1. A checklist of basic problem-solving technique

Problem solving is about the informed application of method. The table below is a suggested technique, which you might find useful to follow. Another very useful practice is to regularly read the judgments in say the Australian Law Reports. There are many relatively short judgments, and to aim to read one a week (or even a month) is a very useful disciple, and will show you how the judges go about the task of answering legal problems.

<table>
<thead>
<tr>
<th>The process</th>
<th>What each step involves</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Read the problem</td>
<td>Your first read can be quite swift, just to get some sense for the subject-matter (a skim reading)</td>
</tr>
<tr>
<td>2. What is the area of law?</td>
<td>Is it about criminal law, family law, constitutional law, or constitutional law, and family law? Making this decision allows you to put to one side what you know about the law, but will not need to answer this particular problem.</td>
</tr>
<tr>
<td>3. What are the specific rules of the applicable areas/s of law?</td>
<td>This process is vital, and quite time-consuming. BUT, without collecting and understanding the applicable areas of law you cannot expect to answer the problem.</td>
</tr>
<tr>
<td>4. What are the material facts/</td>
<td>What are the facts material to the decisional issues? Some will be clearly material, or immaterial. Others may be possibly material, and you can categorize them as such (in hypothetical legal problems most of the facts you will be given will be material, BUT not say in reality).</td>
</tr>
<tr>
<td>5. What are the specific questions I have to answer?</td>
<td>Make a list (eg, the first question is whether X has any contractual rights; the second question is whether X can sue for damages on the contract; and the third question is how X's damages will be calculated)</td>
</tr>
<tr>
<td>6. Juxtaposition</td>
<td>This final step is to answer the questions you have posed, and to set out that answer in written form. What you must do in juxtaposing is place side by side the information you have collected about the specific rules of the applicable areas/s of law, the material facts, and the questions you have identified. To arrive at an answer you will have to draw on the law and the facts, in the context of the questions (this is the essential intellectual process of problem-solving)</td>
</tr>
<tr>
<td>7. Writing your answer</td>
<td>Your answer should begin, “The first question is whether X has any contractual rights. The answer to this question is (or, there are several potential answers to the question, and the one that is most consistent with the case law/interpretation or legislation is ... (giving reasons)”. NEVER begin your answer with the statement, “The material facts are...”</td>
</tr>
</tbody>
</table>
2. Legal-problem solving strategies and issues

The following paper by Professor Bryan Horrigan explains alternative approaches to basic problem solving techniques, more sophisticated problem-solving strategies, and the application of the latter to public policy problem solving.

Legal Problem-Solving Strategies and Issues/ By Bryan Horrigan, (formerly) Professor, School of Law, University of Canberra, Director, National Centre for Corporate Law and Policy Research, Consultant, Allen Allen and Hemsley

Alternative Legal Problem-Solving Strategies

What are the basic legal problem-solving strategies and what are their strengths and weaknesses? Legal problem-solving must be undertaken in a structured way. Legal problem-solving can be difficult, particularly where a problem concerns a number of issues from a number of areas of law arising from a complicated set of facts. A structured approach to legal problem-solving can help us to analyse the problem, identify all relevant issues, research the law relating to those issues, apply that law to the facts, reach a legal conclusion, identify practical options for a client in light of that conclusion, and make a recommendation. There are a number of legal problem-solving methods available. They all concentrate on the same core items but they have a number of different emphases and elements. They all offer a step-by-step template. Here, I want to propose a new problem-solving strategy (or two) for use in teaching students in jurisprudence and "black letter law" subjects alike, as well as new legal graduates who engage in legal problem-solving in practice. Why is a new strategy needed?

Firstly, most conventional legal problem-solving strategies either assume a liberal or "black letter law" framework or are at least used by teachers and students in that way. I accept that good strategies like HIRAC[1], MEIRAT[2], and SCARP[3] contain the basic structure of legal problem-solving from a litigant-based perspective and that they can be adapted by those willing and capable of theorising about law on different levels of analysis to incorporate policy analysis, critique, and legal reasoning within conventional problem-solving. However, I encounter few students and academics in first-year and later-year law subjects, including legal research and writing subjects, who adapt them in that way. The influence of positivism, strict legalism, and the narrowest forms of "black letter law" mindsets is pervasive and structures the use of these strategies, in almost mechanical and formulaic ways. A fresh start and model are needed.

Secondly, a curious dichotomy has emerged in some quarters between problem-solving for litigant-based purposes and problem-solving for society-based purposes. For example, consider the different structures and elements of HIRAC and MEIRAT, on one hand, and TCAGONARM,[4] on the other. This dichotomy reflects the notion that litigant-based problem-solving (i.e. microscopic problem-solving) is structurally and integrally different from society-based problem-solving (i.e. macroscopic problem-solving).

Here are two new problem-solving models or strategies, one (F²A²ILSA³FE[5]) which is best located within microscopic problem-solving but with emphasis upon theorising and criticism as well as substantive law and its application, and one (PAINFUL[6]) which is applicable to the structure and steps within both microscopic and macroscopic problem-solving and whose reference points and foci can be customised accordingly.
Outlined below are the elements of the following legal problem-solving strategies whose mnemonics are:

**IRAC, HIRAC, ISAACS, MIRAT, SCARP, SCARPY, FAILSAFE, IF SAIL AS OR, ISAACS in SCARPY, and CAGONARM.**

All of the legal problem-solving strategies except CAGONARM broadly follow the structure and elements of **IRAC**.[7]

<table>
<thead>
<tr>
<th>I</th>
<th>Issue</th>
<th>Identify each issue and its sub-issue(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>R</td>
<td>Rule(s)</td>
<td>Research and state the relevant legal rule that relates to each issue or sub-issue</td>
</tr>
<tr>
<td>A</td>
<td>Application</td>
<td>Apply the rule to the relevant facts for each issue or sub-issue</td>
</tr>
<tr>
<td>C</td>
<td>Conclusion</td>
<td>Reach and justify a conclusion on the court’s likely decision on the application of the law to the relevant facts</td>
</tr>
</tbody>
</table>

The main strength of **IRAC** is that it is simple, clear, and structured in a step-by-step way. One weakness is that it presumes that someone using it already knows enough about the relevant facts and the relevant areas of law to identify a specific issue. It does not cover any preceding steps. It is very legalistic in its structure and very rule-orientated. It covers the legal answer without expressly highlighting the client-focused need to develop practical options in light of the legal answer.

While **IRAC** does not expressly include reference to critical analysis and factors other than legal rules in this form, one critical question is whether these important elements can be included within its scope. For example, sometimes things like community standards of “reasonableness” and “policy” considerations must be assessed to establish the content of the applicable rule of law. In addition, development and assessment of practical options can be part of applying the law to the facts.

On a wider level, is there a problem with the **IRAC** strategy or how it is used? As it is a fundamental strategy, the nature, limits, and use of **IRAC** are important. One of the most important questions is whether it is structurally capable of including policy considerations, principles, values, and other things which do not ostensibly seem like rules and therefore superficially look outside the scope of its rule-identification and rule-application steps. Like many things in law and life, the approach to the use of the strategy is as important as its steps. They can be understood and used in a mechanical way or a sophisticated way. The latter incorporates things like the choice of interpretive approach and the reference to non-rule-based factors within the steps of the strategy. At the same time, its heavy rule-oriented focus is apt to mislead some people or at least overemphasise the rule-based aspects of legal interpretation.

An analogy might be helpful here. There are strong links between form and substance in religion and form and substance in law. One of those links involves infantile and mature understanding of the disciplines of religion and law. As children are introduced to Christian religious notions, they understand such concepts as “heaven” and “hell” as physical places, as distinct from states of being in a spiritual sense. They are also introduced to concepts like “God” and “Satan” in a way which portrays those concepts (or entities) as individual beings, as distinct from (in the case of Satan) the notion of evil as an absence of good as a state of being. However, the representation or form of a concept as a model or at a simplistic level should not be confused with its substance and also should not be allowed to cloak its complexity.
Similarly, when first-year law students are introduced to legal problem-solving strategies like **IRAC**, they usually identify strongly with the structured and logical way in which such strategies teach them in a step-by-step way to identify issues, find the relevant rules, apply those rules, and then come to a conclusion. However, it is always wrong to mistake to equate what such strategies reveal about the *structure* of legal problem-solving with an undeveloped view of legal problem-solving that views legal answers as a product of wholly logical application of processes of induction, deduction, and analogy to legal rules as a closed system of rules immune from outside influences and knowable as objectively demonstrable things or constructs unanimously endorsed by all reasonable lawyers as “clearly the rules which govern this situation”. The laughable mechanical approach to legal problem-solving which is typified in narrow forms of strict legalism but not its enlightened forms unfortunately still dominates the mindsets of some professors, judges, law firm partners, and barristers.

**HIRAC** is a modified form of **IRAC** which addresses one of these weaknesses. In particular, its first step focuses on identifying relevant areas of law as a preliminary step towards identifying relevant issues and sub-issues:[8]

<table>
<thead>
<tr>
<th>H</th>
<th>Headings</th>
<th>Construct a heading or legal label for the relevant area(s) of law for each issue or sub-issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Issue</td>
<td>Identify each issue and its sub-issue(s)</td>
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</tr>
</tbody>
</table>

Mr John Pyke from the QUT Law Faculty has developed the mnemonic **ISAAC ISAACS**.[9] A slightly modified version is as follows:[10]

| I | Issue | Identify Issue(s) |
| S | State Law | State the law |
| A | Authorities | Identify Authorities |
| A | Application | Apply the law to the facts |
| C | Conclusion | Reach a Conclusion |
| I | Repeat Issue | Repeat for each Issue |
| S | Synthesise | Synthesise into an answer |

Note that identification and analysis of “policy” issues as well as relevant rules of law can be included within each of the preceding strategies at different stages, particularly the rule-identification and rule-application stages. This is implicit.

Professor John Wade specifically adds policy considerations to other matters within his legal problem-solving method with the mnemonic **MIRAT**:[11]
M Material facts  Identify material or relevant facts - present or absent
I Issues  Identify relevant issues and sub-issue(s) of law and “policy”
R Rule(s)  Research, resources, and rules
A Arguments/application  Arguments for and against and application
T Tentative conclusion  Reach and justify conclusion

Wade’s article contains a useful discussion and illustration of these steps.

Students who encounter some difficulty in starting immediately with identification of issues, particularly if they are unfamiliar with relevant areas of law, might prefer to use alternative legal problem-solving strategies like SCARP, SCARPY, or a slightly modified version of FAILSAFE (i.e. FAILSAFE – Version#2). The mnemonic SCARP[12] involves the following:

S Subject matter  Identify the relevant subject matter and area(s) of law
CA Cause of action and relevant defence(s)  Identify relevant causes of action and appropriate defences, and the associated issues and sub-issues
R Rule(s)  Identify the range of possible remedies or other relief
P Parties  Identify the relevant parties who might sue or be sued or who might otherwise be affected

Note that SCARP does not expressly include reference to researching the law, stating the law, etc. These are implicit but its focus is also different. It is directed more towards analysing the problem and communicating an answer in a client-focused way rather than simply finding and applying the relevant law.

SCARPY is a hybrid version of SCARP developed by me. It identifies more of the elements with which we must deal in legal problem-solving, particularly practical aspects.

S Subject matter  Identify the relevant subject matter and area(s) of law
C Cause of action  Identify relevant causes of action and appropriate defences in particular transactions involving particular parties, and the associated issues and sub-issues
A Analysis  Analyse the law and policy relating to the cause of action
R Remedy  Remedies or solutions
P Practicalities  Practical and tactical considerations
Y Your recommendation  Your recommendation(s) to the client about the best course of action in light of your analysis

Finally, FAILSAFE (Version #2) has been developed to capture in a structured way all of the steps which we must follow in litigant-focused (i.e. microscopic) research and problem-solving, from gathering and analysing facts to evaluating our answer critically:
Fact gathering  
Gather and analyse relevant facts, noting gaps in information

Action analysis  
Analyse various causes of action arising between particular parties

Issue identification  
Identify relevant legal and practical issues and sub-issues

Legal research  
Undertake legal research on relevant law and policy

Statement of law and policy  
State the results of that research, including uncertainties

Application  
Apply that summarised statement of the legal position to the relevant facts

Finding  
Come to a conclusion on the application of the relevant law to each issue and sub-issue in particular fact situations

Evaluation  
Critically evaluate both the law and the practical courses of action available to particular parties in light of your analysis

When attention is turned to the advice-writing steps which flow from these problem-solving strategies, two suggested models are represented by the mnemonics IF SAIL AS OR:

I Instructions from client
F Facts, documents, assumptions, and qualifications
S Short answer
A Action analysis
I Issue-by-issue identification and analysis
L Legal propositions
A Authority, Argument, and Application
S Summary
O Options, tactics, and practicalities
R Recommendation

and ISAACS in SCARPY:

S Subject matter
C Cause of action and defences
A Analysis of relevant law and policy
I Issue (or sub-issue)
  - S State applicable law
  - A Authority for that law
  - A Application to facts
  - C Conclusion on that issue (or sub-issue)
  - S Synthesise and proceed to next issue (or sub-issue)
R Remedies/solutions
P Practical/tactical aspects
Y Your recommendation(s) to the client

Of course, one of the most difficult tasks in legal education is to relate these strategies to a deeper understanding of law which conceives of legal interpretation as a complex interaction between legal text, a body of doctrine about that text, an
interpreter, a context, a choice of interpretative approach, a set of values, a range of arguments, and a process of interpretation. None of this is necessarily captured fully by positing a distinction within contingent boundaries of argument between first-order reasoning about rules and second-order reasoning about more amorphous things like rationales, principles, values, and policies. One necessary task is to help those who use such problem-solving strategies to see that implicit within their rule-identification steps and rule-application steps is a range of complex interpretative elements.

Be aware that all of the preceding legal problem-solving strategies are most suitable for what might be called “micro” problem-solving. This is where lawyers analyse a set of facts, research the relevant law, apply that law, and reach a conclusion and a practical answer in client-focused mode. However, legal analysis, legal research, and legal problem-solving are not confined to this “micro” level. Professor John Wade has identified a different mnemonic for a different level of legal problem-solving. This is concerned with legal problem-solving at what Professor Wade calls the “macro” level of law, policy, and social issues.[13] Examples (by Wade and me) of issues at such a level of analysis include:

1. What are the specific ways in which liberal doctrines manifest themselves in criminal law and contract law?;

2. What are the elements of “policy” analysis in legislative, executive, and judicial decision-making?;

3. What are the categories of individual rights and parliamentary features which legislation must adequately respect to accord with “fundamental legislative principles” consistent with “a parliamentary democracy based on the rule of law” under legislation like the Legislative Standards Act 1992 (Qld)?;

4. What steps can be taken to address the apparent exploitation of lessees in many shopping malls?;

5. To what extent is the corporate veil appropriate in Australian society?;

6. What controls should exist upon the granting of credit and the taking of security by financiers?; and

7. What immigration laws and policies are needed in Australian society in the short and long term?

Professor Wade has developed a mnemonic called CAGONARM for this “macro” level of legal problem-solving involving analysis and research of law, policy, and social issues:[14]

| C | Current situation | What is the current situation? |
| A | Alleged problems  | Identify the alleged problems and deficiencies with the current situation |
| G | Goals           | What are the desirable features of a “good” system? |
| O | Options         | Identify the options for change within an appropriate field of choice |
What does all of this mean? A quick glance through this material should indicate that, even within legal problem-solving, our mode of analysis is not always rule-based; it is not always completely logical; and it cannot always be done in a technical, literalistic way. In addition, even within legal problem-solving, the levels of legal analysis can become complex. At a very basic level, this means that our level of understanding and analysis cannot be confined to reading the text of judgments and legislation. Those self-contained reference points are very useful for problemsolving purposes and still essential to some degree for other purposes, but they are not the sum total of the content or levels of analysis which we must master.

Moreover, we must acknowledge and unpack the narrow assumptions which many of us cling to about the nature of law and legal argument in our areas of interest. When we say that a particular rule of law is X, we are usually making a contingent claim that if you accept A, B, C, and D, then the answer is X. A, B, C, and D could relate to arguments about what is the right rule, what is the right analogy, what is the underlying principle at stake, what are the different applications of that principle, what arguments have more weight and why, and so on. All of those require a focus of critique.

2 Rethinking "Policy" Analysis in Legal Education for the Public and Private Sectors

Good legal education embraces multi-dimensional perspectives on law, policy, values, and their impact. Policy analysis is not confined to politicians and their advisers. Academically, policy analysis is notoriously difficult to define and there is scant literature on policy analysis specifically in relation to law, business, and government in Australia, especially from a multi-disciplinary perspective. In *Marks v GIO*, Kirby J highlighted the importance of construing legislation of a particular political, economic, or social character purposively and with a view to policy analysis of it in a sophisticated and not perfunctory way – none of which is achieved simply by legalistic approaches to statutory interpretation of a kind still favoured in much correspondence and formal opinions by solicitors and barristers.

For lawyers, "policy" is most often encountered in terms of government policy or the "policy" considerations which judges are permitted to consider. A more complete understanding of "policy" dimensions diverges on at least five different levels of analysis, relating to policy’s meaning and application in relation to each of the three arms of government as well as society and the corporate sector.

In the courts, judges sometimes refer to policy considerations in what seems to be an acceptable way, in the course of applying or developing the law incrementally. Yet, judges and commentators also distinguish that permissible reference to "policy" (as non-rule-based standards in law) from impermissible social engineering which is a

<table>
<thead>
<tr>
<th>N</th>
<th>Necessary action</th>
<th>Identify the necessary action to achieve each possible option</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Advantages/disadvantages</td>
<td>Assess the advantages and disadvantages of each possible option</td>
</tr>
<tr>
<td>R</td>
<td>Recommendation</td>
<td>Recommend the least detrimental alternative option</td>
</tr>
<tr>
<td>M</td>
<td>Monitoring implementation</td>
<td>Monitor and measure the effects of the reform once it is implemented on the basis of predefined criteria of “success”</td>
</tr>
</tbody>
</table>
matter of "policy" for governments. These different senses of "policy" must sometimes be distinguished from the senses in which legislators and lawyers discuss the "policy objective" of an Act in statutory interpretation and parliamentary scrutiny of legislation. These senses of "policy" can differ from the various ways in which politicians and their advisers discuss "policy", in terms of "policy goals", "policy outcomes", and other "policy"-based nuances. Finally, all of these senses of "policy" might have nothing in common with policy analysis in the corporate and business sectors, in terms of the impact of regulatory policy, policies of corporate governance, and organisational policy-making and development.[17]

What is the point? An integrated and comprehensive approach to legal education and training in university and non-university environments increasingly requires attention to law and policy. This inclusion of policy must be multi-disciplinary and multi-dimensional in focus, in the sense outlined here. That wider perspective is essential for university courses, consultancy work, corporate training programs, grant-based initiatives, individual scholarship, and much legal work for clients in the public and private sectors. It requires sophisticated attention to legal and policy frameworks and problem-solving templates beyond the simplicity of problem-solving strategies like HIRAC, TCAGONARM and their ilk.


[6] PAINFUL, P²A¹i²N₂F²U²L², PAINFUL², or PAINFUL x 2 is invented by Bryan Horrigan and stands for Problem and Perspective; Area and Action; Issues and Information; Needs and Norms, Standards, and Justifications; Full and Forceful Analysis, Argument, and Application; Understandable Upshot (ie Options, Assessment, and Recommendation); and Levels of Leading-Edge Evaluation. The significance of "PAINFUL" is that it structures an approach to legal problem-solving from both society-focused (ie macroscopic) and litigant-focused perspectives (ie
microscopic). The content of the elements of this problem-solving strategy might vary according to whether macroscopic or microscopic problem-solving is engaged. For example, the issues and information might be totally located within a "black letter law" approach or might embrace a combination of this and wider policy analysis and critique in terms of the kinds of issues and information which are relevant. Similarly, the applicable standards might just be legal rules and doctrines from an area of law (with a minimum of theorising) or might extend beyond this to include policy analysis and comparative evaluation and critique.


[13] Throughout this paper, I use "macro" in slightly different but related ways.
