legal community. To recognise and value this is very different from focusing on surface writing elements for their own sake (also sometimes associated with political or pedagogical conservatism). In other words, to value accurate written expression does not always indicate a traditional orientation to writing; it comes from the nature of the subject. Moreover, to describe an orientation to writing as traditional, simply meaning a focus on surface-level elements, is too shallow; it does not capture the strong grammar of law.

The problem is that, on the face of it, the language used in law looks familiar. However, many of these apparently familiar words have particular legal meaning (as highlighted by Ngwenya, 2006). There is complex specialised knowledge behind the language. For example, when writing for the courts, writing must accurately express the substantive knowledge that the language captures; then the knowledge of the processes; and the knowledge of the specifics of how the content must be presented, in the correct order. Very specific terms must be used, that are often unique to the process or procedure involved. "Reading over" language errors in legal writing at universities, as described in this research, is unlikely to facilitate the development of this kind of knowledge. Until something changes, either at universities or in the courts, this big gap between universities' conceptions of language in writing, and legal practice, will remain.

Social realism, again, can be used to disrupt the traditional-revised dichotomy and to bridge the gap between law schools and legal practice. Grammar can be used as a conceptual tool for curricular decision-making. It helps to distinguish where, and in which subjects, it is possible to weaken language and where it is not. It also has explanatory power that foregrounds knowledge rather than language, and so avoids the trap of falling into language remediation for its own sake.

In both cases, I wanted to show the polarity in the way that the literature presents approaches to legal knowledge and orientations to legal writing, and the polarising and paralysing effect this can have on views of legal education and curricular decision-making. More importantly, I wanted to problematise these dichotomies. Both lack explanatory power. Concepts from social realism, including understanding knowledge boundaries as distinct from barriers to epistemic access; the distinction between powerful knowledge and knowledge of the powerful; and strong grammar in specialised knowledge, may offer a basis from which to develop a shared language for talking about legal knowledge and legal writing in legal education.

My main contribution to knowledge, therefore, is to use concepts from social realism to challenge and reconceptualise the polarity in the debates about legal curriculum, legal knowledge, and legal writing. This is not a comfortable compromise between the polarised positions; rather it is an uncomfortable but, I believe, theoretically convincing third position that offers a principled conceptual framework for making curriculum decisions in legal education, both regarding knowledge and writing.

## 9.5 Possibilities for future research

The aim of this study was to explore what it means to write in law, and the possible effect of conceptions of knowledge and education on such understanding. This work has only touched on the possibilities that concepts from the sociology of knowledge offer for research in the field of legal education and writing. Further work can be done to interrogate the knowledge structure of law, and in particular the implications that arise from the proposition that law may be a series of specialised languages, each with its own internal language of description with differing grammatical strength (Bernstein, 1999, 2000; Moore and Muller, 2002; Breier, 2004; Hordern, 2017). It may also be useful to do further research into the implications of law being a region, rather than a singular (Bernstein, 2000) and explore in more detail the disciplines that have influenced the development of law, in order to discern what this may mean for writing in law.

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# Appendices:

## APPENDIX 1: INTERVIEW SCHEDULE FOR PHASE 1 AND PHASE 2 INTERVIEWS

### PHASE ONE:

### <u>Pre-interview checklist:</u>

### The researcher must bring:

Voice recorder

Copy of interview schedule

Pen and paper for notes and/or queries

Copies of the participant's assignment instructions, assessment criteria and samples of student writing

Refreshments

### Before the interview formally begins, or the voice recorder is switched on, the researcher must:

[before the participant arrives]

Set up the interview room so that chairs are comfortably positioned for conversation.

Ensure environment is conducive for interview (e.g. check heating, ventilation, lighting, privacy.)

Set up the voice recorder to ensure optimal recording.

Test that the voice recorder is functioning and has sufficient power for the duration of the interview.

Minimise ambient noise.

[once the participant arrives]

Welcome and thank the participant for coming

Offer refreshment

Show the participant the voice recorder and inform him/her when she is switching it on.

Remind the participant that he/she can bring the interview to a close at any point, indicate if he/she would prefer not to answer a question, and that the data will be treated confidentially.

Ask the participant if he/she would like to choose their pseudonym.

**<u>Interview Questions:</u>**

[NB: These are a guideline only. The researcher should be able to probe, and ask the participant to elaborate on answers, where necessary.]

**<u>Contextualising Information:</u>**

[The researcher will begin the interview, using the following as a guide:]

*"Thank you for being here. I look forward to learning from your insights and experience. Just a reminder that my research is seeking to answer this question:* **'***What underlies the assertion that South African law students cannot write? An analysis of what it means to write in law, with particular reference to this School of Law'.*

*To do this, I have divided the questions into five categories: some background questions that help me to understand your experience; some questions about your particular subject and where it fits into legal knowledge as a whole; and some general questions about legal education. We will then move on to legal writing in general, as well as at XX more specifically. In the last part of the interview, we will discuss the assignment task, and the examples of student work that you selected for discussion. Please feel free to interrupt and ask your own questions at any point, or to indicate if and when you would like a break. Does that sound OK? Do you have any questions before we begin?"*

**1. Background questions:**

1.1 How long have you been at XX?

1.2 How long have you taught YY subject?

1.3 What did you do before coming to XX?

1.4 Where did you study?

1.5 How similar or different was your experience of being a law student to how law is taught at XX?

**2. Legal knowledge questions:**

2.1 Please tell me a little bit about subject YY: what are its origins and what part of the law does it draw on?

2.2 How does subject YY fit into the field of law as a whole?

2.3 Are there any contestations about its knowledge base?

2.4 What do you understand by the term legal knowledge?

2.5 What are the challenges, if any, for students in getting to master legal knowledge?

2.6 What, if anything, do you think needs to change about how legal knowledge is understood?

2.7 What, if anything, is especially important to uphold or maintain?

**3. Legal education questions:**

3.1 What with the CHE review, and our recent shift from undergraduate to post-graduate LLB, it seems to me that legal education in SA is in a state of flux

3.2 Do you agree with my impression? Why / why not?

3.3 Do you agree with the claim that legal education in SA is "in crisis"? Why or why not?

3.4 Has the four year LLB contributed to this "crisis"? If so, how? If not, how do you understand the roots of our current challenges?

3.5 What in the current degree would you keep or protect?

3.6 What in the current degree would you add?

3.7 What in the current degree would you do away with?

3.8 Are there any other changes you would like to see in legal education in SA?

**4. General legal writing questions:**

4.1 What do you understand by the term legal writing?

4.2 Would most of your colleagues offer a similar understanding of legal writing? Or are there differences in understandings of what constitute legal writing?

4.3 Is good legal writing different or the same as good writing in general? Please explain/elaborate.

4.4 If different, how is it different?

4.5 Please describe your general impressions of law students' writing. (Probe: what are the strengths, if any? What are the challenges, if any? Is there a problem? If so, what are the problems? What do you think might be the causes of these problems?)

**5. Assignment-related legal writing questions:**

5.1 Please explain the purpose of this assignment: what did you want to assess?

5.2 How important is writing, in the context of this assignment? [probe]

5.3 How did you assess this assignment? [probe]

5.4 How did you communicate your judgment to the student?

5.5 Please show me, with reference to YY assignment, what you regard to be good legal writing [probe]

5.6 Please show me, with reference to ZZ assignment, what inadequate legal writing [probe] is.

5.7 Please show me, with reference to AA assignment, where the student wrote well, and where it was inadequate. (probe.]

5.8 Do you think these elements that we have just discussed are typical of all law assignments, or are they particular to this subject or this assignment? [explore / probe.]

5.9 What do you think should be done, if anything, to improve writing in the School of Law?

**6. Ending questions:**

6.1 Is there anything that you would like to add, or comment on now, that has occurred to

you during our conversations?

6.2 Is there anything that you would like to ask me?

[The researcher will thank the participant, and ask if they would like to receive the findings once they are published.]

**PHASE 2: INTERVIEW SCHEDULE FOR PRACITIONERS' INTERVIEWS:**

**1. Background questions:**

1.1 How long have you been an attorney / advocate?

1.2 How long have you been involved in training for the Bar / Board?

1.3 Have you been involved in any other type of legal education – at any university, for example?

1.4 Where did you study? (University and post-graduation education)?

1.5 How similar or different was your experience of being a pupil / CA to the training that pupils / CAs receive now?

1.6 I am aware that the Legal Practice Act is likely to have implications for your answers, if I were to ask these questions in a few years' time. At this point, what are your thoughts about the likely implications of the Legal Practice Act for your teaching / training?

**2. Legal knowledge questions:**

2.1 Please tell me a little bit about what you teach for the Bar / Board exams: what are its origins and what part of the law does it draw on?

2.2 How does what you teach fit into the field of law as a whole?

2.3 Are there any contestations about its knowledge base?

2.4 What do you understand by the term legal knowledge?

2.5 What are the challenges, if any, for students in getting to master legal knowledge?

2.6 What, if anything, do you think needs to change about how legal knowledge is understood?

2.7 What, if anything, is especially important to uphold or maintain?

**3. Legal education questions:**

What with the recent CHE review of the LLB degree, and the recent coming into effect of the Legal Practice Act, it seems to me that legal education and the training of pupils and advocates in SA is in a state of flux.

3.1 Do you agree with my impression? Why / why not?

3.2 Do you agree with the claim that legal education in SA is “in crisis”? Why or why not?

With regard to university level legal education:

3.3 Has the four year LLB contributed to this “crisis”? If so, how? If not, how do you understand the roots of our current challenges?

3.4 What in the current degree would you keep or protect?

3.5 What in the current degree would you add?

3.6 What in the current degree would you do away with?

3.7 Are there any other changes you would like to see in legal education at university in SA?

3.8 With regard to post-university legal education/training:

3.9 Has the implementation of the Legal Practice Act contributed to a sense of “crisis”? If so, how? If not, how do you understand the roots of current challenges?

3.10 Will the training of advocates and attorneys change significantly in the years ahead? If so, how? If not, why not?

3.11 Are there any changes you would like to see in the training of attorneys / advocates in SA?

**4. General legal writing questions:**

4.1 What do you understand by the term legal writing?

4.2 Would most of your colleagues offer a similar understanding of legal writing? Or are there differences in understandings of what constitute legal writing?

4.3 Is good legal writing different or the same as good writing in general? Please explain/elaborate.

4.4 If different, how is it different?

4.5 Please describe your general impressions of pupils' / CA's writing. (Probe: what are the strengths, if any? What are the challenges, if any? Is there a problem? If so, what are the problems? What do you think might be the causes of these problems?)

**5. Assignment-related legal writing questions:**

5.1 Please explain the purpose of this assignment: what did you want to assess?

5.2 How important is writing, in the context of this assignment? [probe]

5.3 How did you assess this assignment? [probe]

5.4 How did you communicate your judgment to the student?

5.5 Please show me, with reference to YY assignment, what you regard to be good legal writing [probe].

5.6 Please show me, with reference to ZZ assignment, inadequate legal writing [probe].

5.7 Do you think these elements that we have just discussed are typical of all law assignments, or are they particular to this subject or this assignment? [explore / probe.]

5.8 What do you think should be done, if anything, to improve writing among South African pupils / CAs?

**6. Ending questions:**

6.1 Is there anything that you would like to add, or comment on now, that has occurred to

you during our conversation?

6.2 Is there anything that you would like to ask me?

## APPENDIX 2: TABLE OF CODES AND INDICATORS

**Table of Legal Education Categories and Codes.**

| Dimension | Category | Sub-category | Code | Indicators (example from transcript) |
|---|---|---|---|---|
| Legal Education: | Role | Broad-Philosophical/Academic | Aph | ‘*a lot of their best academic lawyers have a very broad education, mixing, if you like, theory and law.’* |
| | | Narrow-Legal Skills/Practice | LS | ‘*I think it’s very important for the university not to lose sight of its mandate. We want good property lawyers, good contract lawyers, good public lawyers, they’re going to go into attorney’s practices, some of them are going to become advocates, many of them will not practise law perhaps, you know, but we have to prepare students for the profession’* |
| | State | In crisis | IC | ‘*But because with these kind of lawyers that we have, it is in crisis’* |
| | | In flux | IF | *‘It is in a state of flux. It’s in a state of flux for a number of reasons’; ‘I would say that there’s been a movement to change, which is fine. And then law must change and the curriculum, the LLB curriculum needs to change as well. But I don’t think it’s in a sort of desperate situation.’* |
| | | Stable | S | *‘it’s got more clarity on what it’s doing and what it’s supposed to be doing than most…than a lot of fields’*. |

| | | | | |
|---|---|---|---|---|
| | | Not in crisis | NIC | *'I would certainly not agree that legal education is in crisis'* |
| | Reasons for beliefs about state | relationship between staff and students | re | *'I think it's more open - in my day, you didn't go to the lecturers just to talk, to chat'* |
| | | Pedagogy | p | *'It's similar in the way that law is taught'* |
| | | Curriculum | cu | *'I think there's been a significant shift in the direction of public law. Students have many more options'* |
| | | Decolonization | dc | *'it's the feeling that what students are being taught is not inclusive of their history'* |
| | | constitutional basis | cb | *' I think the Constitution is doing well to actually guide the transformation of legal education'* |
| | | changes in law | l | *'there's been a fundamental change in particularly public law but also private law'* |
| | | stability of the law | sl | *it's got more clarity on what it's doing and what it's supposed to be doing than most* |
| | | changes in Higher Education | he | *'as people in universities, we're under a lot more pressure'* |
| | | a drop in standards | S | *'then the level of exams was still fairly high'* |

| | | | | |
|---|---|---|---|---|
| | | funding or funding models | f | *'the root causes are the university funding models, because now universities have to fend for themselves. And by so doing they have to accept as many students as possible'* |
| | | student numbers | sn | *'We had small groups, small classes; I think the biggest class I was ever in was a class of 45 people, which was considered exceptionally large'* |
| | | student preparedness | sp | *'the gap is even larger for a public school student, who comes here without the tools of learning, without the disciplinary tools of learning, without even an idea of how to approach learning a subject.'* |
| *Developed in phase 2 of the research* | | Legal Practice Act | LPA | *'but what the Legal Practice Act is going to change, and I hope it does, and that is to make continued professional development, CPD as we call it, compulsory.'* |
| *Developed in phase 2 of the research* | | Changes in the legal profession | pro | *'the whole legal profession is undergoing changes. Within the next five years it will be unrecognisable. It's been deregulated, lawyers are competing with other professions.'* |

**Table of Legal Knowledge Categories and Codes.**

| Dimension | Category | Sub-category | Code | Indicator (example from transcript) |
|---|---|---|---|---|
| Legal Knowledge: | Orientation | Traditional-Positivist | TP | *'legal knowledge is knowing the law, so knowing what is written or unwritten, but what is law. Understanding it and having the ability to apply it to a given scenario'* |
| | | Social Realist | SR | *'the ones[legal views]  that the South African judges have made part of our law are very much part of it [legal knowledge], and the ones they didn't, get sort of put to the side'* |

| | | | | |
|---|---|---|---|---|
| | | General-constructivist | GC | *'Because so many of its hallowed assumptions are seen more and more to be difficult to grasp, difficult to accept, foundations are shifting, whether a law can even be thought about in foundational terms is not so clear anymore'* |
| | Boundaries | Strong | BS | *'They're clear and uncontested'* |
| | | Weak | BW | *'So what is legal knowledge? I mean, increasingly in, say, constitutional law, I don't know how clear the distinction is between law and politics'.* |
| | | Necessary | BN | *'I would say, keep on protecting your traditional knowledge in ways that you have been doing it. Don't try and push it under the mainstream intellectual property because it won't pass'.* |
| | | Limiting | BL | *'And there are certain risks, in my view anyway, to think about law as if it's discrete, as if it's autonomous'* |
| | State | Contested | KC | *'classical legal theory is in a crisis, increasingly it appears that its foundations are suspect, are almost ephemeral, are really difficult to grasp'; 'South Africa is perhaps a newcomer to these rapid changes in the way we think about law and legal institutions and its relationship to other forms of knowledge'* |
| | | Accepted | KA | *[The knowledge base]They're clear and uncontested'* |
| | | Partially contested | Kpc | *'I would say, partially.. there are sort of areas where there is disagreement, for example areas such as religious marriages'* |
| | | legal pluralism | LP | *'we try to put a customary law section into the property course'* |
| | | academic vs professional | A/Pr | *'procedural courses are purely practical…practice driven in purpose'* |

| | | | | |
|---|---|---|---|---|
| | | Constitution as transforming or flawed | Ct/Cf | *'the assumptions behind what the Constitutional Court is doing are really controversial'* |
| | | law as stable | ls | *'No, it's pretty much given'* |
| | | impact of political changes | pc | *'And I think that the political legal changes require a return of the theory to understand, because law itself has changed so significantly'* |
| | | impact of critical theory | ct | *I'm sure people want to bring that debate back and so on…but it's marginal to what we teach* |
| | | contested assumptions | ca | *'I don't think it's an exaggeration to say that legal theory increasingly shows elements of a kind of intellectual crisis'* |
| | | law as interdisciplinary | id | *'law is embedded in many different subjects'* |
| | | law as distinct discipline | dd | '*law has its own method, has its own learning'* |
| | | law as being very technical | t | *'Legal knowledge is a very technical thing. It requires memorising the rules off by rote'* |
| | | old and established law | oe | *'our procedural law is based on English adversarial law; we have the English common law for our procedural law'* |
| | | private law | pl | *'Property is a private law course and it's like a learning subject. You just can't…there's nothing you can say which is of any consequence unless you learnt it'* |

**Table of Legal Writing Categories and Codes.**

| Dimension | Category | Sub-category | Code | Indicators (example from transcript) |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| Legal Writing: | Orientation | Traditional | Tr | *'the school could take on something like having legal language as a subject to assist students in terms of expressing themselves in English'.* |
| | | Revised | Re | *'And this understanding, this sort of opinion understanding is behind everything. I mean, it's your understanding of the law and whether you can write down your understanding of the law'.* |
| | Framing | Same as other good writing | LWS | *'good legal writing, good writing in Jurisprudence, is not different from good writing in Philosophy or Political Science, but the content is different'.* |
| | | Different from other good writing/unique | LWU | '*They can write, obviously many of them are from private schools, they write very well in terms of ordinary writing, but for legal writing they are really lacking'* |
| | | Definition accepted by academics | LWA | *'I think my colleagues would agree that those are essential elements of legal writing'.* |
| | | Definition contested by academics | LWC | '*we got our trainings from different institutions and so on. I have had an opportunity to mark Masters research papers and PhDs and I think, yes, my colleagues can give me a different answer from what I've given you about legal writing'.* |
| | | Academic | LWAc | '*The legal writing we do in class is not the sort of legal writing people do for courts. What we do in class is really essays or answer problems'.* |

| | | | | |
|---|---|---|---|---|
| | | Professional | LWPro | '*Good legal writing in many courses will be about applying the legal propositions to facts, and maybe that works…it's law and facts and it's the relationship between those two. And it's about finding what the law is, not what the law ought to be so much'.* |
| | State | Legal writing is a problem | LWP | *'they write in a very mechanical way that really annoys me as a person... if you do it that way, it doesn't enable you to think'.* |
| | | Legal writing is not a problem | LWNP | *'Maybe I'm just used to it. Seems unremarkable to me'.* |
| | | Legal writing problems are the same over time | LWSP | '*But for me that has always been a problem, so it's not something that has gone away'.* |
| | | There are new/different problems in legal writing | LWDP | '*with the many students that we have in class now, I have to give them shorter questions and shorter assignments. And I'm not helping them, because they are not developing skills to write'.* |
| | Criteria | method of analysis | m | *'law has its own method, has its own learning'* |
| | | use of legal language | ll | *'it's different because law has a language of its own'* |
| | | formality of tone | ft | *'So on paper would be the tone… Because it's very formal, the law is very formal'* |
| | | the need to be specific | sp | *it's specific.. I mean, I'm looking for specific things'* |
| | | coherence | co | *'I think that being able to coherently put together the material is the key thing'* |

| | | | | |
|---|---|---|---|---|
| | | correct identification of legal issue/s | lii | *'What will get you far will be your ability to identify issues'* |
| | | type of content/evidence accepted | ev | *'So he hasn't identified the source of law… and then he hasn't identified the defences …and that's very serious because it's not really just a random discussion of some of the issues that arise. You have to really identify the sources you're dealing with, and if you don't I think it's hopeless'* |
| | | ability to construct an argument | arg | *'So it's about how you construct an argument, and how you support that argument with evidence'* |
| | | application (of law to facts; theory to law; or theory to theory) | applic | *'for procedural law it's the application. In exams you get practical questions, not theoretical questions'* |
| | | synthesis | synth | *'this is a student who can synthesise'* |
| | | formal requirements | fr | *'he's made an effort to comply with the formal requirements'* |
| | | clarity and precision | cp | *'So there's a lot of precision there, there's a lot of detail'; 'you must be able to take those words and put them down on paper in a way which is clear and unambiguous'* |
| | | good English | Eng | *'So a basic tool of a legal professional who practises whatever, whether you draft up a contract, or whether you draft up a pleading relating to a delict, or whatever, you need a knowledge of the English language'* |
| | | structure and format | struc | *'you have to have understood the structure of a pleading. In other words, so you need that formatting knowledge, and then you need the language ability within that structure'* |
| | | plagiarism/ethics of writing | pl | *'The ethics of writing, that you don't copy, you don't plagiarise'* |

| | | | | |
|---|---|---|---|---|
| | | grammar and punctuation | gp | *'there are issues of grammar, the way you form sentences, the way you structure a paragraph, all of those basics'* |
| | | conceptual depth (or lack of) | cd | *'basically it's the conceptual depth with which they've approached the question that is really the issue for me'* |
| | | depth of analysis (or lack of) | da | *'Well there's a lack of depth of analysis, which is what I think you're really looking for. Like looking at the facts really carefully, looking at the law really carefully, and putting it together… I don't think I really think about anything else'.* |
| | | correct citation | cit | *'how you reference, the formal rules of citation, that's very important, that's basic, it's fundamental'* |
| | | role of context | ctxt | *'you really have to be someone reading news, following the international trade, what is happening around the world…Trump has won elections, he says no to migration, what does it really mean in terms of Trade In Services'* |
| | | topic analysis | TA | *'The analysis of the question. It's the analysis of what you're being asked and then being able to apply the law to the facts, or then finding the law and being able to apply the law to the facts, and he's just failing on everything'* |
| | | relevance | rel | *'The Constitutional Court has said that these sections are constitutional and students waste their words rehashing that debate. Need to see that it's lost. So it's not relevant, it's not worth words'* |
| | | elegance of rhetoric | ElR | *'It's sort of pretty. It's nicely written. It's sort of rhetorically appealing if you're doing a speech on freedom of expression'* |
| | | thoughtfulness | Th | *'There's someone who is engaging with this material thoughtfully'* |

| | | | | |
|---|---|---|---|---|
| | | initiative and creativity | IC | *'This is a student who can…apply the readings in a creative way'* |
| | | persuasiveness | pers | *'And so legal writing is persuasive writing. Right? That's the first thing. You write to persuade that your facts should make your point win'* |
| | | achieves purpose | purp | *'you must do…it ties in with writing for the reader…write according to the purpose of the document'* |
| | | fit for audience | aud | *'it's also about you understanding your audience, who are you writing for, and what do they want?'* |
| | | understandable | und | *'So ideally you should be able to write in the clearest of language and form but not be shallow, so that the judicial officer, when they get into court, they know what your argument is'* |
| | | good literacy skills | lit | *'Literacy is number one. You cannot be a lawyer with poor literacy skills'* |
| | | brevity | brev | *'So with legal writing it's the skill of being able to set out the case in the briefest of forms'* |
| | | no jargon | jarg | *'Plain language. In fact, part of my writing course starts with me telling them, jettison the jargon'* |
| | | no use of precedents | prec | *'But when you're drafting for purposes of dispute resolution, opinion work, heads of argument, each case is unique. There is no precedent. But guess what? The attorneys still look for a precedent. The reason they do that, they don't know how to draft on their own'* |
| | | works out cause of action | caus | *'If you write particulars of claim and a judge reads it in court and doesn't understand what the cause of action is, it serves no purpose'* |

| | | | | |
|---|---|---|---|---|
| | | understands legal significance of facts | fact | *'I spend a lot of time on fact, before I spend any time on writing. You cannot write as a lawyer, if you didn't understand the fact. You can't write as a lawyer, if you don't know how to apply those facts to the law'* |
| | | communicating your client's case | communic | *'For us legal writing is about effectively communicating your client's case'* |
| | | understanding the role of definitions | defn | *'the way you will use definitions…that's peculiar to legal writing… the way you define things and why you define them and how you use that is specific to legal writing'* |
| | | lead with the law not facts | LWLNF | *'People tend to want to argue law before it's time to argue law… you put as little law as possible in your pleadings because it's facts there'* |
| | | simplicity | simp | *'it's the art of turning the complex into simple'* |
| | Causes | students don't read | Sdr | *'I think it has something to do with not that love for reading. Or maybe it's not about the love for reading, but not the necessity and really sitting down and reading everything'* |
| | | English not home language | EL2 | *'most of our students, English is not their first language and therefore it's going to be a problem with expressing themselves in a language that is a second language for them'* |
| | | students not expected to write enough (not enough writing) | New | *'With many students that we have in class, I have to give them shorter questions and shorter assignments. And I'm not helping them, because they are not developing skills to write'* |
| | | students apply formats in shallow ways | Shf | *'this mechanical way is just meant for first years, for you to know what a legal answer should look like, and as you progress in your studies, you should be writing, you know…your answer should flow very well…not in these little silly headings that are mechanical like that. Because if you do it that way, it doesn't enable you to think'* |

| | | | | |
|---|---|---|---|---|
| | | large student numbers | Sn | *'it also has to do with student numbers'* |
| | | poor basic education | Be | '*for those students who, say, are coming from rural areas, or who have had less of an exposure to a good school, they come to this law school and to a course like Jurisprudence with huge deficits'* |
| | | unclear/conflicting writing expectations | Exp | *'a lot of the students say to me when they come to Jurisprudence, what do you expect from us? And then in some courses they have been taught they've got a formula…and I say to them, what I'm looking for is an argument and the way you support that argument. Other than that, I have no framework for what is good writing'* |
| | | Lecturers marking only content not writing style | mark | *'a lot of time in varsity you mark for content and you're not teaching students how to write, how to construct sentences'* |
| | | LLB now first degree not second | LLB | *'Initially the LLB was a postgraduate degree. When someone graduated with a LLB, there were two things you could take for granted, the one is that they had literacy skills…now…no literacy skills'* |
| | | Language requirement removed from LLB | LR | *'they wrote out Afrikaans and Latin, no one complained. Then they said, well what about English then? So they wrote that out. Now you cannot produce law graduates who don't have really powerful literacy skills"* |
| | | Where students studied sometimes contributed to their difficulties in writing | educ | *'it's also where they receive their education… the usual suspects just produce people with better language skills'* |
| | | Where pupils had previously worked sometimes contributed to their difficulties in writing | work | *'someone who was an attorney at a big firm for ten years versus someone who was a legal advisor at a parastatal for ten years, their ability to write legally are vastly different'* |
| | | Universities' focus on financial viability at the expense of quality and literacy | fin | *''I think universities have lost what education is about… the administrations are making sure that they keep themselves financially viable and students are trying to pass'* |

| | | | | |
|---|---|---|---|---|
| | | Pupils feeling anxious in high-stress legal environments | intim | *'the environment becomes intimidating as well for pupils..we're trying to create a place where a lesbian woman or gay man, a black person, a woman, can be trained without being judged. Can practise their craft without the burdens of prejudice'* |

**Addendum: Shortened List of Codes: (Key for the diagrams in chapter four and six):**

| | |
|---|---|
| **Legal Education** | |
| **Role** | |
| Aph | Academic/philosophical (broad role) |
| LS | Legal practice, or legal skills (narrow role) |
| **Status** | |
| IC | In crisis |
| NIC | Not in crisis |
| IF | In flux |
| S | Stable |
| **Legal Knowledge** | |
| **Orientation** | |
| TP | Traditional-positivist |
| SR | Social Realist |
| GC | General-constructivist |
| **Boundaries** | |
| BS | Boundaries strong |
| BW | Boundaries weak |
| BN | Boundaries necessary |
| BL | Boundaries limiting |
| **State** | |
| KC | Knowledge contested |
| KA | Knowledge accepted/stable |
| Kpc | Knowledge partially contested |
| **Legal Writing** | |
| **Orientation** | |
| TR | Traditional |
| Re | Revised |
| **Framing** | |
| LWS | Legal writing same as good writing in general |
| LWU | Legal writing unique/different from other good writing |
| LWA | Legal writing (understanding of) accepted/shared by colleagues |
| LWC | Legal writing (understanding of) contested/understood differently by |
| LWAc | Legal writing includes academic legal writing |
| LWPro | Legal writing is the kinds of writing required by the profession |
| **State** | |
| LWP | The state of students' legal writing is a problem |

| | |
|---|---|
| LWNP | The state of students' legal writing is not a problem |
| LWSP | The state of students' legal writing is the same/similar over the years |
| LWDP | The state of students' legal writing reflects new or different problems than |

**Main writing criteria:**

(Only the criteria used by the participants are captured here. They are listed in the order in which they appear in the diagrams.)

| | |
|---|---|
| ***Criteria used in phase one of the research; some of these were also used by phase two*** | |
| Arg | argument |
| Ev | evidence |
| Rel | relevance |
| Applic | application |
| Pl | plagiarism |
| Gp | grammar and punctuation |
| TA | topic analysis |
| Fr | formal requirements |
| Struc | structure |
| Cit | citation |
| Tht | thoughtfulness |
| IC | initiative and creativity |
| Synth | synthesis |
| Cp | clarity and precision |
| Ctxt | context |
| Co | coherence |
| Cd | conceptual depth |
| Da | depth of application |
| ELR | elegance of rhetoric |
| M | method |
| Lii | legal issue identification |
| Ll | legal language |
| Eng | English |
| ***New criteria only used in phase two of the research*** | |
| Pers | persuasiveness |
| Purp | achieved purpose |
| Aud | fit for audience |
| Und | understandable |
| Lit | good literacy skills |
| Brev | brevity |
| Jarg | no jargon |
| Prec | no precedents |
| Cause | works out cause of action |
| Fact | understands legal significance of facts |
| communic | effective communication of client's case |
| Defn | understands use and role of definitions |
| LWFNL | leads with the facts not law |
| Simp | simplicity |

## APPENDIX 3: PARTICIPANT PORTRAITS

As a way into the data, I created a brief snapshot or overview of each participant, and the range of views they expressed in the interviews, about legal education, legal knowledge and legal writing. This was done in both phase one and phase two of the research.

**Participant Portraits: Phase one of the research (Interviews with legal academics):**

**Participant One (P1): Family Law**

***"I'm very much in love with the Constitution...Writing? I'm looking for all of it"***

*Participant 1 is a lecturer who has taught at this Law School for 6 years, and taught this subject **(Family Law)** for 5. She has experience as both an academic and as a legal researcher.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P1 agreed with the view that the LLB is in flux. However, she believes that "academics are doing as much as they can for students - students need to do more". Legal education today is "not very different" from when she was a student, except for the teacher-student relationship (which she described as being "more open, less formal - students expect more from lecturers"). With regards to legal knowledge, P1 explained that the law has changed significantly since the Constitution. For example, Child law has improved; given children rights. However, she felt that legal knowledge is now "pretty intact" -P1 is not yet convinced of radical changes necessary or coming.

P1 views legal writing as "knowledge, understanding, and applying law to facts". She also acknowledged the importance of legal language; legal terminology. P1 sees the problems as being rooted in some of the following: not reading; English not L1; students struggling to express themselves in English; sudden shifts in logic (so conclusions are not based on arguments made). P1 feels that, compared to her student days, there is more and longer writing; and that case analysis a new and useful type of writing

**Participant Two (P2): Jurisprudence**

***"We lawyers are like medieval priests discovering that God doesn't really exist but we still have to hold onto the doctrine... and preach that it does"***

*P2 is an adjunct professor who has taught at this law school for 5 years, and taught this subject (**Jurisprudence**) for all of this time. She has worked in a range of legal professional spaces, both professional and academic.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P2 thinks that legal education now is better than when she was a student – there are both more options and a broader understanding of the law. She described a shift from the focus on private law, and narrow understandings of law to greater recognition of public law, and a broader understanding of what legal knowledge entails. P2 believes that boundaries between private and public law are collapsing. She believes that legal theory, and a broad academic education, makes people better lawyers. Specifically, she thinks the LLB is better as second degree, so students get exposed to broader education, social and political theory, before starting law.

P2 conveyed a strong belief that the law itself is shifting and changing; accepted foundations are crumbling; and old assumptions are being questioned. With regards to legal knowledge, she conveyed a sense of very fluid boundaries; that knowledge is highly contested; and that nothing can be taken for granted. She thinks that we are going through as significant a shift in law and legal thinking now as we did 20 years ago with the introduction of the Constitution. She views law as both a narrow, bounded discipline and something that is part of much broader social system. She sees the blurring between the legal and the political as a recent shift that is both exciting but disconcerting. She feels that “critique used to be very liberal, pre- Constitution, but it is now much more than that –liberalism itself is under question”.

P2 was quite offended by claim, in the title of the research, that there is a perception that law students cannot write – “it jumped out at me” – and she asserted strongly that this was neither true nor fair. “I don’t agree that law students can’t write” although she agreed that there are “a very small number of students who are completely out of their depth, who don’t have any real writing skills in English”.

P2 described her subject, jurisprudence, as inter-disciplinary, and so offering a broader scope in writing. Good legal writing in jurisprudence, she explains is “the same as a good philosophy or political science essay; the content is just different”. When talking about students’ writing, she talked far more about ideas, making an argument, effort as things to be recognised. Also she talked far more about intellectual endeavor and voice – and clearly rewards this, even if ‘writing’ itself is poor. What is important in writing is argument and ethics (ie no plagiarism / acknowledging sources). However, she described legal writing in other subjects as being quite different: it is about “applying legal proposition to facts, finding out what the law is, not what the law ought to be. The student has to get it right”.

**Participant Three (P3): Constitutional Law**

***“If you don’t know stuff, you’re of no use to anyone. And pretty phrases just won’t do it”***

*P3, an associate professor, has taught at this law school for over 20 years; and has taught this subject (**Constitutional Law: Bill of Rights**) on and off over this time. She has also practiced as an advocate.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P3 agreed that higher education, universities in particular, are in crisis, but not so much legal education or the law. She feels that “whatever happens, after the ructions we’ll come out doing more or less what we’ve always done”. P3 described legal education as closer to the sciences than humanities – “it’s got more clarity on what it’s doing and what it’s supposed to be doing than a lot of other fields.” She also feels that much of the criticism (of law and legal education) is rhetoric; and that she “will need far more cogent argument to persuade me that things need to change”. P3 thinks doing a first degree before a LLB is “infinitely superior” but also says that there is no reason why one can’t learn to be a lawyer in four years – “being a lawyer is not that elite”.

She described contestations about legal knowledge as "marginal – I'm yet to see anything cogent". With regards to her own subject, she agrees that there is contestation about the interpretation of the Bill of Rights, but the foundation (of the Constitution as ultimate law) is largely uncontested. P3 sees a role for philosophy and social context, but does not see it as law / legal knowledge unless it is incorporated into the law by court decisions. In that sense, P3 regards legal knowledge as having strong and necessary boundaries. P3 sees the distinction between public and private law as still being important. Although aspects of public law have been incorporated into private law subjects (like Property) P3 views holding the private law core as 'sacred' – these are the real skills that students need. So preparing for practice, and what counts as legal knowledge in practice, is central for her. She described private law as being "like learning to do a puzzle – if you don't know all the pieces of the puzzle, or if you can't put them all together - it's just hopeless". She commented that public law is more about "deep moral values" and suggested that students "can get by on more common sense understanding of the law or legal issues".

P3 suggested that legal writing "could be a whole lot of things" and views lack of conceptual depth as the real issue in writing: "depth of analysis; looking at facts really carefully; looking at the law really carefully, and putting it together". Knowing what the courts have accepted as law, and applying this, is key. P3 is not really interested in critique or "pretty phrases". She explained that a lot of critical discussion of law and judgments may be done in class, but she expects students to understand that none of this is relevant when problem solving – they can mention it briefly (although they don't have to) but must only draw on law as decided on by Courts.

**Participant Four (P4): Intellectual Property**

***"Good writing won't get you far; what will get you far will be your ability to identify issues...You come across another student who can barely construct a sentence but hell no they've got it"***

*P4, a senior lecturer, has been at this law school for 3 years; and has taught this subject (**Intellectual Property**) for four years prior to this, at another South African university.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

This participant perceives legal education to be both in flux and in crisis, but identified the root cause of this as being either in students, or in the university funding model. She said "the key difference is in expectations: these students are here for marks; we were there to learn to be lawyers". She feels that the approach to learning is very different – "we were much more interactive and prepared for class". Classes are much bigger, so students read and write less. "It's because of these kinds of lawyers that we have, it is in crisis." Regarding the 4 year LLB, P4 doesn't think we can sustain 2 degrees, for funding reasons. But she sees the 4 year degree as being very narrow. P4 suggested that a solution could be to have a 5 year LLB, which includes legal practicals / internships during the degree.

With regards to legal knowledge, P4 feels there is no contestation about the knowledge base in her subject: "it is clear and uncontested". However, she described how students raise the question of incorporation of traditional knowledge but says that "there is no room for it in IP". She explained this as follows: "where they fail is that IP falls under private law… it is about rights... traditional knowledge is passed from generation to generation… it cannot be

IP”. She further elaborated that “I tell them, ‘keep on protecting your traditional knowledge in the ways that you have been doing it. Don’t try to push it under the mainstream IP because it won’t pass’.”

P4 believes different institutions lead to different understanding of legal writing, so accepts colleagues will have different views. She was annoyed by the mechanical application of formats taught in first year. She argued that an answer must “flow well’ – if you use a format it doesn’t enable you to think.” P4 believes that good writing and legal writing are different. She explained that “good writing won’t get you far. Your ability to identify legal issues is what gets you far”. She commented that students write well (in the general sense) but are poor legal writers - “they just waffle”.

**Participant Five (P5): Civil Procedure**

***“Can you teach that to someone? As I said, you can take a horse to the water, you can’t make him drink. That’s the reality. The drinking part is that part: school, culture, family life, that’s what makes you drink. You must be a literate person as opposed to an ignorant person”***

*P5, an associate professor, has taught at this law school for 12 years, and taught this subject (**Civil Procedure**) for all 12. She previously worked as an attorney (litigator) for many years.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P5 agreed that legal education is in a state of flux, largely as it is now a first degree (she thinks it should still be a second degree.) She described the LLB as being “completely different” from when she was a student. She attributed this to class sizes being much bigger now; that the level of teaching and exams was much higher then; that students were expected to read and prepare and they did. She also suggested that the bridge from school to university then was much smaller.

P5 described procedural law as being “entirely colonial” but explained that “there’s nothing to replace it with, so decolonising debates do not apply”. She added that “to replace it would result in chaos” (although she also described court procedures as already being “in chaos”). P5 claimed that there was little contestation about procedural law – “it’s pretty much given” – and added that the “dispute is not over the tools. There’s no argument as to what the rules are”. She explained that there can be some confusion in interpretation if a rule or act is badly written, and that any debates are “about costs, and the implications of these for access to justice”.

P5 suggested that students either arrived at university with the ability (instilled by community, family and school) to succeed - and write -as a lawyer, or they didn’t. She suggested that not much can be done to teach legal writing to those who do not arrive with those resources: “you master it by repetitive practice; that has to start early, in school, to read, and write and translate and have a love for language”. She described “two core skills in procedural knowledge: know the law; know how to be able to speak and write in good English”. She regarded coherence as an essential element of good writing in procedural law, but had a very particular understanding of coherence in her subject: “Coherence has three aspects: technical knowledge; a practical component; and a language component”.

**Participant Portraits: Phase two of the research (Interviews with advocates and attorneys):**

**Participant Six (P6): (attorney, advocate and judge) LEAD trainer in trial advocacy and commercial drafting**

***"Practical application is knowledge. Legal knowledge is equivalent to practical application."***

***"I'll tell you why you are getting it wrong. Where it fails is, you are teaching them how to write but you are not teaching them what to write…Writing is about thinking."***

*P6 has worked in the legal profession for over forty years, has been involved in the professional education of candidate attorneys and pupils since 1994, and has trained both for the Bar Council and for LEAD. She currently runs training mostly for qualified attorneys, through LEAD. P6 began her tertiary education at the University of Durban-Westville, a historically black university, at a time when black students required ministerial consent to attend a "white university" She applied, repeatedly, for ministerial consent and transferred to the University of the Witwatersrand at the end of the second year of a BA degree. She completed a BA, LLB HDip (Company Law) and LLM (Property Law) at Wits. Professionally, she completed trial advocacy training with the London Bar, Scottish Bar, the American Institute and in Australia.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P6 agrees, with certainty, with the claim that legal education in South Africa is in crisis, as well as with the claim that "we have LLB graduates today who can't read and write". She further characterises the legal education crisis as one of "relevance" and "literacy skills". She attributes the roots of this crisis to large class sizes; a lack of resources; and the university funding model – "the Law Faculty has become a cash cow for universities…we don't want to throw away the subsidy, come go into law". She views the LLB as a degree that has too many modules that "amount to little vignettes of subjects…they want to cover everything". She further feels that the "biggest challenge" about the poor quality of LLB graduates is the shift in onus from student to lecturer: "when I was at university the onus was on the student to attend lectures, understand the subject, study and pass the exam…It's not the student's responsibility now, it's the lecturer's responsibility. So if the lecturer fails 80% of the class, there's something wrong with the lecturer!" She further claims "I know lecturers all over the country, universities, who pass people – they know they shouldn't pass them!" With regards to the training of advocates and attorneys, she notes a significant shift between her experiences and the training offered now. For attorneys, she observes "we hardly had much training… you learnt it on the job." For advocates, the training programmes "got better recently. It seems to be more structured now and formalised".

P6 views knowledge as being split into two parts: academic knowledge – "the theoretical knowledge, which you must have as a background" – and practical knowledge, or application. She claims that "legal knowledge is equivalent to practical application". Echoing Campbell, she acknowledges the historical differences in how different universities tended to teach legal knowledge, associating the liberal English universities with "understanding and cognitive skills; application" and the Afrikaans universities with "old authority Roman Dutch Law". However, she does not engage with current contestations about what is valued, or "counts" as legal knowledge today, nor does she engage in the decolonisation discussion.

P6 argues passionately that "writing is thinking" – reflecting the revised view. However, she speaks almost as much about law students' lack of "literacy skills" suggesting that she also draws on traditional orientations to writing. She distinguishes between academic writing and legal writing, and believes that the majority of her colleagues would agree. She observes that the nature of legal writing is changing, largely due to the influence of the plain writing movement, although she observes that some older members of the profession resist this. She argues for legal writing that is purpose-driven rather than precedent-based. Finally, she frequently articulates the view that to become better writers, lawyers need to become readers: "I work with the best lawyers around the world, I've had the privilege of working with them. They all have one thing in common: they read a lot. Here, you mention authors and they just look at you…have no idea. Not a clue".

**Participant Seven (P7): (advocate) – teaches legal writing to pupils at one of country's biggest Bars**

***"Legal skills cannot be acquired overnight. So you can't have quick fixes, and that's what people do when they sense a crisis. And that's my problem with looking at it as a crisis".***

***"We start with a problem. Rather than a concept. You know…the problem dictates where we go… So, you know, it's just, what law will assist in this problem? Rather than starting with the law".***

*P7 has worked as an advocate for over eighteen years and been involved in training pupils for twelve of these years. She was originally involved in teaching legal writing and advocacy training for court appearances, but now focuses on the legal writing aspect. She studied a B Proc and LLB through UNISA.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

Although P7 acknowledges that there are deficiencies and "serious problems" with legal education in South Africa, she resists the notion of crisis because "the problem with looking at something as a crisis is you over-react, you try and make short-term gains. Which just makes it worse". She is particularly concerned about LLB graduates' poor research skills and suggests that the improvement she would most like to see in the LLB is that a focus on "proper research skills" and "the practical side of practice" be "put on a par with subjects that focus on knowing the law". Unlike P6, she feels that LLB graduates haven't learned enough. Like P6, P7 notes that pupils' training is much more structured and formalised than it was when she was a pupil; also much longer and "more intense". She comments that there are notable differences in capacity based on which university the student went to; how familiar they are with English; and what the pupil's previous work experience was.

P7 is tentative in her views on legal knowledge, acknowledging that it is likely to be a matter of focus or perspective. She agrees that a practitioner's view on legal knowledge is likely to be different from a legal academic's, and suggests that the key difference is the point of departure: legal academics start with the law, or the legal concept; practitioners start with the problem, or the facts of the case. She describes legal knowledge as being about "the living law… the knowledge of how to practically resolve legal problems" but also as "a wide thing… not only understanding the specific substantive aspects but also how they translate into effective relief". Like P6, she does not engage in critical or decolonial understandings of legal knowledge.

As with her understanding of legal knowledge, P7 offers a nuanced response in explicating her conceptions of legal writing. She acknowledges that it can be both wide – "any written application of legal skills" – and (for legal writing at the Bar) more narrow. She calls this "narrow" writing "forensic writing" that "effectively communicates the client's case". Like P6, she foregrounds the importance of writing for a particular audience and purpose. She also draws on both revised and traditional orientations when talking about writing. P7 agrees that good legal writing draws on many of the same principles as other good writing but that, due to its specialised nature, it also has a number of peculiarities related to purpose. P7 articulates a range of very specific criteria that she draws on to teach legal writing at the Bar.

**Participant Eight (P8) (two advocates) – members of an alternative Bar; teaches advocacy and legal writing to pupils at the Bar.**

***"You know when I go to court and my opponent is any senior white silk…ja…people take it for granted that because we are schooled in South African universities and we can speak English to some extent, they don't realise how hard it is to be smart in a language that's not yours. They don't really understand what it takes me to go to the highest court in the land and try and be eloquent against someone to whom it comes naturally. I have to leave who I am. I have to leave [name] behind in order to excel. I have to think of concepts that don't exist in my life, in my language. And I'm going to be judged on how I express myself in a language that's not part of my upbringing".***

***"I still want to take a matter where I'm going to argue in my own language in the Constitutional Court and see what South Africa will say. Because that is a transformed society, in a meaningful way, when you recognise who I am and I can stand in the highest court in the land and judges who don't understand me, we'll see what they do, they'll get an interpreter, and…and that's why I'm saying, for as long as in your own country your language is not the language of power, is not the language of law, you're not free. Not fully".***

***"Writing itself, even if it's for law, it's not valueless. You know, if you trace the history of advocacy all over the world…let's take the UK…if you go to the UK and watch the advocates in the 19th century, you will see that everything we are taught now was not the case then. Advocates were these flamboyant men, usually, gifted in the use of words of the English language. And so even this idea that when, because we are lawyers we write and speak succinctly and all this, is not valueless, is a product of thinking of particular styles and cultures. Right? So when people say, do this and do this, it's not valueless. If you go to another community, for instance, if you go to a lekgotla in the former Bophuthatswana or Zululand, wherever, and ask them, what is their best way of persuading a chief about a case? They will tell you something completely different in that the man who stands up to regurgitate the idioms, the expressions, will win".***

*P8 has practised as an advocate for 17 years and has been involved in teaching and mentoring pupils since she joined the Bar. She has been an examiner for the Bar examination in legal writing for five years. Before being an advocate, P8 lectured Political Science at NNMU and before that was a high school History and English teacher. P8 obtained her BA and LLB through the University of the Witwatersrand; a Master's degree in Politics from the University of Pretoria, and her Teacher's Diploma from Indumiso College in Pietermaritzburg.*

*The second advocate has practised as an advocate for 23 years and been involved in teaching pupils for 15 years. She enrolled for the advocacy training programme, went through the 'train the trainer' programme, and then became a trainer herself. She obtained her BA LLB degree through the University of the Witwatersrand.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P8 problematizes the concept of transformation (of education or any part of society) and advocates for an authentically decolonised Bar. She explains this as follows:

> "Because you're trying to turn things that just culturally were not designed for what you want. And so you're going to have endless fights over things that you actually can't change. And we thought it's the same reason we formed this group. We formed this group ourselves. Because we thought, well, if we have new ways of seeing things and then things we want to do, create a structure that lives those values, a structure in which those values and things you think you want to introduce are a lived reality of that place. Stop telling other structures to become what you want. Try and demonstrate by creating that lived reality".

She also problematizes what she sees as the voluntary, ad-hoc nature of the pupillage programmes offered at the different Bars around South Africa and explains that the new pan-African Bar will have a formal school that undertakes the training of pupils more systematically.

With regards to the four-year LLB, P8 describes how she resisted its introduction, and that she is in firm support of a general first degree, and for the LLB to be offered as a second degree. This is related to her belief that university education is no longer about knowledge, it is about a bureaucracy remaining financially viable, and students whose main aim is to pass, and not to become educated. Like P7, however, P8 resists the notion of crisis, if applied only to Law, as she sees it as a problem in all the professional degrees.

P8 offers both what she terms a narrow and a broad view on legal knowledge. The narrow view is that legal knowledge is understanding the fundamentals of South African law. Her broad view incorporates a philosophical understanding of law being about people, and the legal systems of different people. She suggests that being able to critique the law, as well as "swallowing" it, is part of legal knowledge, reflecting a general-constructivist orientation to legal knowledge. Her view on legal knowledge is pluralist, and she views strong boundaries to knowledge as limiting. Her understanding of the state of legal knowledge acknowledges far more contestation and criticality than any of the other advocate participants, and she uses the decolonial lens in a way that the other participants do not.

P8 simultaneously describes the kind of legal writing valued at the Bar, and challenges this kind of writing, using the argument that no writing, or expectations about writing, are "valueless". As an example, she contrasts the often cited legal requirements of brevity and precision with what is valued in a traditional Zulu legal context – where brevity is not valued at all, and where idiom and culturally valued expressions of respect, are. P8 views language both as a means of communication and a "carrier of culture". As such, she is a passionate advocate for advancing multi-lingualism in Law, both in court papers and in court proceedings. She speaks eloquently, as seen in the quotations above, about the effect of having to operate constantly in a language that is not one's own, and the impact this has on identity. She also reflects on how, by acquiring "skills" valued in the profession, other types of writing, that she previously felt competent in, have "died". However, she feels strongly that an attribute of legal writing – being evidence-led – is something that other kinds of writing could benefit from.

**Participant Nine (P9): (attorney; works for social justice legal NGO); in charge of training programme for CAs who work for the NGO)**

**On legal knowledge: "*We're still trying to develop an institutional position, because people have different positions. I don't think that everyone will agree entirely, so that's why we're running a series of conversations internally for us to reach an institutional position"***

**On legal education: *"Looking at the graduates coming out, I think they're more knowledgeable… I really get surprised at how much first years know"***

**On legal writing: *"I think it depends on the role that you play. There shouldn't be a distinction [between good writing in general and good legal writing] because the difference is just the context. What is good? Is it accessible? Is it easy to understand? Can you give it to anyone who's not necessarily part of that community and would they understand it?"***

*P9 is a young attorney, who was admitted three years ago. She has been a mentor for CAs at her organisation for three years and has just taken over the running of the training programme for CAs at her institution. She has also done some lecturing for LLB students at a local university. She studied at the University of the Witwatersrand, both LLB and LLM, and has completed several LEAD courses.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

Overall, P9 had a largely positive view of legal education and legal writing in South Africa. She felt that students and graduates of today were "smart" and "knew more" than she did at the same age and that an improved curriculum, both at basic education and at university level, may have contributed to that. She also had a positive view of the media's impact on students' general knowledge and overall knowledge of the law and the role that it plays in society. Although she acknowledged that legal education was, in some ways, in flux, she rejected the notion of crisis.

P9's conception of legal knowledge was largely social realist: she was accepting of the boundaries of legal knowledge and the Constitutional framework, but sought ways to revise and extend legal knowledge within this framework. In this way, she saw legal knowledge as evolving and developing, and a powerful means to address social injustice. Although she recognised contestations about legal knowledge, she was hopeful that series of reflective conversations could lead to shared positions on controversial aspects of knowledge.

With regards to legal writing, P9 clearly viewed it as something separate from the underlying knowledge, analysis and argument. When speaking in general terms, she largely used traditional conceptions such as syntax, grammar, spelling and editing to talk about writing. When referring to a good example of writing, however, she extended her repertoire of criteria to include structure, clarity and tone, as well as the traditional criteria of grammar and good editing.

**Participant Ten (P10): (attorney; runs own firm; trains for LEAD, SASETA and several large firms)**

***"I just thought to myself, you've got a degree, you're capped, and you're not able to write a letter. We have failed as a profession"***

***"I think writing… it's the core of why we are what we are as lawyers. And we're not trained for it. I think it will be a major embarrassment for the profession in the future"***

*P10 has been an admitted attorney for twenty years, and has been training for eighteen years, at LEAD, SASETA and other private institutions. She has trained CAs at a range of big law firms, as well as at her own, smaller firm. She has a BProc and LLB degree from UKZN, and an Accounting degree from Unisa. She has two Master's degrees from Unisa, in Accounting for Public Entities and in Governance and Risk.*

***Snapshot of views on legal education, legal knowledge and legal writing:***

P10 was extremely critical about the current state of legal education, both at university and in the profession. She was equally concerned about the lack of capacity, interest, discipline and desire to learn she claimed to see in the majority of students and professionals in training that she worked with. This led to equally negative views on the current state of legal writing amongst students and young professionals. This tended to lead to a series of "war stories" rather than a response to specific questions asked. Although attempts were made to redirect and repeat questions, it was not always possible to get answers to the questions that the other participants provided.

## APPENDIX 4: ETHICS APPROVAL 2016

**Wits School of Education**

WITS UNIVERSITY

27 St Andrews Road, Parktown, Johannesburg, 2193 Private Bag 3, Wits 2050, South Africa. Tel: +27 11 717-3064 Fax: +27 11 717-3100 E-mail: enquiries@educ.wits.ac.za Website: www.wits.ac.za

07 November 2016

Student Number: 1471086

Protocol Number: 2016ECE056M

Dear Jean Moore

**Application for Ethics Clearance: Master of Education**

Thank you very much for your ethics application. The Ethics Committee in Education of the Faculty of Humanities, acting on behalf of the Senate has considered your application for ethics clearance for your proposal entitled:

**What underlies the assertion that South African law students can't write? An analysis of what it means to write in Law, with particular reference to the Wits School of Law.**

The committee recently met and I am pleased to inform you that **clearance was granted**. However, there were a few small issues which the committee would appreciate you attending to before embarking on your research.

**The following comments were made:**

- Title of research: Capitalization of the word "Law" should be done consistently. Contractions should be avoided in academic writing, for instance, "cannot", rather than "can't" should be used throughout.

- 5.1 under the "student" section "at" should be "and"

- Appendix 5 – “Chose” should be “choose”

Please use the above protocol number in all correspondence to the relevant research parties (schools, parents, learners etc.) and include it in your research report or project on the title page.

**The Protocol Number above should be submitted to the Graduate Studies in Education Committee upon submission of your final research report.**

All the best with your research project.

Yours sincerely,

## APPENDIX 5: LETTERS OF PERMISSION TO THE ACTING HEAD OF SCHOOL; REGISTRAR; AND VICE-CHANCELLOR

The Acting Head of School

[redacted]

7 November 2016

Dear Professor [redacted]

**Permission to conduct research at the [redacted] School of Law**

**(Ethics Protocol Number: 2016ECE056M):**

My name is Jean Moore and I have registered to study for a Masters in Education by Dissertation in the School of Education at the University of the Witwatersrand. I understand that I need to ask for your permission to conduct research at the School of Law. I have also sent a similar letter to [redacted], Registrar of the University, and to the Vice-Chancellor.

I am doing research on "What underlies the assertion that South African law students cannot write? An analysis of what it means to write in Law, with particular reference to one South African law school".

My research involves trying to understand more fully what legal academics understand by the term 'legal writing'. My experience at the Law School, in my work at the Writing Centre, has led me to develop some hunches: firstly, that people mean very different things by this term, although we all assume that we are talking about the same thing. Secondly, it seems to me that beliefs about legal education and what constitutes legal knowledge inform how one sees legal writing.

I would like to conduct in-depth interviews with six lecturers who teach very different types of courses (one that draws more on common law; one that is foundational; one that is much newer; one that is procedural etc) and find out more about their beliefs about legal writing. These interviews will be recorded, transcribed and analysed. The audio-recording is for accurate transcription purposes only, will not be shared with anyone else and will be destroyed once the study is complete.

Students will not be directly involved in the research, although I will ask lecturers to identify some samples of student writing that they believe to be good and/or inadequate. These samples will be drawn from a current semester two assignment. Although the students' identities will be absolutely anonymous to me, I will ask all students affected to complete a consent form. I would like to conduct the interviews between November 2016 and January 2017.

The reason why I have chosen your school is because I believe that the insights gained will deepen the understanding, and hence the work, of the Writing Centre. I also hope that colleagues will be comfortable sharing their insights with me openly, in a way that they might not share with an "outsider". I also hope to use the research findings for possible conference papers and/or journal articles after the dissertation is complete.

The research participants will not be advantaged or disadvantaged in any way. They will be reassured that they can withdraw their permission at any time during this project without any penalty, and their identities will remain anonymous. There are no foreseeable risks in participating in this study. The participants will not be paid for this study.

The names of the research participants will be kept confidential at all times and in all academic writing about the study. Your individual privacy will be maintained in all published and written data resulting from the study. I have not kept the name of the institution anonymous, as this seems an impossible anonymity to protect; the legal writing fraternity is small and they all know that I work at [redacted]. If you prefer, however, for me not to mention my site of study, I will remove the name of the institution from my title, and will not use the name in the study either.

All research data will be destroyed between 3-5 years after completion of the project.

Please let me know if you require any further information. I look forward to your response as soon as is convenient.

Yours sincerely,

Jean Moore

[redacted]

The Registrar

[redacted]

[redacted]

[redacted]

6 November 2016

Dear [redacted]

**<u>Permission to conduct research in the [redacted] School of Law</u>**

**<u>(Ethics Protocol number: 2016ECE056M</u>**

My name is Jean Moore and I have registered to study for a Masters in Education by Dissertation in the School of Education at the University of the Witwatersrand. [redacted]. I have also sent a similar letter to Professor [redacted], the acting Head of the School of Law, and to the Vice-Chancellor. I have applied for and been granted ethics clearance (see protocol number, above.)

I am doing research on the following topic: "What underlies the assertion that South African law students can't write? An analysis of what it means to write in Law, with particular reference to one South African law school".

My research involves trying to understand more fully what legal academics understand by the term 'legal writing'. My experience at [redacted], has led me to develop some hunches: firstly, that people mean very different things by this term, although we all assume that we are talking about the same thing. Secondly, it seems to me that beliefs about legal education and what constitutes legal knowledge inform how one sees legal writing. I would like to conduct five in-depth interviews with six lecturers who teach very different types of courses (one that draws more on common law; one that is foundational; one that is much newer; one that is procedural etc) and find out more about their beliefs about legal writing. These interviews will be recorded, transcribed and analysed. The audio-recording is for accurate transcription purposes only.

I would like to conduct the interviews between November 2016 and January 2017.

Students will not be directly involved in the research, although I will ask lecturers to identify some samples of student writing that they believe to be good and/or inadequate. These samples will be drawn from a current semester two assignment. Although the students' identities will be absolutely anonymous to me, I will ask all students affected to complete a consent form. The lecturers' participation will be voluntary, confidential and anonymous.

The reason why I have chosen the [redacted] School of Law as my site of study is [redacted] I also hope to use the research findings for possible conference papers and/or journal articles after the dissertation is complete.

The research participants will not be advantaged or disadvantaged in any way. They will be reassured that they can withdraw their permission at any time during this project without any penalty, and their identities will remain anonymous. There are no foreseeable risks in participating in this study. The participants will not be paid for this study.

The names of the research participants will be kept confidential at all times and in all academic writing about the study.

All research data will be destroyed between 3-5 years after completion of the project. The audio-recordings will be stored carefully and destroyed as soon as the study is complete.

Please let me know if you require any further information. I look forward to your response as soon as is convenient.

Yours sincerely,

The Vice-Chancellor

[redacted]

[redacted]

[redacted]

6 November 2016

Dear Professor [redacted]

**Permission to conduct research at the [redacted] School of Law**

**(Ethics Protocol Number: 2016ECE056M)**

My name is Jean Moore and I have registered to study for a Masters in Education by Dissertation in the School of Education at the University of the Witwatersrand. [redacted] I understand that you are one of the people I need to contact, for permission to conduct research in [redacted]. I have also sent a similar letter to Professor [redacted], the acting Head of School, and to the Registrar, [redacted] Ethics clearance has been applied for, and granted (see protocol number, above.)

I am doing research on the following topic: "What underlies the assertion that South African law students cannot write? An analysis of what it means to write in Law, with particular reference to one South African law school".

My research involves trying to understand more fully what legal academics understand by the term 'legal writing'. My experience [redacted], has led me to develop some hunches: firstly, that people mean very different things by this term, although we all assume that we are talking about the same thing. Secondly, it seems to me that beliefs about legal education and what constitutes legal knowledge inform how one sees legal writing. I would like to conduct five in-depth interviews with five lecturers who teach very different types of courses (one that draws more on common law; one that is foundational; one that is much newer; one that is procedural etc) and find out more about their beliefs about legal writing.

These interviews will be recorded, transcribed and analysed. The audio-recording is for accurate transcription purposes only. I would like to conduct the interviews between November 2016 and January 2017.

Students will not be directly involved in the research, although I will ask lecturers to identify some samples of student writing that they believe to be good and/or inadequate. These samples will be drawn from a current semester two assignment. Although the students' identities will be absolutely anonymous to me, I will ask all students affected to complete a consent form. The lecturers' participation will be voluntary, confidential and anonymous.

The reason why I have chosen the [redacted] School of Law as my site of study is because [redacted]

The research participants will not be advantaged or disadvantaged in any way. They will be reassured that they can withdraw their permission at any time during this project without any penalty, and their identities will remain anonymous. There are no foreseeable risks in participating in this study. The participants will not be paid for this study.

The names of the research participants will be kept confidential at all times and in all academic writing about the study.

All research data will be destroyed between 3-5 years after completion of the project. The audio-recordings will be stored particularly carefully and destroyed once the study is complete.

Please let me know if you require any further information. I look forward to your response as soon as is convenient.

Yours sincerely,

## APPENDIX 6: PHASE 1: PARTICIPANT INFORMATION SHEET AND CONSENT FORM

### INFORMATION SHEET: ACADEMIC LEGAL EDUCATORS

30 August 2016

Dear ________________________________________________________________

My name is Jean Moore and I am [redacted] I am also completing my Masters by Dissertation in Education, in the School of Education at the University of the Witwatersrand.

I am doing research on: "What underlies the assertion that South African law students can't write? An analysis of what it means to write in Law, with particular reference to [redacted]

I would like to interview a range of lecturers [redacted] of Law about their beliefs about legal writing: what they think is important and what they value in student's writing. I am also investigating the relationship, if any, between conceptions of legal writing, legal education and legal knowledge. For this reason, I hope to speak to lecturers who teach on a range of LLB courses that draw on different knowledge bases. My selection of participants is thus guided by the criterion of the course that you teach. The interviews are semi-structured, and are likely to take between half an hour and 45 minutes.

Although my focus is on lecturers' beliefs, I will be asking you to select some examples of recent student writing, so that we can draw on these as part of the discussion, and you can show me what you mean by 'good' (or inadequate) legal writing. These examples will be chosen by you, from the most recent assignment submission, and the student's identity will remain completely anonymous to me, the researcher. I will prepare and administer the necessary student consent forms.

Would you be prepared to be interviewed? I will be audio-recording these interviews, so that an accurate transcript can be made. This recording will not be used for any other purpose, other than to ensure an accurate transcription of the data. The recordings will be destroyed once the study is complete. I hope to conduct the interviews between November 2016 and January 2017, at a time that is convenient to you. These interviews will be conducted at [redacted] at a venue of your choosing.

To maintain anonymity, I will use a pseudonym, rather than your own name. I will also use codes, instead of course names, so that you cannot be identified through the course that you teach. All information about you will be kept confidential in all my writing about the study. Also, all collected information will be stored safely and destroyed between 3-5 years after I have completed my project.

I have not kept the name of the institution anonymous, as this seems an impossible anonymity to protect; the legal writing fraternity is small and they all know that I work [redacted]. If you prefer, however, for me not to mention my site of study, I will remove the name of the institution from my title, and will not use the name in the study either.

This is an entirely voluntary process and there is no inherent risk of any institutional sanction should you choose not to participate. You will remain at liberty to withdraw from the interview at any point, or indicate that you prefer not to answer any of the questions. If you are prepared to be interviewed, please will you sign the accompanying consent form.

This research may be of personal and professional benefit to me in that I hope that this research will inform and improve the work of [redacted]. I may also use the data for conference papers or journal articles that may arise out of the research findings.

Please feel free to contact me if you have any questions. Thank you

Yours sincerely

[redacted]

## APPENDIX 7: ETHICS APPROVAL 2018

**Wits School of Education**

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

27 St Andrews Road, Parktown, Johannesburg, 2193 • Private Bag 3, Wits 2050, South Africa

Tel: +27 11 717-3221 • Fax: +27 11 717-3009 • E-mail: enquiries@educ.wits.ac.za • Website: www.wits.ac.za

24 October 2018

Student Number:

1471086 Protocol

Number:

2018ECE023D

Dear Jean Moore

### Application for Ethics Clearance: Doctor of Philosophy

Thank you very much for your ethics application. The Ethics Committee in Education of the Faculty of Humanities, acting on behalf of the Senate, has considered your application for ethics clearance for your proposal entitled:

**What counts as legal writing? An analysis of what it means to write in law, with reference to both legal academics and practitioners in South Africa.**

The committee recently met and I am pleased to inform you that clearance was granted. Please use the above protocol number in all correspondence to the relevant research parties (schools, parents, learners etc.) and include it in your research report or project on the title page.

The Protocol Number above should be submitted to the Graduate Studies in Education Committee upon submission of your final research report.

All the best with your research.

Yours sincerely,

MMaleb

Wits School
of Education
011 717-
3416

cc Supervisor - Prof Yael Shalem

## APPENDIX 8: PHASE 2: INFORMATION LETTER TO THE HEAD OF SCHOOL

The Head of School

[redacted]

7 November 2018

Dear Professor [redacted]

**Further development of research conducted at [redacted]**

**(Original Ethics Protocol Number: 2016ECE056M;**

**New Ethics Protocol Number: 2018ECE023D):**

In November 2016, I wrote to you for permission to conduct research [redacted], which comprised in-depth semi-structured interviews with five legal academics. This was for my Masters in Education by Dissertation – entitled *What underlies the assertion that South African law students cannot write? An analysis of what it means to write in Law, with particular reference to one South African law school*. You granted this permission.

My dissertation was submitted in March 2018. Examiners recommended that I extend the work into a PhD, so I am now a registered, part-time PhD student. My revised title for the PhD is *What counts as legal writing? An analysis of what it means to write in Law, with reference to both legal academics and practitioners in South Africa.* I continue to be supervised by Professor Yael Shalem (Wits School of Education) and Professor Tracy-Lyn

Humby (Wits School of Law). I have applied for and been granted ethics clearance for this further research (protocol number above).

The main focus of my further work will be to conduct five comparable interviews with attorneys and advocates who are involved in the legal education of candidate attorneys and pupils, in preparation of their Bar and Board examinations. Their responses will be recorded, transcribed, analysed, and compared to the findings from the first five interviews. The same ethical steps outlined in my original letter to you will be taken, to protect these new participants' confidentiality, and to protect the data generated in the interviews.

This further empirical research will not be [redacted] students be affected by the research. However, as it grows out of initial research conducted at [redacted], I wished to officially inform you of this development (although I know you are aware, from the conversation we had about this earlier this year).

Please let me know if you require any further information.

Yours sincerely

Jean Moore (Ms)

[redacted]

PhD Candidate (Wits School of Education)

Jean.moore@wits.ac.za

[redacted]

[redacted]

# APPENDIX 9: PHASE 2: PARTICIPANT INFORMATION SHEET AND CONSENT FORM

## INFORMATION SHEET: BAR/BOARD LEGAL EDUCATORS

March 2019

Dear ________________________________________________________________

My name is Jean Moore and I am a lecturer at [redacted]. I am also completing my PhD, in the School of Education at the University of the Witwatersrand.

The title of my PhD research is: *What counts as legal writing? An analysis of what it means to write in Law, with reference to both legal academics and practitioners in South Africa* Ethics clearance has been applied for and granted (Protocol number: 2018ECE023D.)

I have interviewed a range of lecturers at [redacted] about their beliefs about legal writing: what they think is important and what they value in student's writing. As part of these interviews, I also investigated the relationship between conceptions of legal writing, legal education and legal knowledge. To further this research, I would like to interview a range of attorneys and advocates who are involved in preparing candidate attorneys and pupils for the Bar and Board exams, or who are involved in training of qualified legal professionals, and ask them a similar set of questions. This letter serves to ask if you would be prepared to be interviewed.

Here is some information to help you to decide: The interview is designed to be in-depth and semi-structured, and so is likely to take between 45 minutes and an hour. If you agree to be interviewed, the interview would take place at a time and place that is most convenient for you. If possible, I would like to conduct the interviews in March to May 2019. If you wish, I could provide you with the interview questions beforehand. I will be audio-recording these interviews, so that an accurate transcript can be made. This recording will not be used for any other purpose, other than to ensure an accurate transcription of the data. The recordings will be destroyed once the study is complete.

I would ask you to select two examples of recent CA / pupil's/ workshop participant's writing, so that we can draw on these as part of the discussion, and you can show me what you mean by ‘good’ (or inadequate) legal writing. These examples would be chosen by you, from a recent assigned task, or examination. The CA’s / pupil’s identity would remain anonymous to me, the researcher.

To protect your anonymity, I would use a pseudonym in the study, rather than your own name. All information about you would be kept confidential in all my writing about the study. Also, all collected information would be stored safely and destroyed between 3-5 years after I have completed my project.

You would remain at liberty to withdraw from the interview at any point, or indicate that you prefer not to answer any of the questions. This research may be of personal and professional benefit to me in that I hope that this research will inform and improve the work of [redacted]. I may also use the data for conference papers or journal articles that may arise out of the research findings.

Please let me know if you are willing to be interviewed, or if you have further questions before you decide. If you are prepared to be interviewed, please will you sign the accompanying consent form.

Thank you very much for considering my request.

Yours sincerely

Jean Moore (Ms)

[redacted]

PhD Candidate (Wits School of Education)

Jean.moore@wits.ac.za

[redacted]

## PARTICIPANTS' CONSENT FORM:

Please fill in and return the reply slip below indicating your willingness to be a participant in my voluntary research project called '*What counts as legal writing? An analysis of what it means to write in Law, with reference to both legal academics and practitioners in South Africa'* (Ethics protocol number: 2018ECE023D.)

I, ____________________________________________ give my consent for the following:

**Circle one**

**Permission to be interviewed**

I would like to be interviewed for this study. YES/NO

I know that I can stop the interview at any time and don't have to answer all the questions asked. YES/NO

**Permission to be audiotaped**

I agree to be audiotaped during the interview. YES/NO

I know that the audiotapes will be used for this project only. YES/NO

**Permission to view documents**

I agree that the samples of CAs' /pupils'/training participants' writing can be viewed. YES/NO

**Informed Consent**

I understand that:

- my name and information will be kept confidential and safe.
- I do not have to answer every question and can withdraw from the study at any time.
- all the data collected during this study will be destroyed within 3-5 years after completion of my project.
- although this data is collected primarily for the purposes of doctoral research, it may also be used for conference papers and/or journal articles that may emerge out of the research.

Sign____________________________________________ Date____________________________