

The impact of the changing values in society was a theme discussed by I₄, the principal of a girls Years 6-12 private college. She was concerned about the rapidity of values change and the manner in which this was evidenced within the context of the operations of her school. The nature and scope of this change was of concern to her especially in the seeming inability of the written law to:

I₄: ... cope with the exceptions to the law. That is very hard when you have to work on precedent and interpretation of the written word. And the written word was mainly made for a type of society that had strong family values, and in most cases in Australia, strong Christian values. The fact that you have to swear on a Bible is pretty irrelevant when you have an atheist or an agnostic doing it. How can they perjure when they don't believe in the oath? And children will do that - cause parents to lie. (49)

Well let's take legal liability. When a child falls down and hurts herself, twenty years ago the school went to the trouble, rang the parents, perhaps took the child down to the doctor, got some bandages on, and the child was back at school next day with a grazed knee or whatever. Now you're talking about parents refusing to give that. They want it to a specialist. They want X-rays taken. They want the school to pay for that and they want to take you to court. I find this 'self-responsibility' is being removed and 'corporate responsibility' being substituted. And unfortunately, the law is finding itself in the situation of enshrining that right. Somewhere along the line I think it reflects part of what we were talking about with family breakdown. No one is going to be responsible. The whole group, those out there, distant ... (51)

The rapidly changing nature of social values poses a dilemma for the law of a society. There are not only dualistic notions of the written and the unwritten law, but also historical, social, perceptual, procedural, private, and public changes evident in the statements included above.

4.5.5 The Need for a Proactive Education

Two interviewees (I₁₇ and I₆) were particularly interested in role that law plays in our society and the perception of an individual's ability to participate in processes by which law affects people. A key dilemma raised by I₁₇, an education officer with a Queensland legal service, was particularly concerned about people's consciousness of the law and their perceptions of what happens when they are confronted by it. In the following statement, he was articulating his understanding of the dualism between these two factors:

I₁₇: I guess one of my starting points is a recognition that for most people in our society the law is something that happens to them. (269)

It's certainly at a conscious level, most people don't consciously think that the law is theirs or that they can use the law. The law usually confronts us in some way, whether

it's the criminal law or whether it's through a minor thing such as a parking ticket ... (270)

R: It's almost when you confront the boundary of the general community standard then it identifies itself ... (270)

I17: But many people get a negative view of the law. It seems like someone, something or some objectified body like the Government or they or them, they're doing this to me or to us. And they oughtn't do that or whatever the view might be, to us. But I think the lasting impression of the law that I have is that people often experience it as *something being done to them*.

A Years 11 and 12 Legal Studies teacher (I6) in a Queensland secondary school was vocal about the role that education should play within society to raise people's awareness of the law and its impact on them. He expressed concern at the immature and inappropriate relationship between students' education and lifestyle. He perceived education as being a preventative measure especially for students who had been exposed to courses that addressed legal thinking. The following extract is an example of his concerns:

I6: But the problem is with the individuals and the law right now. They go to seek help after they get themselves in trouble. Law should be reminding people of what the issues are. Alerting people to given situations and then people making decisions given that knowledge. But they don't do that. As a result we have all sorts of strange situations in our society at present that shouldn't really develop and people don't *think legally*. They require *legal thinking* once they have got themselves into strife that they should never have got themselves into. That is a problem with the education system. (100)

R: 'Ignorance is no excuse!' the old classic statement. (100)

I6: If you had the issue of thinking legally, then 'ignorance is no excuse' may pass out of our jargon. (100)

R: Because everybody could be informed ... (100)

I6: 'Ignorance is no excuse' usually comes up when people are in trouble and say 'I didn't mean that' or 'I didn't know ...' They should have taken steps to inform themselves. (100)

He was particularly concerned about the right for every individual to be informed and the responsibility of society to inform its members through its formal and informal education systems. This is another expression of *dualism*.

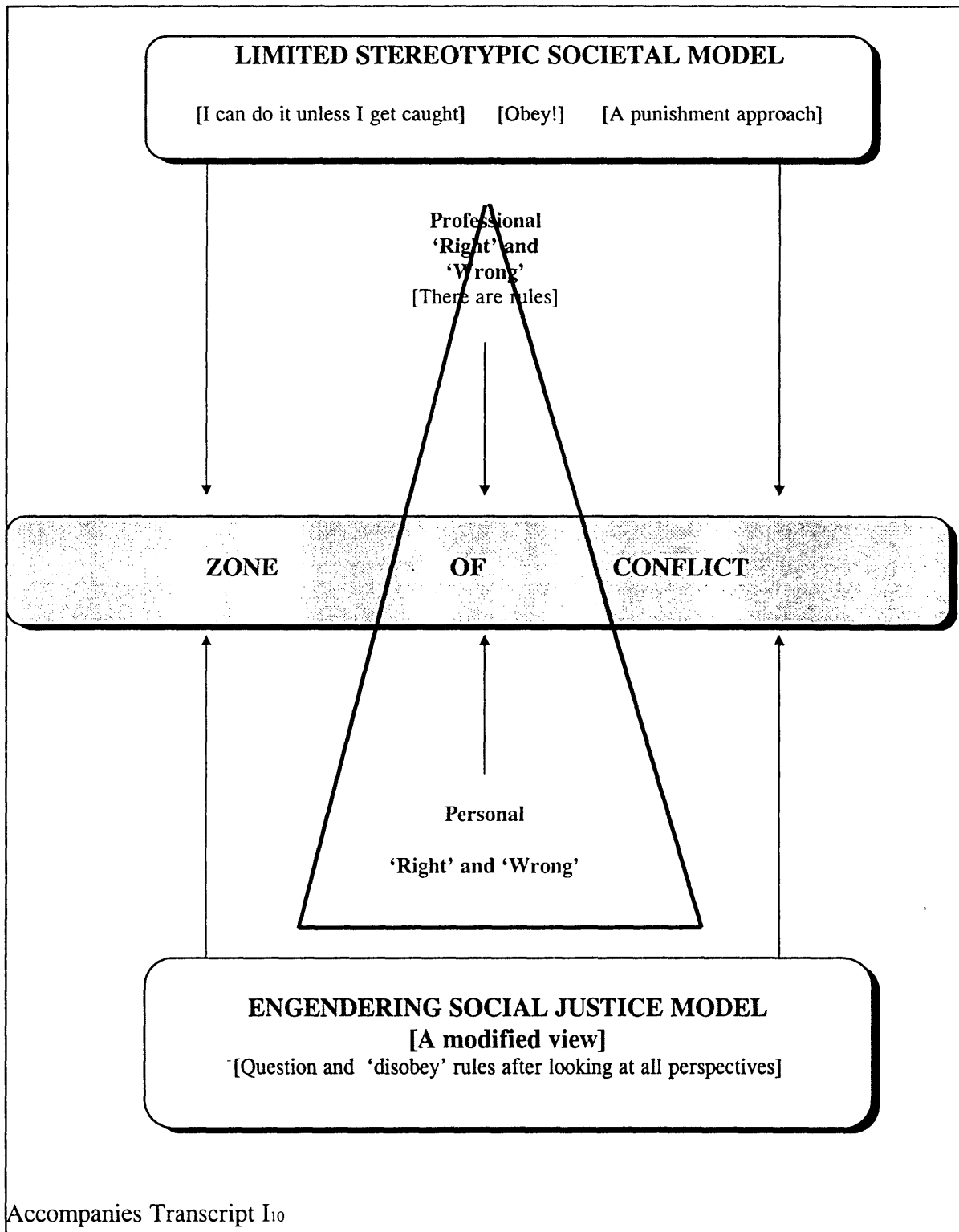
4.5.6 Knowing and Acting

A doctoral student in law (I₁₀) at a Queensland university was particularly vocal about the relationship between thinking and behaviour, particularly when it was related to the education of her child. Her concern, expressed in the following statement, focuses on the need to engender a causal relationship between thinking and behaviour:

I₁₀: That's right! The other situation I find really difficult is 'Do you smack you child and engage in corporal punishment? Do you create obedience through a very strong system of behaviour or do you create obedience through 'Darling do you realise you just hurt your brother? It's not nice to be hit. You shouldn't do that because it is not the right thing to do'. Or do you whack the kid because he just whacked the other kid but he sees you're allowed to whack them because you whacked him for whacking the other kid anyway. They haven't truly engendered a sense of 'That is not the right thing to do'. You've engendered a sense of 'if I do that Mum's going to hit me but when she is not around I can do it because I'm not going to get hit'. (159)

She further articulated concepts and processes in the latter part of her interview/discussion. These are expressed in diagrammatic form, in Figure 4.5.2, which depicts a zone conflict as the interplay between a *Limited Stereotypical Societal Model* and an *Engendering Social Justice Model* in the context of both personal and professional concerns:

Figure 4.5.2 Interviewee I10's view of Engendering Social Justice



Accompanies Transcript I10

This dualism of *knowing and acting* was illustrated by the Years 11 and 12 Legal Studies students at a Queensland secondary school. Their notions of ‘what I think’ and ‘what I do’ seem to connote a lack of correlation which is the fundamental principle of a dualism. The following statement is illustrative of this situation:

SS₁₂: While you were doing it, I’d be thinking ‘I shouldn’t be doing this’. When you got caught it would be like ‘Why me?’. (Laughter). (192-193)

I₁, a Years 11 and 12 Legal Studies teacher at a private co-educational college, explained this dualism in terms of the disparity between *knowing* and *acting*:

I₁: Do I act what I think is right or wrong? It comes down to the age-old thing that even though you think you know something is right or wrong, you don’t necessarily act in accordance with it. You don’t so I think you are more likely to do the act because you just want to do it at the time (Laughter). It is more convenient or whatever and then later you will think, ‘No, that was wrong’. I consider speeding is wrong. It risks myself. It risks other people but I still speed because (a) I think I can get away with it, (b) the consequences are not right there at that time, you know and (c) everyone else is so although you know that is the risk you take it is so easy to just put things aside like that. (12)

If you are doing 100km/hr on the freeway, everything just zooms straight past. I think that is the main problem that even though it is not easy to decide what is right and wrong, it does not in any sense mean that you will act in accordance with that, or when it is you in the situation, you will still think and act in the same way. I think that is one of the perennial problems that society will always have. That’s why the law can never achieve what it really sets out to achieve. (12)

The relationship between *knowing* and *thinking* was addressed by I₈, a Legal Studies lecturer at a Queensland university. In the following extract, he was intent on enabling his students to understand the relationship between knowing how the law works and contextualising it in the appropriate social settings:

I₈: So I suppose I don’t sort of think legally in every situation but to convey to someone how to think legally (133)

I suppose with my students in a sense, they are coming to me thinking in a legal context from the black letter law. Not that that’s a strong approach here in the education processes. I’m trying to get them to think not so legally but to think more in a social context. ‘That’s how, the law is not here to control society but it’s a tool of society’. (133)

The principal (I₄) of a private Years 6-12 girls college was concerned about the amount of litigation in which society was becoming involved, especially in her case in relation to family matters, many of which were affecting the students of her school:

- I₄: Not so very good experiences in a number of areas, defamation, legal liability, discrimination and Family Law Court over issues regarding custody and guardianship of children. Tragically as an institution it is unable to cope with the human reality of each of those cases. We talk about the wisdom of Solomon. I believe all Judges need that in large amounts. (49)

I₄, a deputy director in justice studies at a Queensland university, had the following to say in relation to the *knowing-acting* dualism and judges of Queensland courts. His main concern was that even the judges that he knew personally exhibited traits of this *knowing* and *acting* dualism. While judges often have prided themselves on their knowledge of, and participation in, society, I₄ was quite concerned about the judges' apparent inability to overcome what is an obvious human *knowing* and *acting* dualism:

- I₁₄: They are very intelligent people with razor sharp minds, who act very foolishly in terms of the lack of common sense. There's no view of the wider picture because it is not about a wider picture. It's about scoring points. It's about finding the slightest difference in meaning or interpretation they can put on anything to turn the argument around. (225)

A Master of Law student (I₂₀) at a Queensland university saw the relationship between *knowing* and *acting* in slightly different terms. He was more focused on matters of academic importance yet seemed unable to understand that simple matters such as birth certificate, driver's licence, passport, and the like, had legal implications. This was evidenced by the following conversation:

- I₂₀: Yes I've done a number of those: birth certificate I got that for the license, passport, ... (336)
- R: They're all legal issues, aren't they? (336)
- I₂₀: Yes. They are but they didn't seem to be at the time. I mean it's documentation. I mean they are legal issues but they are pretty *passé*. (336)
- R: Do you mean procedural? (336)
- I₂₀: I mean the only way that I could do it now in so far as what I teach here, it doesn't really bear upon in a practical sense and it is two things. There are other people who have to think about it and there are people who are actually working. I always knew that I could never go into practice because I just didn't have the aptitude for it. (336-337)

Consequently, the concept of *dualism* being addressed here in Section 4.5 can also be applied to the apparent disparity between *knowing* and *acting*. The foregoing discussion has provided

numerous examples of the dilemma faced by people who, though seemingly well-intentioned, seem to be unable to obtain congruence between knowing and acting.

4.5.7 Personal and Professional

Other participants in the research study seemed to apply dualistic perspectives to the relationships between *personal* and *professional* aspects of their lives. I₁₈, the senior partner of a Queensland law firm, was particularly explicit about these personal and professional aspects of his life. He was able also to explain the relevant aspects of the personal and professional dichotomy as well as his perceptions and interests in the interrelationships between these when he was discussing his response to the first of the three research questions posed in this study:

- I₁₈: ... because in my background as a lawyer, I suppose I come at it from two points of view. (i) the personal point of view and (ii) the professional point of view. To a certain extent, both are interrelated in terms of your perceptions of them but if you deal with the personal sort of concept of 'right' and 'wrong' and obviously both are influenced by the other, part of what I do on a day to day basis. On a personal level I think your idea of what's 'right' and 'wrong' is moulded by your view of morality, your view of what you think is fair and just, your knowledge of what the law is, and then your bottom line perception of whether you agree or disagree with what society may view as 'right' or 'wrong'. That doesn't necessarily equate to the same thing by any stretch of the imagination. In terms of that perhaps I am a little bit more cynical than most in terms of the professional side of my life where what is 'right' and 'wrong' there is what the law says is 'right' and 'wrong'. That to me is quite different in a number of respects from what I might personally think is 'right' or 'wrong' or what the average member of society might think is 'right' or 'wrong' because they have never had the legal perception of 'right' or 'wrong' in particular cases pointed out to them. (290)

Another participant was rather more guarded in his views about the interactions between the personal and professional aspects of his life. In fact, I₇, the president of a Queensland professional association of lawyers, chose only to discuss the concepts of 'right' and 'wrong' embodied in the first research question from a professional perspective. He was either unwilling or unprepared to bring personal information to the interview/discussion:

- I₇: Well, I'll answer you as a lawyer rather than personally. (107)
- R: Feel free if you want to add any personal, private, public or professional aspects into this discussion. (107)
- I₇: From the point of view of a lawyer, although it is necessary to take time to determine underlying principles that hopefully everyone can recognise that distinguish 'right' from 'wrong', ultimately what we are concerned with on a mundane day to day basis is to put into action those principles in the millions of different situations in which

disputes can arise between a private person and another private person or between a person and the state. So we don't spend a lot of time on a daily basis as part of our work debating the underlying thesis or what might underlie the distinction between 'right' and 'wrong' although it underlies everything that we do. (107)

Another aspect of the personal and professional dualism was explored by I₂₀, a Master of Law student at a Queensland university. He was concerned about the apparent disparity between those who teach the law and those who practise it. In the following segment, he attempted to deal with the personal and professional issues that were evidence of his dualistic thinking:

R: So how do you resolve this in-depth interrogation in your legal study, yet in a sense, you have little engagement in the issues of life and practice? (336)

I₂₀: It's difficult because I can remember that when I was at University, I totally despised people who were teaching but who had little practice. It is quite disheartening to think that I have become one of them. (336) ...

I think that is probably a bit more general. I think that *legal thinking* implies that legal thinking is done by a legal person, whereas *thinking in legal ways* or *thinking legally*, anybody could do it. For example, the person in the street could *think in legal ways* but it is a lot more generalised. (346)

A director (I₂₇) in legal practice at a Queensland university expressed some personal perspectives about ways in which the professional activities of lawyers have been analysed and categorised. He was interested in the different approaches that lawyers often take when dealing with clients. In the following statement from his transcript of interview/discussion, he provided an overview of his perceptions of the various approaches to lawyer-client relationships:

I₂₇: They talk about *client-focused approaches to problem-solving*. What lawyers do has been subjected to a whole range of analysis as you know. Some people see lawyers as problem-solvers. Some see them as task performers. There's three predominant themes: *problem-solvers*, *task performers* and a *skills approach*. So they would say a lawyer has certain skills and it doesn't matter what the risks, maybe the skill ... (516)

A rather different perspective on this personal-professional dualism was expressed by the manager (I₂₁) of the Queensland branch of an Australian insurance company. He was concerned with the ways in which his personal values, perspectives and ethics related to his professional life. His holistic perspectives enabled him to conceptualise the integration of his personal life and values with his professional practice. He saw this as being related to the principle of fairness that was built on a principle of ethical thinking. Consequently, in the

following segment, he was able to integrate aspects of his personal values with his professional ethics:

I₂₁: But I take the view that at the end of the day 'what is fair?' And that's how our organisation quite frankly runs itself. I mean I'm not suggesting for a moment that the company that I represent in my business life is unethical. In fact, it is quite the contrary. I think it very much reflects the values I have personally. So if I am ever confronted with a case where I think there's a chance where maybe we could get away with something which is not 'right' or legally 'correct', I would usually take the view that let's settle it the correct way up front and get it behind us. (356)

The interrelationships between the personal and professional aspects of life can be categorised into three main groups. These are: (i) that the personal and professional aspects are segmented but unrelated; (ii) that these aspects are segmented but interrelated; or (iii) that these aspects are totally interrelated. For most participants a *dualism* existed between the personal and professional aspects of their lives but interviewee I₂₁ had integrated these aspects of his life in holistic ways.

4.5.8 Contextual and Decontextual Factors

This particular concept was raised by I₁₇, an education officer for a Queensland legal service. He was the only interviewee to raise the question of the degree to which particular contextual factors are taken into account in the resolution of personal or community conflict. The following segment indicated his desire to see the application of legal principles in situations that enable it to be contextualised to specific settings:

I₁₇: ... A lot of things like that where you come at a question from a slightly different values perspective and you can arrive at a very different answer. The legal way seems to be self-fulfilling prophecy in a sense because if you only look at issues in a particular legal context and look at the way those issues are being discussed and resolved in that same legal context in the past, the pressure is to come to a similar decision. (280)

If you take yourself out of that and think 'What was the justification in a values, moral or ethical sense of that decision?' and say 'That's plainly wrong. We'll have to change the law'. (280)

His concern was for these dualistic perspectives to be resolved by the contextualising of the law into particular settings and situations. This would enable a more holistic framework to be taken into account when resolving conflict in society. The framework would relate the legal situation to the setting in which it was evident so that it could be contextualised rather than be

decontextualised. The implication here is that following this analysis, the rules by which conflicts are resolved might need to be changed if justice, equity and holistic outcomes are to be key principles of the resolution processes.

4.5.9 Rights and Obligations

Another dualism that focused on *rights* and *obligations* was evident in the research study was that raised by the Queensland manager (I₂₁) of an Australian insurance company:

- I₂₁: In fact, I hadn't written that down but I had thought about it. Yes often times we hear particularly today, people clamouring for their rights. I often think that maybe we should be thinking more about what our obligations we have. (364)
- R: Yes! (364)
- I₂₁: I think that is often forgotten but then to *think legally* seems to me, maybe that is all about rights. Certainly the law does place some obligations but it certainly codifies some rights. (364)

His concern was for a relative holism and balance between what may be perceived as competing perspectives. He was interested in the resolutions of dualism and his perception, that rights and obligations should be considered as complementary, was a way of being non-dualistic. Consequently, he was able to express the mechanism of *the complementarity of rights and obligations* for overcoming the dualisms to which he had referred.

4.5.10 Individual and Community

As president of a civil liberties group in Queensland, I₂₅ understood the complexities of the interrelationships between an individual's rights and community responsibilities. He was explicit about the need to balance a set of competing demands, especially in a situation where conflict was evident:

- I₂₅: We often talk about the balancing act. Simply it involves the classic conflict between your right to do what you wish to do as an individual that doesn't hurt anyone else against the interests of the community in keeping you alive on a respirator because you were stupid enough not to wear a seat belt or a helmet which we as the community then pick up the tab for your personal freedom to not wear a helmet. (446)
- R: So how do you weigh up this notion of say individual rights and more corporate responsibilities? (447)
- I₂₅: It's a bit difficult at times. I think we just look at it issue by issue and say for instance ... these are all examples ... but the argument over the cameras in the (Queen Street)

Mall. Now that's an individual's right to privacy whilst the community interest is reducing crime in the Mall. Two things, one we say is that it is not necessarily the best method so there is the critical thing. (447)

However, this issue is a very *dualistic* one in that, while an attempt has been made both to identify and to describe the situation in question, no attempt was made to resolve it. I₂₅ had difficulty resolving the tension between these two competing sets of ideas.

4.5.11 Fantasy and Reality

Another dualism was verbalised by I₂₈, an ex-prisoner from Pentridge Gaol. He explored a number of issues related to situations in which he had, in the past, performed certain illegal actions. His focus was on the apparent *fantasy-reality* dualism that to his mind was very evident in criminal circles. In the ensuing discussion, he explored issues related to practical reality and the fantasy world of the criminal's mind:

I₂₈: Yea, I was more in 'Leave my father alone than anything else!' Dad just stood back. He never got even charged. I was the one they sent reinforcements for. Anyway, they took me around and they pinched me for that. I got a fine. It wasn't much you know, just resisting arrest. But I didn't go to prison for it. It was nothin'. That enhanced my bitterness against the Police. So as my life grew, the next thing was I worked in a pub, like I said before. I was a bouncer for 6 odd years. During that time, I didn't like the way that the Police would come into the pub and the publican would look after the Police. (536) ...

R: Does that become fantasy to you? Do you fantasise about what you might do and be able to get away with? (538)

I₂₈: Yea, you always do. When you grow up in this lifestyle, you are always thinkin' of the dollar. On how to make the next dollar without workin' or if you have to work, how to make a lot of money quickly. That's just the way ya are. Now whether it be to make that money to get heroin, that's another driving force altogether. (538)

This is an example of dualistic thinking where the individual is unable to resolve the tension between the alternatives. It becomes an either/or situation with little focus on either the consequences or other alternatives. This becomes non-dualistic when a person commits a criminal act since the 'fantasy', in I₂₈'s terms, then becomes a reality.

4.5.12 The Process of Law

One of the interviewees was particularly interested in various ways of thinking about the operation of law in society. I₁₇, an education officer for a Queensland legal service, in the following discussion explores a number of approaches to thinking about what he termed, *the*

legal process. He was interested in: (i) the trap of *thinking in legal ways*, (ii) the inappropriate applications of precedent, because it sometimes decontextualises the legal problem being addressed from the setting in which it operates, (iii) processes that reduce rather than heighten the legal differences, and (iv) the need to consider patterns, and unique expressions, of phenomena. These are evident in the following extract from his transcript of interview/discussion:

I₁₇: It's a difficult question for me because I have tried not to *think in legal ways*. I think there is a trap in *thinking in legal ways* and that's the trap in legal education. Legal thinking seems to me to rely a lot on analysis of previous interpretations of the law, of earlier versions of the same law and in trying to use that analysis to justify a position in the here and now, whatever that position might be. (274)

So in that sense for something like the law and this concept of 'black' and 'white' that we were talking about before that in one sense pretends to be able to give definitive answers to problems, and so 'This is the right answer', I've always been intrigued the way you can provide a set of lawyers with the same set of so-called facts and say 'Well what's the answer there?' They will come up with any number of answers all of them different. So I suppose some of my ideas about *thinking legally* are *thinking about legal process* and thinking how we do things to ensure that that process works. To make sure that there are at least two points of view being expressed. At least two interpretations being evaluated by someone, whether a judge, or a magistrate, or a jury, or whoever. (274)

Yes! The process sometimes heightens the differences rather than reducing them. I think, we certainly see a lot of that at Legal Aid where people don't necessarily want to not, ... refuse to acknowledge someone else's rights whether that's to property or access to children, or whatever. But sometimes feel that they have to push an extreme argument in order that they be heard. That's where I suppose I have a sense that the Family Law Act despite all its promise, has failed. I think that's largely because it has been taken over by the law. Admittedly it is the law but it has been taken over by a lot of the legal processes that are encouraged in law and doesn't always have a good fit with the kinds of problems it's trying to deal with. (276) ...

But in a way that symbolises *legal thinking* and that reliance on 'Well there's a pattern in all of this. You just have to learn the pattern and you'll come up with the right answers'. I guess that's the big challenge about *thinking legally* because that gets back to the 'gray' areas we were talking about before and all of these issues we've been discussing. We could very easily slip off the edge and go into freefall and have a lot of other ideas about how the laws could be. You know 'What would our society be like if we hadn't had the Magna Carta or something?' And we hadn't had those sorts of values inculcated through the ages. (279)

Consequently, I₁₇ considers the non-dualistic *process of law* as a vehicle or strategy for overcoming, or at least ameliorating, the effects of dualistic thinking. This occurs where processes are put in place to contextualise the problem in question, minimise the differences being voiced, resolve the tensions and promote peace and harmony in society.

4.5.13 Conclusion

This Section 4.5 has explored the concept of *dualism* and used interviewees' discussions about some of the factors that are involved in this. Of particular note are the insights implicit in participants' discussion (such as I₂₁) where dualistic thinking may be viewed as (i) unrelated segments; (ii) segmented but interrelated; or (iii) aspects that are totally interrelated.

Often in an analytical process, it is beneficial to those involved in a particular dispute to consider things dualistically so as to facilitate the investigation of particular facets of the issue in question. However, the disadvantage of this is the perceived difficulty of synthesis which should follow the analysis. It is *dualistic* to view analysis and synthesis as competing processes but it is *non-dualistic* to perceive them as complementary. A key to understanding *dualism* is the ability to view either opposing ideas or tensions within an integratory or non-dualistic framework.

This process is viewed in this section of Chapter 4 as:

**Thinking Legally as a process of
*dealing with dualism.***

4.6 Conception E: Thinking Legally as *personal processing* of contextual and situational data.

General Description:

It is imperative that one is *aware of the processes* (4.6.1) that enable one to develop an understanding of the *big picture* (4.6.2) related to selected legal topics, questions and issues. Many *choices* from selected alternatives have to be decided (4.6.3) as one implements *personal processes* (4.6.4) such as *logically sequenced questions* (4.6.5) as well as *education and training in procedural strategies* (4.6.6). The *development of personal and professional competence* (4.6.7) in one's preferred processes provides the knowledge, skills and abilities for *identifying process difficulties* (4.6.8) that are the subject of legal investigations. However, this is a difficult process and one should *seek professional advice* (4.6.9) as well as *the role of advocacy* (4.6.10) if problems are to be resolved.

If appropriate personal and procedural approaches are used, there should be few legal consequences or continuing implications resulting from a particular case, situation or issue.

Discussion:

4.6.1 Awareness of process

Awareness can be developed in a number of ways. Participants in the research process indicated a number of personal strategies that had been used by them in developing their awareness of the processes of law.

For example, a doctoral student (I₁₀) of law at a Queensland university indicated that personal knowledge and experience could result in either ignorance or awareness:

I₁₀: We're not being aggressive in any sense because we don't think like that because we've been legally trained and we just see this as a legitimate process of dispute resolution. When the neighbours hear that they go: 'You aggressive pig. How dare you! How dare you drag us into a system where we might lose! And even if we don't it's going to cost us money', and so it goes on and on. (168) ...

Yes I think it is a very different concept. So I guess my concern is to take, if it can possibly be done through education or whatever else, to take away the negative overtone of what legal process is in people's minds. It's just like what they do in primary schools now when they try to make kids view the police as nice friendly people who can help you instead of someone to throw you into gaol. It's the same

concept. The legal process is there to help you, to resolve problems, to resolve disputes. It's not there to 'get you'. (168)

Another participant I₁₉, a judge of the Supreme Court of Queensland, suggested that his awareness of legal processes had been developed through both personal and professional training as well as through experience gained on the bench while perceiving what he referred to as 'the consensus view of the thinking society'. In the following statement, selected from the transcript of his interview/discussion, he elaborated on this theme:

I₁₉: Well, when it (legislation) is set by Parliament, we still have to interpret it and we have to, words can have different meanings and different nuances and we're obliged then to ultimately when we are applying these things, it is a matter as of *legal reasoning*. First being educated into the views of the community with respect to these matters and then secondly, trying to apply a reasoning to a particular problem because each of our cases is a particular problem. It's the individual people coming before us with a given set of circumstances, and so each case is a particular one rather than a general one. (316) ...

Then we have to say "Well in this particular case what is 'right' and what is 'wrong' in accordance with the law which is laid down by the Government or by our own decisions?" There is then still a question that remains to be answered depending upon 'right' or 'wrong'. Then our reasoning requires us not to apply our own idiosyncratic views, although we are often helped by that, but also to apply what we perceive objectively the consensus of views of the thinking society. Those people who are not carried along by emotion but who think carefully, rationally and so forth. In effect we try to achieve what we feel even the emotional people in their more rational moments would say "Yes! That's right!". (316)

So it's really a distillation of what we perceive to be the proper views of rational society, or at least the great majority of rational society, and applying these to the particular circumstances. (316)

The principal (I₁₁) of a single sex Years 4-12 private school understood that awareness was a precursor to personal action. In his opinion, one's personal values, cognitive awareness and cognitive experience assisted in the development of 'great respect for the law'. In the following extract, he developed this theme in some detail:

I₁₁: ... One is in the practical experiences of the everyday accounts of what things happened and the other side of it is the study of law because, I mean, that is an experience in itself. (Laughter) It's a study of the formal law and what is the legal process. I think that part of it obviously affects very much what you do because you become aware. The first point of action is awareness and so to study law is to bring yourself very closely into the constraints of 'rightness' and 'wrongness'. So there is a cognitive awareness; a cognitive experience of the law and great respect for the law, I might say. (183)

Another strategy for developing awareness of legal processes was expressed by I₁₃, the deputy principal of a Queensland State secondary school. His approach related to the use of key questions to assist in the reflection on one's experiences. His approach is outlined by an explicit sequence of questions as follows:

- I₁₃: To be reactive and to feel terribly depressed is inappropriate aspects of today's world. In all of that, even though it may be social work of sorts, it still has a legal thread where, to me, people are still thinking about 'What led up to this? What is the concept of justice? What are the circumstances that led to this? Is it equal? Why is it not such? What can you do to do something about it? Can you do anything at all? Do you need to?' (215)

A similar strategy for developing awareness of the legal processes was indicated by a Years 11 and 12 Legal Studies teacher (I₁₅). She placed great dependence on her personal and experiential learning. The situation depicted in the following statements had obviously had a major impact on both her awareness and thinking about legal processes:

- I₁₅: The first one (experience) was a few years ago when I witnessed an assault. It was a very violent assault and I was with another person. It was just us two girls in the car and we thought we should get out to help this person but it was so violent that we thought we might get hurt as well. So we stayed in the car until the guys left on motorcycles. We took down the rego number and descriptions of the offenders then got out and helped the victim. About a year later we were phoned up by the police wanting a statement. We had written down a few notes and kept that because we thought it was so violent that something would come of it. They wanted us to be witnesses in the court case. I really didn't want to. I realised I had to be a witness because I wanted to help the victim but I didn't want to because I was very fearful of the offender that he may retaliate and sort of come back at me. (241-242)

So in the end, when the defence counsel saw our statement, they changed the plea to guilty which meant that we didn't have to go to court and the offenders didn't have to see our faces again. (242)

Other participants, such as a senior lecturer (I₅) in law at a Queensland university, understood the benefits of recreational learning for developing awareness that would greatly assist him in his subsequent formal legal studies. His awareness was heightened, 'if you have your antennas out', by informal personal pursuits which are outlined in the following statement:

- I₅: It's interesting that when I decided I was going to study law, I decided one year when it was just a bit too late to enrol for the law course for that year. But I had made a very definite decision, so in fact I gave up my relatively expensive flat and it was fortuitous Dad was going overseas, I went and lived in his unit rent free so I could save up some money so that I could study law. And I also thought, well I must start preparing myself for this program next semester. So I went to the university and got the course handbook, found that names of the texts for the first year subjects and bought myself particularly the case books. And in the six months or so before I started studying,

spent a bit of my recreation time - it was quite recreational, I really enjoyed it - reading the early chapters of the Torts case book and the Contracts case book. I think I also had the Criminal books. It was the impact of the Torts and Contracts that was particularly strong. (73) ...

Well, I read this before I sat down and studied law and I guess it helped me later. Embodied in that one judgment, it seems to me, if you have your antennas out and you're not just trying to learn a rule but you're reading it as an example of process. Reading the whole sequence of cases in the case books, but particularly in that one judgment, you pick up the notion that law is expected to be about rules, but once a rule has been stated in a precedent, later cases are expected to apply that unless there is something to distinguish it honestly or dishonestly. But at the same time, at least in these cases that get in the case books, the rules are expected to have some correlation with the general ethical rules which the 'Right' thinking members of the human race would expect. (75)

The president (I₂₅) of a civil liberties organisation seemed quite focused not only on the role of personal faith, belief and values in the development of one's awareness but also on what he referred to as 'basic instincts'. In the following extract from his transcript of interview/discussion, he referred to international covenants, good instincts, notions of 'right' and 'wrong', and the need to diverse interpretations of the law to match particular circumstances:

I₂₅: And I think that there is probably not a great number of issues like that but there are certainly some that are so deeply rooted that you start from a faith position and then argue. I think look, even if all the accrued evidence was against me, I would still argue because it is a basic level of faith. It comes down to one of the, ... and a lot of these faith things of course, come from the International Covenants on Civil and Political Rights which is that every person has their right to life and not to have their life arbitrarily taken away from them. (452-453)

(...) talks about 'good legal instincts'. In other words the lawyer might not know the answer, but if he has good instincts about what is 'right' and what is 'wrong' and where you can look for the answer, then he or she may well be as good a lawyer as someone who knows all the answers or think they do. (460)

That (Bromage) I'm sure was a case where (...) 's instincts said 'Well there must be a defence there!' He looked at the law, took it to the tribunal and in fact got a new interpretation of the law that actually had this person found 'Not Guilty'. Whereas as far as we know it had never been done before. (460)

The role of intuition in one's personal awareness was discussed by I₂₆, a lawyer involved in custody and migration matters. She seemed to rely on both common sense and personal judgments while using the fund of legal knowledge, skills and abilities gained through personal experiences with the law. In this extract, she reflects on her experiences:

- I2: ... And you need to think about the consequences you put on them if they have done something wrong you will get the parents of the wrong child abusing you on the phone. So you have to think of those consequences as well and whether you are willing to wear that. Because it seems that when you made a decision for a suspension or and expulsion or something like that then you'll get the parents saying 'What about this student and that student?' Then you say 'But I don't know about that student?' So you have to really think it all the way through. (25) ...

That's right! Not from their viewpoint because I just still get them to come, sit and share with me and sort of say what the problem is. I still keep it very informal that way. But when I go away from that, I know I really have to sit down and sort myself out. Get the facts out. Get everything written down and then look at the whole situation. Look at other students who have been involved in previous similar situations, what did we do for them, to develop the consistency. So I suppose it is one good way to develop the consistency in the school so long as the rest of the staff, the ones who are doing the same sort of job as I do, are doing the same sort of steps. So which then brings it us to, the situation which I don't really like, if they are smoking, this penalty, if they are ... Because I always feel there are other circumstances involved that in one way you can't say it is "black" and "white" though that is what we would like. (26)

- I15: When I think about the (research) question I sort of thought, when I think about those particular issues and what happened I sort of think 'Now I'm more able to look independently at that and not bring my moral values into that particular issue and sort of confuse what my rights are under the law and what I think they should be morally'. (244)

The interrelationships amongst these key ideas identified in the above statements indicate the complexities as well as the holistic perspectives that need to be taken into account when dealing with situations and cases which on the surface might seem to be isolated and unrelated. There are often complex interrelationships, such as those mentioned above, lurking beneath the surface of these uncharted situations. These often become traps for novice and young players.

4.6.3 Making choices

The principal (I11) of a single sex Private Years 4-12 School had some pertinent advice to offer in relation to his dealings with sensitive situations involving complex issues and interrelationships. His following statement indicates a deal of insight that he has gained from personal reflection on issues as he has had to face in his organisation and management of schools. The choices that one makes in relation to the facts of a particular situation to some extent determine the 'success' or otherwise of a particular set of negotiations or difficult situation:

- I11: Today, as Principal, I judge the 'rightness' or 'wrongness' of the case that I am hearing between staff members, students, or who ever. I have to consider the legal

I₂₆: Well it's just a hit and miss thing. Basically if you know how to do research properly then you'll do a good assignment. If you don't, then you don't. (475)

I mean, Ahm! I always thought that most lawyers would say that to *think legally* means to *think analytically* and the learning process of law is meant to teach you how to *think analytically*. Nobody ever actually explains that to you or tells you what analytical thinking means. (475)

Consequently, a range of strategies was suggested by the research participants as being useful, as well as directly related, to the development of their personal *awareness of legal processes*.

4.6.2 Getting the 'big picture'

In the following discussion, I₁, a Years 11 and 12 Legal Studies teacher, expressed concern about the fact that many people seem to become too concerned with the specific details of their particular situation. Consequently, they fail to place these details in an appropriate context or 'big picture'. Her key idea here is that if people have a holistic view of the general focus, context and directions of the legal issues they are addressing, there might be a better chance for them to understand the interrelationships among the various pieces of the puzzle being investigated:

I₁: Yes! I think you do still need the people who are concerned with detail but I think really, in the initial stages anyway, you need big picture people to get the initial direction to the solution. Because if you don't really get that, you never get the direction and you never really come up with a solution. You need the initial direction and then if you hone in on the details of the problem you are going to be better off. (10)

R: Some people though like to start with the detail, the little pieces of facts and information and build a structure. (10)

I₁: Yea! I guess it is 'How can you get a big picture if it is not made up of the smaller pieces?' That has merit. (10)

This concern was also taken up by I₂, the dean of students at a co-educational Years 1-12 Private School and I₁₅, a Years 11 and 12 Legal Studies teacher at a Private Girls Years 6-12 College, who seemed concerned for the relationships between the facts of the case and the overall situation as represented by the facts. The roles of values, rights, morals, and consequences of personal actions were discussed also in the following statements. The impact of consequences, the differing viewpoints, personal reflection on the facts of the case, decision alternatives, and the like, were addressed in their following statements:

implications of the actions within the school for the well-being of my employer; for the well-being of my employees. I have to negotiate between parents and teachers in a mediating role, and similarly between students and teachers where there is a disagreement or even between student and student. We're involved if the police are called in for some case or if there is a reportable incident or ... There is a myriad of issues. Time and time again I think I'm glad I've had at least the opportunity to be aware of some of the things I need to be sensitive to. At least I am conscious of the fact that there is something that I need to take into account even if I don't know the full score. I know I need to find out more about the facts or I know that I must act in a particular way in order to attain a just outcome. (185)

In a similar manner, the principal (I4) of a Girls Years 6-12 Private College voiced her intentions in the following discussion:

- I4: How to think legally is very much how to make appropriate choices. You gather your information together. You've got to know what kinds of information, that's the hard part, then go through the processes of thinking, looking, reviewing, analysing, thinking again and then making a choice on the values. And in my case, it has got to be through the teachings of the New Testament. And if I love one another as myself, and if I look to the Lord my God as my Saviour, that love relationship should give me a good answer. But others would judge it as a wrong answer. (59)

These participants in the research project, in dealing with the legal processes involved with particular situations and scenarios, have paid close attention to the alternatives, choices and consequences of the personal processing of factual and situational data at their disposal.

4.6.4 A personal process

Sections 4.6.4 and 4.6.5 of this chapter deal with two key sets of processes that seem to be employed in dealing with legal problems, issues and situations. Section 4.6.4 focuses on the personal processes used by individuals, while Section 4.6.5 deals with processes that are logically sequenced and implemented.

The following statement, from a group of three Year 12 Legal Studies students at a Queensland State secondary school, indicates that they are developing some awareness of the intricacies and complexities involved in legal and social situations. The transcript of their discussion/interview indicates a naive optimism that is often expressed by novices who are in new situations but who, as yet, do not fully understand the complex phenomena they are encountering:

- SS12: Well before, I didn't know much about the law or anything. I had no idea what was involved or what our laws involved, but now I know a fair amount about what we have

learnt. And you just get more knowledge about society and how it works. If you do something 'wrong', we are learning to think before we do something 'wrong' because you know what will happen. (Laughter). (197)

The dean of students (I₂) at a co-educational Years 1-12 Private College was explicit about the legal and social processes with which she had been exposed through the business dealings of her husband. Her personal processes for resolving conflict such as making sure of the facts of the case, dealing with the whole situation, seeking professional counsel, reviewing the consequences of various courses of action, and the like, are outlined as:

I₂: I think I'd say: make sure you have your facts; that you really look through the whole situation; definitely speak to someone else who has been in that situation; look at the consequences; look at the costs involved; and then make your decision. Some times it is not even worth the costs involved, you know what I mean. Whether is goes to a court case situation or the costs in your own personal life if you have to go to the same church as them or see them as your next door neighbour, is it still worth the price. Do you know what I mean? The bitterness that can build up inside you. Weighing up the costs. (28)

The following statement was made by a Years 11 and 12 Legal Studies teacher (I₁₅) at a private girls Years 6-12 college:

I₁₅: Then I really go through a step by step procedure as to how to work that problem out. Then ... (244)

I would try to apply that to what was happening in that situation. So I've got the law and I know what should be the outcome now. (244)

And then explore the different avenues that might be available. Pick one and if that doesn't work, try another one and just keep going down until you've exhausted all of the different methods that you have identified. (244)

When I *think legally* about something, that's the procedure I go through that. Legally I want a satisfactory outcome, so how do I go about getting a satisfactory outcome from what the issue or problem is? (245)

Here, I₁₅ was endeavouring to detail the processes that she uses when dealing with legal problems and issues. The explicit stages of her processes are evident and seem to have been developed from the experience gained in dealing with practical situations with which she has been involved.

In a similar manner, the president (I₂₅) of a civil liberties organisation detailed the personal decisions made when dealing with particular cases. His decision pathways, such as thinking through the whole situation and the impacts of alternative actions, professional choices,

briefing other professionals and the cost to be incurred, to name but a few, are closely associated with reasoning processes:

R: So how does that process of deciding what approach to run a case, after you've got all the facts and figures and you've done the law research and you know where you're at, work? (460)

I₂₅: Sometimes it is literally sitting down and thinking it through ... (460)

R: The alternatives ... (460)

I₂₅: Yes! (460)

R: So you're deliberately choosing a pathway from the range? (460)

I₂₅: Sometimes and this is one of the great benefits of briefing a counsel, briefing a barrister, because the two of you can then, sometimes even the three of you, you the counsel and the client, but it's a process. Yes! Sometimes you know very clearly what you want to do. I've had success by doing this sort of case in the past this way and I'll run it again this way. Sometimes you actually consciously go through the processes with the client, in fact you often do, and get their consent to do it this way or that way. This will cost you \$X, that will cost you \$Y. This course will have this emotional cost, that will have that emotional cost. This will involve you putting your girlfriend whom you haven't told your wife about, in the witness box and saying 'No! He was fucking me at the time and that's his alibi!' It's going to wreck your relationship with your wife but it's going to stop you going to prison for 20 years. 'No I'm not prepared to do that.' You have to make a decision. (460)

R: Because any course of action has its consequences, doesn't it? (460)

I₂₅: Yes! So that's the reasoning process that you go through. (461)

I₂₇, the director of a legal practice course at a Queensland university, was able to explain the processes used by the best lawyers from his own personal experience. In the following statement, he proposed that the negotiations that lawyers make with their clients to a large extent determine both the personal and the professional decision pathways that will be used in a particular case. The following statement illustrates this:

I₂₇: I don't think it would hurt to say that 'What is it that the best lawyers do?' They dispassionately use facts. They dispassionately establish the facts. They are in an ongoing negotiation with the client about achievable objectives that are mutually agreed based on the emergence of facts as they go through an investigation, sort of thing. That's really the process and I would just sort of describe it as a process that most lawyers go through. This is what law practice is about. Or another way would be to simply say 'There is no one process that lawyers go through. There's no one way to *think legally* because the way people think is this wonderful unique product of everybody's background. There may be elements of the way lawyers go about their work that are similar, but there's no one way'. (526)

I always say to my students 'If I gave three absolutely top lawyers the same problem and then I tracked how they solved that problem, the letters they wrote and so forth, those letters won't be carbon copies of each other. The strategies they employ won't be carbon copies. But all that I can tell you is that you'd get three good jobs done'. (526)

4.6.5 Logically sequenced processes

Any discussion of process is dependent on the factual basis from which one commences an investigation. I₂₇, the director of legal practice course at a Queensland university, had quite a deal to say on this matter. He was particularly interested in the facts of cases, the interview strategies, establishing the *bona fides* of evidence, legal investigations, and the like in the following extract of interview/discussion:

I₂₇: I know what you are talking about. I mean the difference with the law is that it is about facts. You might even call a lawyer a *factologist* or something because what you are dealing with in lots of the areas of the law is 'Well what are the facts?' Now the reality at Law School is you are given the facts'. The real difference in practice is that you don't know the facts and a big part of your job is an investigator of fact, hoping not jumping to logical conclusions that prove to be wrong factually. (521) ...

So when you talk about *thinking legally* the dimension that I think is important is that it is different. Because a lot of life experiences is on impressions and so forth. When you are dealing with the law if you are a good lawyer, you are only making judgments on provable facts. Not even facts that you know to be true in your heart or whatever, but provable facts. A lawyer doesn't assume anything. A lawyer has the facts in front of him before he then jumps. (522)

Thinking legally then to me has a very strong current of factual investigation or establishment and decisions made on facts that can be established in their legal context, namely provable in a court of law or there in a hard copy form or whatever. It's brushing away any strong impressionistic 'It'll be right' hunches or whatever. As a lawyer, it's about cold hard facts. I do think and I get as close to it as it can. Sometimes you can't get the facts that you need but it's about finding those out, then making logical decisions based on those facts. (522)

R: What about the question of 'truth'? Is that your notion of 'What are the facts' because the facts represent the truth or are the facts the truth? (523)

I₂₇: For a professional, the facts are the truth. There's nothing more to it than that I think. You just have to accept that that's it. They may not be the true truth but within the legal arena you have to live with that. If you can't, you shouldn't be practising law. You just have to be prepared to wear these things, take them on the chin and soldier on. (524)

Once the factual basis for a particular course of action has been identified, another key issue in the personal processing of legal situations is a consideration of the options that are available to an individual in a particular set of circumstances. I₃, the president of a professional

association of lawyers in Queensland, not only made particular reference to these options but also considered the related issue of consequences. In the following three excerpts from his verbatim transcript of interview/discussion, options, consequences and his personal questioning strategy were addressed:

Excerpt 1:

I₃: I mean, you've got a situation with clients where you give advice to clients, and your advice to them may well be that you tell them what the options are. You tell them the consequences of those options and some of the options may in fact be illegal. (32)

What you have to do is provide a client with all the information, what is legal, what is illegal and what the consequences are of taking various steps. If the client decides to go a way that is illegal, then again you've got no choice but to withdraw. You simply have to say that 'if you want to do that then you will have to see someone else. I'm not prepared to do it'. (32) ...

Excerpt 2:

It's a question as to 'how do you think legally?' I suppose, if a proposition is put to you your response is to consider what the legal effect is on that proposition. Is there a law that applies to it in the first place? If there's not, is there a practice that applies to it? Is there a procedure that you should follow? That's the only way I can conceive of 'thinking legally'. (36) ...

Excerpt 3:

Well, I've always regarded mathematics as a very sound basis for practising law because in mathematics you have to build a sound structure logically. You go step by step and in dealing with the law you have to go the same way. You have to first of all establish the facts. In litigation it is the facts of 'What happened?' In some commercial transactions it's trying to establish 'What the intention is?' The intention is to achieve a certain result at the end and then you have to build on that to determine how that is to be achieved. 'What are the steps? Who's to do what to achieve that result?' So again you build your structure until you finally are satisfied that you've got all the pieces together and then you put that into a document. Then again you've got to develop that methodically by taking it step by step. Starting with your parties, 'Who is this between?' and then setting out who is to do what progressively through the document. Then if somebody fails to do what they are supposed to do 'What are the consequences? How do we deal with that?' And that goes into the document, and so on. (40)

This notion of a questioning strategy was linked through the application of existing legal rules to the concept of rational thinking developed by I₅, a senior lecturer in a Law Faculty of a Queensland university, when he said:

I₅: Ahm! Inside the idea there would have to be two main concepts with several sub-concepts. The two main concepts would be the application of existing rules and the development of these. The application of existing rules is fairly simple and straight forward and deductive. Anybody who can think rationally can do it. There is an emphasis on thinking rationally. You've got to recognise that there is going to be a

general legal rule about the dispute in negligence or breach of legal contract or a very emotional one, the custody of kids. If they're fighting for the custody of kids - which is something they should not do, they should settle out of court! (81)

In dealing with the concept of a *logical, sequential process*, the research participants used various organisational structures as a basis for their discussion. One of these was formulated by I20, a Master of Law student at a Queensland university who referred to a *rational, logical approach to legal investigations* that included processes such as legal argumentation, procedural thinking, analysis, the questioning process, and strategic thinking. He elaborated on these in the following statements:

R: What is *legal thinking* to you? What's your personal set of concepts, definitions or structure or mental images of it? (344)

I20: The things that I jotted down while I was thinking about these questions were sort of related to a rational, sort of logical approach. It goes back to what I said before and is removed from that moralist point of view but has strong linkages there. It is a rational logical approach to problems previously taken by the Courts and Parliament. So it is pretty clinical from that point of view yet you should also have some sort of healthy respect for what has been told to you. The whole adversarial system is based on challenge so as to establish what are the facts. (344)

So I mean from that point of view it's not accepting everything that you are told, definitely but arguing within the system that you have got. (344)

R: So what about terms like inductive logic, deducting reasoning, procedural thinking, ... what's the relationship between some of these and the things you've just been referring to? (344)

I20: It just depends, because obviously, from my point of view, *procedural thinking* is that the law is a set of procedures and doesn't impact on where I am coming from. Whereas an analytical approach to a whole concept explains where I am coming from. Obviously from a different perspective, it would be different. Primarily you view it from a logical basis but there are obviously logical and illogical components of law. The difficulty is sorting out which is which. So it is approaching it from that logical basis but also having that extra edge of overturning what you disagree with. So the key elements are the questioning process. (344-345) ...

Nothing really. It's almost related to Question 1. I mean 'What seems 'right' and what seems 'wrong'?' If you are questioning something, you are doing it because it obviously seems 'wrong'. Whether you are satisfied with the question and the answer that you get is whether it seems 'right' or 'wrong'. It is almost, I am describing this intuitively but essentially maybe it's because I have been conditioned to *think legally* and it is just second nature to me. (346)

R: Or is there a rational strategy to arrive at intuitive outcomes that either confirms or denies these? (346)

I20: I would agree with that. I wish I had said that. Essentially, you probably get an intuitive feeling about something then you have to approach it in a very rational-logical way, so you would go through all the steps. As I said before, you would need to ask each question and then arrive at the outcome that you want or need. (346)

The chairman of a Queensland 'watchdog' organisation (I₉) referred to this approach as *procedural steps*. By this he meant that one ought to ascertain the key issues, apply key legal principles, and establish appropriate standards of proof. These are illustrated by his following statement:

- I₉: You determine what are the crucial issues. You focus your attention on those and you put aside all else. Then you apply legal principle. Sometimes it is easy with a problem. Then again sometimes it is hard. But then the hardness or the difficulty creeps in in those cases because the complexity of conflict situations in which legal principles apply. It is really hard to find out what really happened. To have a tribunal determine whether the events given by a plaintiff or defendant can be proved. Whether the matter has been established to the requisite standard of credibility on the grounds of probability and so on. There are a lot of procedural steps to be taken before you apply legal reasoning. (149)

In a similar manner, I₆, a Legal Studies teacher in a Queensland State secondary school described his concept of *legal pathways* in the following excerpt from his transcript. His view was that there were alternate courses of action which all seem equal possibilities. However, as one acquires the facts of a case, particular pathways are more profitable to pursue than others:

- I₆: I say, if I give this advice right now what can happen. You don't even actually physically say it to yourself. A person asks you for advice and straight away you know 'these are the steps that I am going to make sure that I am or am not going to go through'. That has helped me to think legally and I don't think anybody can afford not to think legally given the environment in which we live today. (96) ...

It allows you to develop logical pathways. If you think legally, you'll think logically. That's very important. Even people who are educated don't think logically. Then they get themselves into all sorts of strife ... (97)

The senior partner (I₁₈) of a large Brisbane law practice also referred to the *processes of legal analysis*. By this he meant, in the following extract from his transcript, that one identifies the facts and the issues involved with a case, considers legal and wider commercial implications, applies legal principles and precedents, any way one can to best achieve particular results for clients, within the framework of the law:

- I₁₈: Well, it's just part of my training and part of the profession that you have to *think in legal ways*. So now what you do is you identify the issues in any given fact situations referred to you in a professional capacity. You think through the legal implications of that then you look at the wider commercial and client specific needs and what they are trying to achieve. Then you try to work out whether you can do that within the legal framework. So that you have a different approach to how you analyse things. You look in terms of legal rights and entitlements first and then look at how you can best achieve the result that your client is seeking to get within that legal framework. (301)

- R: Are there procedures that you use that are 'rule of thumb' things or quite explicit methods or strategies, or is it a process of analysis? (301)
- I₁₈: It's more like a process of analysis. It's a bit like anything. You know you can rely 9 times out of 10 that your gut reaction will in fact be the correct response. It is normally right when you go through and analyse it and work it out. Sometimes you'll know it's not right or you'll know it's right but you can't exactly say 'why' on the spot. (301)

A judge of the Supreme Court of Queensland (I₁₉), detailed his views on *legal reasoning* in the following transcript quotation. He focused on a logical process where analysis, application of general principles to the facts of a case, and the resolution of intricacies in the law, when he stated:

- I₁₉: The interesting thing was that I had a mathematical mind and I was really good at all the mathematical subjects and physics and things like that. ... But mathematics has been useful in that I have found it has enabled me as a lawyer and particularly a Judge to carry out *legal reasoning* because *legal reasoning* is often a very logical process. (318)
- R: Is this notion of *legal reasoning* to you deductive logic within an analytical framework? (319)
- I₁₉: You have to analyse the things out first and yes, there's a great deal of analysis goes on: analysis of the facts and really a distillation of the general legal principles down to the principle that is applicable to that set of facts. So you have to be doing the two at once. With your left hand, you're ... with a broad knowledge as to the legal question, you're analysing it out to get the essential and relevant facts. Then at the same time with your right hand, you're taking the general legal principles and you're getting or throwing away the stuff that has no relevance to these particular facts. Ultimately you get the legal principles that will marry with these particular facts. You're doing both at the same time to match them, then you bring the legal principle which is a general statement of the law, you've got to bind the legal principle that applies to these particular set of circumstances and marry the two together. (319-320)

And so it's a combination of doing the two. If you don't broadly know what legal principles you're working towards, then you won't know what facts are relevant. Of course, unless you know what the relevant facts are you don't know what legal principles to draw out. So you really have to have, you have to be looking in effect, down on the two when you analyse the two of them out in a certain way trying to find a match between the law on the one hand and the relevant facts on the other so that you can say "Yes that's the law for that particular set of facts and they're the relevant facts for the law!". (320)

Because sometimes you have some difficulty because you can have two different sets of legal principles that might apply to the same facts and situations. (320) ...

Yes, well, what you have to do is do your best. What you do is you try to find the closest legal analogy to it I suppose. If it's an Act of Parliament for example and the Act simply says 'It shall be so and so if so and so', then it either is 'so and so' or it isn't. If the hypothesis in the condition is met, then the first premise applies. But if the condition is not met, then the first premise doesn't apply. So you have nothing. So the Act of Parliament, ... we don't say "Well an Act of Parliament says that if A then B,

but it's not A". We don't say "Well then it's C". We simple say that the Act says it's only B if A occurs'. Now if A isn't there then B doesn't apply and there's nothing you see. (320)

This concept of *legal reasoning* was developed further by I₂₅, the president of a civil liberties organisation. In the following statement, he expressed interest in the processes that lawyers use when leading clients from their first interview to the conclusion of their case. These ranged from interview procedures and composing statements of evidence to applying legal knowledge and case problem-solving, in the following statement:

I₂₅: Right! Having written books on it and lectured on it, what is important in reality is to realise that every single one of those cases that you have read started with someone walking into a solicitor's office and saying (a la 'Donogue and Stevenson') 'I've just drunk this bottle with a snail!' Someone then has to sit down from the start, take a statement, think what the current state of the law is, look it up or whatever and somewhere along the line take a leap of faith which says 'Well we should run this! It's a reasonable case'. So *legal reasoning*, I think comes down to a combination of being able to analyse the facts. Sorry No! one step before that, finding out what the facts are, and you are constantly torn between you can't spend 10 hours there, particularly in private practice. You can't spend 10 hours there dragging out every last little bit. (458)

So, by experience, recognising what are the important facts and that's where books like my book assist people by saying 'Well what is important?' giving them checklists and background. So digging out the facts. Analysing them and saying 'Well what does that reveal in legal terms?' By and large for instance in the criminal law. 'Have you committed an offence?' Going and looking as if you don't already know and by and large, you won't know the current state of the law although you probably have a fair idea of it. So knowing where to go to look for the resources to research what you do know and to check that it hasn't changed and that there isn't some little twist to it that you might be able to exploit. Then in an ethical way, I mean you can't lie to the court. (458-459)

So a client walks in, you have to gather all the facts in, apply your mind to what's relevant in gathering those facts in and then from that apply the relevant law that you have gathered in your content-based experience and/or if you didn't pick up anything useful at Law School, which you probably didn't, but if you did, from there handle your texts, your basic working texts that you go to for assistance. (459)

That's what you are not taught in Law School. That's a process that in a lot of senses is very simple but nobody at Law School ever said to me, they may do it now but they certainly didn't do it then ... (459)

Legal reasoning was described as an *analytical thinking process* by I₂₆, a lawyer specialising in custody and migration matters. Her main focus related to learning from one's professional experience, reflecting on the errors one makes, and developing the ability to think at deeper levels. The following extract illustrates this:

- R: So do you have to arrive at your own analytical process? (475)
- I₂₆: You just sort of arrive at your own analytical process. Yes! I mean, ... (475)
- R: Does that take a lifetime? I definitely takes more than Law School, doesn't it? (475)
- I₂₆: It takes more than Law School. Yea, it's just something, it's a skill which constantly gets honed. As I say, I mean unfortunately you develop it only by stuffing up, basically. Then you look back and think, 'Right, well I really should have been considering that and looking at it from that aspect'. I should have been sorting out those issues and it is just the only way you learn, really. (475) ...

... I guess the learning process, besides the learning process for analytical thinking, is that you keep learning how to go one level deeper. It's very easy to look at things on the surface and you think you're saying 'Do you know why this has happened?' and you think you do. It takes quite a lot of experience and just sheer mistakes and experience to be able to keep going behind the question that you have just asked and the answer you have just been given. That is just sheer hit and miss and experience. I think that is really, ... analytical thinking, I guess, is about knowing when and how to ask 'Why?' and how to work out Why. I think that's what lawyers are meant to do. (477)

Processes such as those outlined in Section 4.6.5 were used by I₁₃, the deputy principal of a Queensland State secondary school when he had taken civil legal action in a particular case involving a community member. His statement on this matter was as follows:

- I₁₃: Exactly! And I think that's benefiting the school. It certainly is benefiting the community because people know that you will take action against that. The Police were quite pleased because it would actually in their point of view be an example of someone who has taken the step instead of ignoring the issue or talking about the issue, then complaining about policing. From a justice point of view, the justice process was followed completely and the person received a minor punishment. But the process to me and the community was just as important as my own personal interest in what followed. (206)

Consequently, it appears, from the various statements made by participants in the research project, that *logically sequenced processes* are vital to the successful factual analysis, planning, strategising, conduct and resolution of a legal situation involving conflict. While there are many variants in the particular processes used by individuals in their practices, logical processes are an important ingredient in both their personal and professional actions as they enable individuals to resolve problems and make decisions in sequenced stages.

4.6.6 Education and training in procedural strategies

Procedural or strategic competence (used and defined here in a non-technical sense), is a quality of life that is developed over time given the nature and scope of one's knowledge and

experiential bases. Foundational abilities must be laid with further extensions of these as one gains greater life experience and increases the quality of one's knowledge.

The principal of a Years 6-12 girls private school (I₄), in reflecting on her own childhood experiences, had the following to say on this matter as she had been taught some valuable lessons by her mother. These included problem analysis, identification of the truth and learning from the experiences even through an investigation of the consequences of one's personal actions:

- I₄: ... She (her mother) always gave time for you to present your circumstances. Because often as a child your circumstances were altered according to what you thought might be the punishment. (Laughter). I think the thing is that we learnt to trust and have faith. And that was in the practical side and 'wrong' was usually looked at from the point of view of Who did I hurt? How did that person feel? and How did I feel after I realised I had hurt a person? So it had a very pleasing effect when we opened up and discussed something that had been done which was 'wrong'. (44)

But also the process by which she punished was very much working through that and then allowing us to take responsibility and correcting that wrong with a lot of help. (44)

In a similar manner, a judge (I₁₉) of the Supreme Court of Queensland gave credence to his academic and practical training that had been developed through his general research and Honours work at a Queensland university. He believed that he had 'picked up' *legal reasoning* as a result of all the thinking associated with university assignments. He concluded:

- I₁₉: Consequently, I picked up the *general legal reasoning*. Doing the general research and the Honours course and writing those papers was very good. Therein is a very interesting and important thing for you to know that the best way for people to understand *legal reasoning* is to do it. There's no substitute for that. Sitting down, listening and being told about *legal reasoning* is of minimal use compared with the advantage of actually doing something. (319) ...

Of course, when one is a young lawyer, it's a bit daunting in a way because there is so much to learn both in the way of *legal reasoning* and in learning what the law is because there is so much of it and in trying, in the difficult task of trying to apply what you know about the law to the facts of a particular case and things like that. (323)

I₁, a Years 11 and 12 Legal Studies teacher, made specific reference to the procedural and strategic training that she had gained through her Law course at a Queensland university. She indicated that:

- I₁: ... It takes a while though to pick up those procedural and problem-solving things. I think that I didn't really .. (pause) I was only just coming to grips to that kind of thing

at the end of two years of my study. I think that in my third year I would probably have been better equipped to study law really but I pulled out before then. When I think back to my first year of studying law, I really had no idea. To a certain extent they tried to teach you but they don't put a lot of emphasis on it (procedural strategies) but it is not that they completely neglect it either. Really I didn't have the thinking processes that I really needed. I think there needs to be more attention given to that but I don't know if you only really get it from being in it. Sort of they try to teach it but to a certain extent you've got to know the content first. (4-5)

On the other hand, another Years 11 and 12 Legal Studies teacher (I₁₅) made specific mention of procedural and strategic learning that she had gained as a result of her practical involvement in the conveyancing of her block of land and commercial dealings with a commercial company over issues related to the Trade Practices Act. She described these experiences as:

I₁₅: I also recently bought a block of land and I did my own conveyancing after finding out the fees that solicitors were going to charge. I have a friend who is a solicitor so I teed him up thinking that if I had a problem, I could go and see him. I approached that, probably with a lot of excitement actually. I was very excited about doing it myself. I had never done it before and I was just about to teach the unit to year 12. So I thought it was a good opportunity for me to understand a lot about the processes. (242) ...

I bought a video camera and it had a fault which was quite a major problem. I went through all that. They exchanged the camera for one which had the same problem. After quite a few months when I got the second one I said, "This is faulty, can I just have my money back? I'm not happy with the situation.". (242-243)

They went through the rigmarole of telling me that "No I was not entitled to it!" I explained to them that I knew my rights under the Trade Practices Act. Then the salesperson said "Oh! I'd better get the manager for this". I think he thought that this was just a young girl who didn't sort of know anything and tried to 'bully' me I guess. (243)

I think the main impact would probably just have been that I grew from it mainly in a sense that it built up my confidence that I knew my rights and my responsibilities and I was not going to sort of let anyone tell me otherwise. Also what I learnt from it. I can carry that on and develop that in the future. (243)

Another avenue for the development of competence in these processes and skills was mentioned by (I₂₆) a lawyer involved in custody and migration matters. She spoke of the need for the development of analytical skills in two specific areas of her professional life. These were: (i) analysing the facts, and (ii) analysing the law:

I₂₆: Ahm! There's sort of two processes in any legal problem. That's *analysing the facts* and then *analysing the law*. They work quite separately. Often they are just as hard. *Analysing the facts* is often far more difficult than *analysing the law*. You can't even begin to do a legal analysis until you've done the *factual analysis*. (479)

The five participants whose statements have been used in this section have explicated some issues associated with the development of these procedural or strategic skills and abilities. Their suggestions indicate the diversity of the inputs that can be made to a person's life as one gains knowledge, skill and resulting personal and professional competence. Obviously, their education and training did not occur in a neat lineal pathway that can be singularly applied to every individual. Their comments and explanations, however, do give an indication of the range and diversity of educational and training activities that are beneficial to the development of these competencies.

4.6.7 Development of personal and professional competence

The experiences involved in the development of one's personal and professional competencies (used here in general rather than technical terms) are both unique to each individual and complex in terms of the scope and sequence of the experiences that develop them. Several of the research study participants were explicit both about factors which had encouraged and those that had hindered the development of their personal and professional competencies. These included (I₂₆), a lawyer involved in custody and migration matters who focused on the value of personal experience, professional knowledge and procedural skills:

I₂₆: Very much so, because I mean until you know the problems that you are dealing with and what you are actually going to have to do, it's very hard to know what skills you need to perform it. (475)

A similar expression on this topic was made by the president (I₂₅) of a Queensland civil liberties organisation who referred to the incidental or non-formal learnings associated with the development of what he called a 'method of analysis'. This related to obtaining the facts, analysing the problem, and applying legal principles and procedures. He expressed this as:

I₂₅: ... So you need to know the context from the start. Then you can start fleshing out the facts. But it's real people with real problems and that's why I think substantially although you need to know content, you need to be able to analyse problems and that is what wasn't taught to me in Law School. I only learnt that by accident and that's what I would like other people to learn if they are going to be effective. (464)

It's a method of analysis that is different from most other analytical methods. It is not being precursored by anything at High School other than (in recent times) Legal Studies. You get straight into university and you are expected to be able to analyse a legal problem with no groundwork at all other than English which might have taught you how to put one word after another. (464)

The chairman (I₁₀) of a Queensland ‘watchdog’ organisation was concerned particularly with the time it took to develop the knowledge, skills and abilities of practitioners. He indicated this concern in the following statement:

I₁₀: *Legal thinking* is the ability to take masses of information, determine what is relevant, work out what the true issues are in relation to the problem, apply the law to the information that is relevant, come to a series of possible outcomes and then start on the best avenues to take from there. That is the classic *legal thinking*. It is a problem-solving approach. (167)

My experience of law students is that it takes years for them to be able to develop that process and it comes to the point that once you develop the process in you it is just like the fact that you have to be male or female. It is just a quality of you. It is a fact of life that you become very boring at parties because you think this way all the time (Laughter). However you always say ‘What are the other possibilities?’. (167)

I₂₀, a Master of Law student at a Queensland university was perhaps the most explicit of the four participants who commented on this topic. In the following statement, he was particularly interested in *a logical-rational approach which is derived through a questioning process*. By this, he meant the process of addressing fundamental questions that represented his process of legal analysis:

R: Do you have any easy guide to that questioning process that has been extrapolated from your experience in relation to how you tend to work in that questioning process? (345)

I₂₀: Whenever I’m looking at legal problems, and this is how I have done it with students as well as when I write my own essays, the questions are fundamental. You take nothing as given so let’s say someone is looking at the Fisheries Act. Then the whole essay is then answering a number of questions. So you ask ‘What is this about?’ It says it is about this ‘Is that really the fact or is it the case?’ So all the time it is challenging what is the accepted or official version through a questioning process. Also that is how I teach with those question as well. ‘What questions should you ask here?’ ‘Can you see such and such?’ ‘Why?’. (345)

I think that might be as much as I can say about that...

Ahm. Pretty much what I said to you I think. It would be to look at a problem, document or anything rationally. Figure out the weak points of it or other things on it, its own agenda, question those points of the agenda so that you can arrive at a conclusion(s) as to its status or what the actual true position is. (347)

R: At what point would you consider alternatives, the impacts or the outcomes of the issues associated with those alternatives. (347)

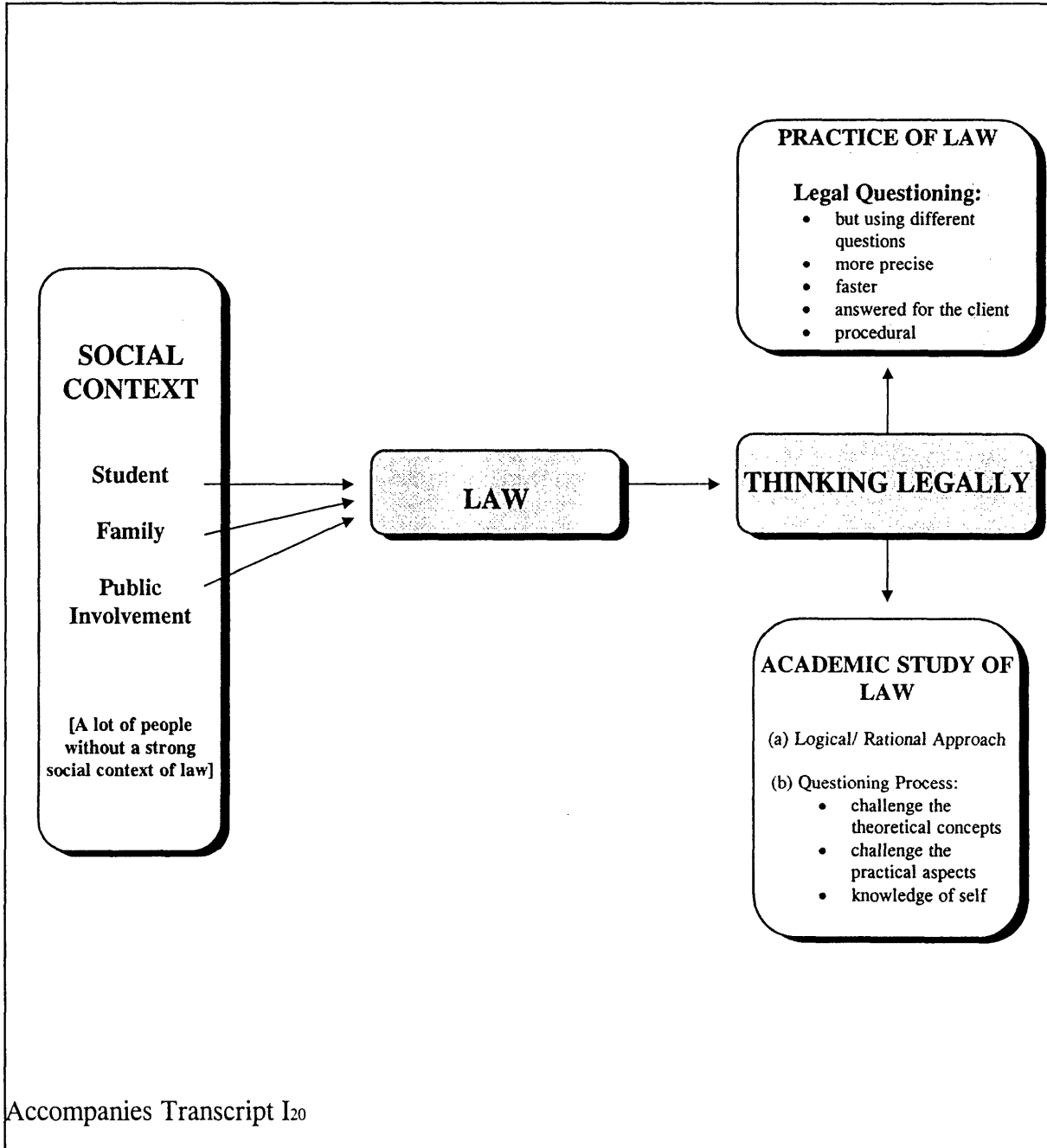
I₂₀: That’s probably something that you get through training. I mean I definitely got most of that just in the last year and a half in my Masters study. I didn’t get it in my undergraduate work. (347) ...

OK! Well what's in the middle (speaking of Figure 4.6.1) - 'Law' I suppose. And then different perspectives would flow from that. There we have *Legal Thinking* or is it *Thinking Legally*? I said they were the same things anyway which I have said involves a *Logical-Rational Approach which is derived through a questioning process*. (351)

These four participants, whose statements have been used in this section, have attempted to explicate their understandings of the topics and issues that are involved in the development of personal and professional competence. However, this is a very complex phenomenon and has not been investigated in detail in the context of this research study.

One schema to illustrate these approaches was developed in diagrammatic form by I₂₀, a Master of Law student at a Queensland university. His was focused particularly on the relationships between issues such as the social context of the problem, the law and thinking legally, especially in its practical and academic forms. His personal schema to describe this relationship is outlined in Figure 4.6.1.

Figure 4.6.1 Interviewee I₂₀'s View of the Relationships among the Law and its Social Context, Practice and Academic Study



4.6.8 Identifying process difficulties

A Years 11 and 12 Legal Studies teacher (I₁) was the only participant in the research study who attempted to address the question of process difficulties in legal situations. She referred to these as 'loop holes' or 'problems':

- I₁: Yea! You never know where a loop hole might be or whether you might be able to make one (laughter). So in a way legal thinking is sort of being able to look at a situation and find where there are holes in it and being able to identify problem areas. Normally the thinking is just looking at it all and that's it in a way. Legal thinking is knowing enough of the law to be able to analyse it, to see where there are problem areas even if you can't always find the answers to those problems. Just being able to see if they are there. (6)

I₁'s insightfulness into these issues made her contributions to the research study quite significant. Her philosophic, procedural and personal knowledge, skills and abilities seem to be highly developed. She was particularly focused on the need for legal practitioners to be trained in the law and its application, as well as on their ability to place the law in its social context within a community. Her formation of the above statement is indicative of her ability to reflect on her training and professional competencies in quality ways.

4.6.9 Seeking professional advice

Some participants in the study were able to articulate their views on this topic. In particular, (I₆) a Years 11 and 12 Legal Studies teacher from a Queensland State secondary school had a clearly stated view on his role in the areas of 'advice giving' and 'advice seeking'. The following statement is an indication of his commitment to both professional ethics and processes. He was adamant that his students obtain professional advice so that they did not inadvertently place themselves in more difficult legal situations:

- I₆: As a result when students come to me and ask questions about they've been caught in this or that situation, straight away you can see the first two or three steps that they probably should do. One of them is naturally, 'go and get some legal advice' or 'don't answer any more questions until you have that person next to you'. (96)

They don't see that and they don't see the consequences of perhaps not following that advice. That's been important to me. It is an absolute given, actually! It has been very useful in my teaching career. (96)

In a very different manner, the director (I₂₇) of a legal practice course at a Queensland university expressed his views on the nature of the lawyer-client relationship. He seems in the

following statement to focus intently on the nature of the client's expectation and the need for the professional lawyer to seek earnestly the advice of the client so as to obtain all the advice, factual data, desired goals, preferred strategies, and the like, in an attempt to ensure that the client's needs are being met:

I27: ... if you are a problem-solver, then do you have a *client-centred approach*? I suppose it can be with skills or tasks or whatever. What is your focus? What are you out to achieve? (516)

So it seems to me from the point of view of the lawyer, one of the, I don't think it necessarily ought to predominate, but one of the things is 'What's my client's concern? What does my client wish to achieve?' Then you ask yourself 'Is there anything in my background because I'm an experienced lawyer that I need to tell them that will moderate the objective that they had in mind?' Then I would say 'Well look, I'm not saying that's not a commendable objective but either the law can't give it to you or have you thought really that that is not what you want? What you really want is this, this and this for these reasons'. So it's a to-ing and fro-ing. It's almost a negotiation between you and your client about the objective and whether you believe it is reasonable and so on. (516-517)

Within the context of the information available to the researcher in this study, only two individuals articulated any views on advice seeking strategies and tactics.

4.6.10 The role of advocacy

A judge (I19) of the Supreme Court of Queensland was quite explicit, in the following statement, about the role of advocacy in the legal processes especially in the presentation of a case in court. It seemed quite obvious to him that any case will finally only be as effective as the quality of its legal thinking, case argumentation and the impact of its presentation:

I19: *Thinking legally* ... I haven't ... thought much about that phrase at all .(325) ...

All right! *Thinking legally* I would think in that sense is giving to understand the way in which those who have to apply the law think. It's not thinking in the way in which they are thinking but understanding the general way in which they think. It doesn't mean that you have to be able to achieve it yourself. I suppose it's a bit like ... Ah ... my tennis. I know how to play a good shot and so forth. If I see somebody playing a good shot, I can recognise it but I can't do it myself, you see. (325) ...

A very good lawyer will present to a Judge a case in the most attractive way but in the end the most important thing for a practising lawyer is not so much to be able to be a good speaker, though it's nice to hear an attractive speaker, but to be able to reason well and to know the law. They usually win their cases by setting out the good clear well-reasoned arguments rather than flowery rhetoric. That's the difference. It's very useful for a lawyer to learn to debate and things like that because that allows them to think on their feet and to explain themselves clearly and well. You need not only to be able to work out a good legal conclusion but you've got to be able to explain it clearly as well. (327-328)

Well, but the fundamental thing of course is to be able to do the reasoning and to see the good arguments of the case. (328)

This statement highlights the need for a fundamental compatibility between the quality of the legal thinking that has been invested in the particular case and the strategies used finally to present the case to the authorities or the court involved in its adjudication. This compatibility should result in a synergy between the legal thinking that is put into a particular case and the presentation, through argumentation, of its outcomes. The presentation would seem to make as important a contribution to the final outcome as the quality of the legal thinking and processing that has been implemented in the case's preparation.

4.6.11 Conclusion

In this section of Chapter 4, key factors that contribute to an overall understanding of the *personal processes* that are involved in *thinking legally* have been identified, structured and sequenced. A wide range of participant data has been used to outline, define, structure and give example and meaning to these processes. This has enabled the nature and scope of the conception to be explained as:

Thinking Legally as *personal processing of contextual and situational data*

I₁₈, the senior partner of a large Brisbane legal practice provided a summary of the perspectives raised in relation to this conception when he made the following statement during his interview/discussion. These key issues included (i) identifying the issues, (ii) applying legal concepts, rules and procedures, and (iii) the determination of parties' rights:

I₁₈: ... It means isolating the issues and then applying the legal concepts and legal framework to the determination of the parties' legal rights. So that is what I consider *thinking legally* means. (303)

So firstly we've got to isolate and analyse the issues ... (303)

R: Obviously that's in the context of the case, isn't it? (303)

I₁₈: Yes in the context of any particular case and that differs from case to case. There's no such thing as the one solution to every piece or dispute or whatever it happens to be. (303)

So you isolate the issues in the particular context. You then identify the relevant legal rules, principles, legislation or whatever it happens to be that you're going to apply to it. And you then come up with what you think ought to be the determination of the legal rights and obligations of those parties. (303)

That's really it. That's what *thinking legally* is about. (304)

4.7 Conception F: Thinking Legally as providing *pathways* for decision-making.

General Description:

The strategies that individuals use to process information about any problem, issue or question are often a complex web of both tactics and procedures. This is especially the case in legal matters where an *analysis of the problem's context* (4.7.1) must be related to the *legislative entitlements* (4.7.2) operating in the society in question. The courts have also made rulings in previous cases so *procedural precedents* (4.7.3) need to be investigated. *Analytical procedures* (4.7.4) then need to be implemented in such a manner that the *identification of alternative strategies* (4.7.5) produce *logical and procedural clarity* (4.7.6). This should enable the participants in the these processes to develop *negotiation and ownership of the problem-solving processes* (4.7.7) while at the same time investigating *procedural consequences* of their proposed courses of action (4.7.8). As a case is resolved, *procedural closure* (4.7.9) should enable the parties to the conflict to settle their differences.

Thinking legally enables one to use diverse yet efficient and productive *pathways* that assist in the successful resolution of conflict through personal decision-making.

Discussion:

4.7.1 *Analysis of a problem's context*

Several participants in this research study were conscious of the need not only to examine the legal problem under consideration but also to consider the context within which the problem was located. Their concern was for a contextualisation of the whole issue within the prevailing social, economic, political, and the like, conditions that were operating at a given time.

ii. a Years 11 and 12 Legal Studies teacher, expressed the view that the law needs to be placed in the wider social, economic, political, and the like, contexts if it is to be both relevant and useful to community members. In the following statement, she outlined her views on this as:

- I1: It depends whether you see *thinking legally* as similar to passing law exams. (Laughter) And I don't think they really necessarily are. I suppose, Ahm!, when it comes to thinking legally, they first of all need to know what the problem is. They need to have a good understanding of the problem and all the issues involved, not just the legal issues but also all the social, economic, political, ... whatever. And they need to consider sort of, a knowledge of the law and how the law works; what kinds of effects the law has in different areas; what happens when the law says you can or can't do something. It's a matter then of trying to marry the two. I suppose it depends on whether you are wanting the law to serve a particular outcome you've got in mind. So then you need to think about what kind of outcome do you want to this problem? Or what are you trying to avoid? Really I think that's where you've got to start. Ahm! Then I suppose it is trying to work out how the law can serve that and whether it is capable of doing that. (8) ...

I think I've kind of rambled a bit. There's the real legal problems, the private and public, the right-wrong, the pragmatic things, the knowledge, the procedural, legal problem-solving, ... things. Can you find procedures to solve the problem? Because if you can't, if you acknowledge it is a problem, ... (15)

As the president of a professional association of lawyers, I3 expressed a more limited view of the need to consider the legal problem or issue within the whole of its context. He was more focused on the financial considerations of a particular case rather than considering all the factors that might affect it. The following statement is illustrative of this:

- R: So in your mind this whole question of thinking legally or legal thinking is revolving around applying principles of the law, applying the procedures as we have developed in history and the whole notion of common law and precedents. (38)
- I3: I think you have got to do more than that. It is not enough to know that you have justification in an Act or in a practice. You really have to think it through in terms of whether it will work. When you look at the cost of it, that it is justified. I mean you can ... (38)

Two other participants, I4, the principal of a Year 6-12 private girls college and I6, a male Year 11 and 12 Legal Studies teacher in a Queensland State secondary school, expressed similar views to I3 but their focus was on the *information base and material resources* that were needed to address a particular problem and the need for individuals experiencing the difficulty to be *aware* that they were already in a legal problem or in a situation that could lead to legal complications. Their statements were:

- I4: The process is the other thing (about thinking legally). You must gather the appropriate range of materials that will give you guidance in making a decision or looking at a problem to get a 'just' decision. Then contextually you have to look at that material within that process within the whole. It is very easy to make a snap decision which you will pay dearly for later. (55)

and

- I₆: So that to me is *thinking legally* and it is to me, ... and I think the majority of people in ordinary situations associated with law, is related to a problem. And either they're already in the problem or they are going to enter an activity which could lead to problems. So therefore they've got to be able to think it through. And even for someone like social welfare workers, *thinking legally* is they're operating with clients and those clients may be confronted by the legal profession so (i) they've got to be able to recognise a legal problem, (ii) they've got to be able to tell their clients that they've got a problem, and (iii) they've got to advise their clients of the best ways, persons or institutions to go to, to help them overcome that particular problem. (101)

4.7.2 Legislative entitlements

Participant I₆ expressed concern also about the relationship between the situation in which a person was experiencing a particular legal problem and the government legislation that related to that issue. In the following quotation from his transcript of interview, I₆ made special reference to the Australian Family Law Act. However, this was merely an example from a particular piece of legislation which could then, by analogy, be extended to all individuals who were experiencing legal problems:

- I₆: Yes! And I suppose it might even be reflected in (Lionel) Murphy's Family Law Act by trying to resolve family difficulties with no-fault divorce to take the heat out of the process. But then again, it doesn't always work either as I have seen people involved with that particular piece of legislation. (95)

4.7.3 Procedural precedents

The following two selections of transcript dialogue are illustrative of the importance placed by some of the participants on the sequence of procedural issues that need to be implemented when dealing with sensitive personal and legal matters.

I₄, the principal of a Years 6-12 private girls college, was most concerned about the strategies that she could employ to ensure equity and make an impact on the particular situation with which she was dealing. She was interested in ensuring also that she made similar decisions in like cases so that fairness and justice would not only be done but also be seen to be done.

I₂₄, a prosecutor in the Queensland Police Department, was explicit about the procedural issues that needed to be addressed in any investigation not only being undertaken by the police but also being brought by the prosecution. His attention to detail on this matter is illustrated in the selected section of dialogue:

I4: I think that what I do is look for more elements of practice and precedents. So even when I am dealing with a child, I'll try to think back to a related case and on what basis did I make that decision. It doesn't mean I won't make the decisions, for example on similar cases, and actually make two different decisions. But I do think it is worthy of going back and going through why I went the way I did. Not WHAT I did but WHY I did it! And look at how that actually affects this other case. I also find however, I often ring the lawyers much more that I would have say ten years ago, to get alternative points of view to simple questions. (53) ...

Written word, consequence, process, ... they're the three. (54)

Written word which are the laws and rules, whether they are in your school, a signed agreement, contract, documentation, ... (54)

R: Is that just legal context? (55)

I4: No! It is much wider, to me. The documentation that pertains to even simply the entry to this school is legally binding documentation. I have obligations unless fulfilled, the parents in paying the fees but by also selection and signature has said 'I am obligated to support this school'. We have a Code of Behaviour issued in the enrollment. Obviously the Code of Behaviour is the every essence and spirit of this school. You sign that enrollment, you are saying I accept the above which is the Code of Behaviour... (55)

R: Which is really the Mission Statement of the school, isn't it? (55)

I4: Totally the Mission Statement in the context that it is a Christian school.

and

I24: There is definitely a formula for going about an investigation, like a criminal investigation which has to be ... which can't help but invoke legal ways of thinking about it. You'll find that an investigator, whether it be a detective or a uniform Police Officer will conduct an investigation certainly in a different manner to someone who is untrained. That's primarily because they know what is coming. They know what is in front of them. They know that if they don't follow these particular steps they will not be successful when it comes to a court action. (424) ...

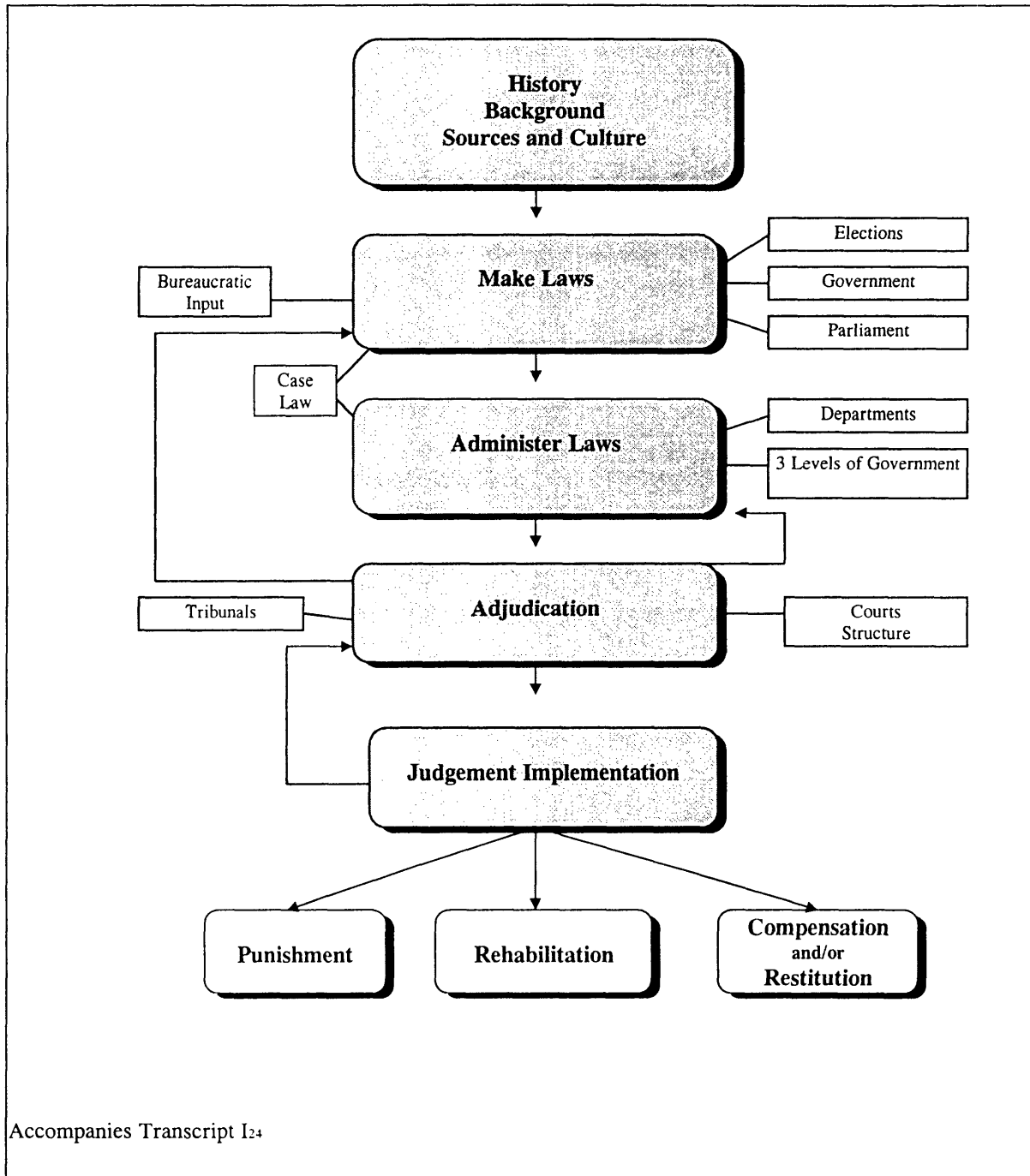
I suppose I can talk more about criminal matters that I can about other actions that are taken. But the students will have to know that there is an investigation process that is done by the Police. Someone is charged whether they are guilty or not. That is a process to be determined by the court and they need to be and they have a right to be defended. That's where solicitors become involved (432) ...

As long as they develop an understanding of the adversarial system. I mean, you then start to break up the system. You might say well in court what'll happen is the person who has put in a complaint, plaint or the prosecution or indictment or whatever will give their case first and you'll have evidence in chief. Then you'll have cross-examination. Then you'll have re-examination and one party put their side forward first and the second party gives their side of the story. Then it is left to adjudication either by a magistrate sitting as arbiter of the law or by a judge and jury where the jury has to make the decision on the facts and the judge has to make the decisions on the law. So that should be a necessary part of it (433) ...

Yes! Exactly. Then if it's a punishment or rehabilitation, do they understand that it's more bureaucrats who run the Prison System? It's another Department of Corrective Services which is influenced or infiltrated with social workers who are primarily looking at the rehabilitation of the offender as opposed to the punishment of the offender or the compensation to the victim. You get a few little activist groups that jump up and down and say 'Don't forget the victim!'. (433)

The procedural issues that need to be addressed in any investigation being undertaken by the police were depicted by I₂₄ in the following diagram (see [Figure 4.7.1](#)) in which he attempted to sequence the investigative procedures that had been addressed in the discussion/interview. In his discussion of the [Figure 4.7.1](#), he placed importance on the sequence as well as the feedback links and loops.

Figure 4.7.1 - Interviewee I24's view of the processes of *Thinking Legally*.



4.7.4 Analytical procedures

Several participants discussed the strategies that are used to analyse particular legal situations and issues. I₁₇, an education officer with a Queensland law commission was able to describe the broad analytical approaches used when he was *thinking in legal ways*, but he had some difficulties with the sequencing of specific strategies. This is illustrated in the following quotation from his interview:

I₁₇: Well, I suppose, *thinking in legal ways* is what I have attempted fairly broadly to describe as an analytical, ... the kind of legal logic based on precedent and earlier decisions, and tried to match the extent to which particular situations equate and that gets to in some ways ludicrous kinds of results: putting values on losing a hand in compensation law or something. How can anyone decide? (278)

R: It all depends whose hand it is. (278)

I₁₇: That's right! The value of a hand. That's a rule of thumb 'Oh that's about \$20 000'. Or whatever the figure might be. That's where I think *thinking in legal ways* tends to take people down those pathways. (278)

R: So that's the logical, deductive, analytical, argumentative approach! (278)

A more detailed treatment of these analytical process was outlined by I₂₅, the president of a Queensland civil liberties group. He explained his sequence in terms of facts, bridges, case and statute law, legal analysis, and so on, but was aware of the uniqueness of each case, in the following statement:

R: When you get to the point where all the facts are in, or the facts that you have access to are in, and you're making the bridges between that and existing case or statute law or situation, is there a specific, if you like, cognitive process one goes through in your analysis or is it just that every case is different? (464)

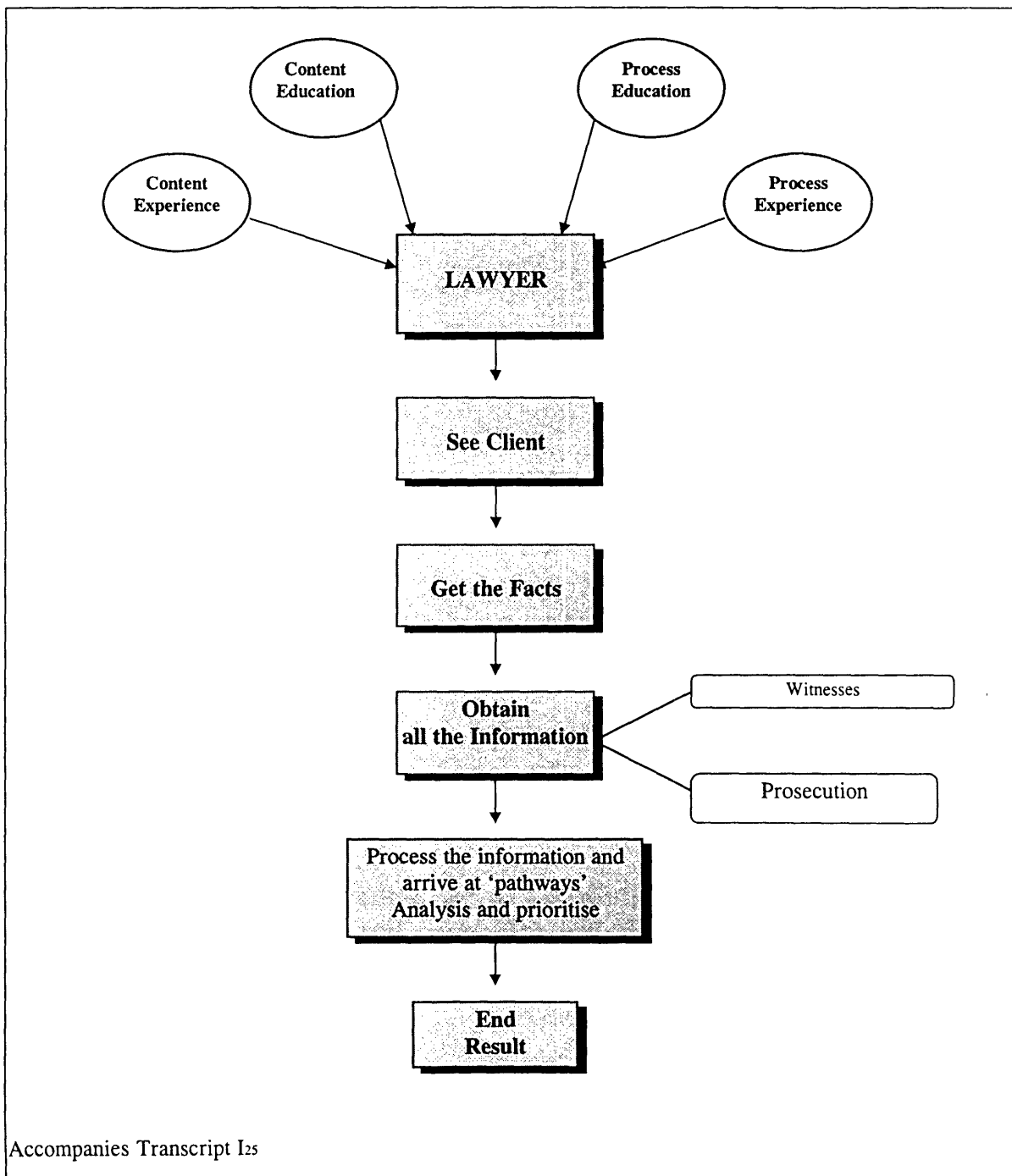
I₂₅: Every case is different unless they are just literally identical. But you look at the case and see a pathway, or you may see a number of pathways, through to the solution. Quite often you know what the solution is that you are attempting to achieve. It might be for a client on a criminal matter, say I'm doing a plea of guilty, I know what I want to achieve. For a relatively minor offence, I want them to have no conviction recorded. For someone who has brought in a tonne and a half of dope, I want to get them less than the maximum and by my content research, I know what's achievable and I will ask for what is achievable not what is stupid. I don't want to be laughed out of court as much as is possible. I know with different judges and different magistrates, different things are achievable. You know, a process setting. (464-465)

But I think it's pathways that I set up. Sometimes when I talk to someone else, they'll see a different pathway. Then I have to go back to scratch and say 'Shit, I missed that'. Their experience is different to mine. They see a different pathway. They may have done a similar amount of homework. (465) ...

I25: And good lawyers I think probably see more pathways that others do and give their clients choices that others don't. (465)

Here, I25 was able to illustrate the procedures referred to above in diagrammatic form. His focus related to the background influences on lawyers as well as the sequence of steps involved in dealing with a client. His views are replicated in Figure 4.7.2:

Figure 4.7.2 - Interviewee I25's view of Lawyers' processes of *Thinking Legally*.



Accompanies Transcript I25

4.7.5 Identification of alternative strategies

In participants' discussion of the *pathways for processing personal and professional decisions*, a number of issues were addressed in relation to the need to investigate various alternatives before choosing a particular course of action that was intended to resolve the difficulties being encountered. I₁, a Year 11 and 12 Legal Studies teacher, focused on some substantive issues such as overloading of the legal system, the use of jargon and the need for clarity of interpretation and meaning in language:

- R: I just think of all the new approaches like mediation. It used to be the professionals or the courts who solved these problems. Now we are trying to get very diverse ways to try to resolve the difficulties in our society. (15)
- I₁: Exactly, I suppose it's a recognition of the fact that the law is just overloaded and can't cope. So they are having to try to find different avenues for coping with things. I think there is a move to try to simplify the law to a certain extent. We've ended up with all the legal jargon, all the special legal words and definitions with special legal meanings so as to try to eliminate ambiguity. But in a sense they created ambiguity and made the law so inaccessible that now the movement is back to 'plain English'. They are even trying to draft legislation in more basic terms. (15)

The roles of personal knowledge and experience were highlighted by I₆, also a Years 11 and 12 Legal Studies teacher, who was interested in the use of diverse processes which included information gathering and evaluating possible alternative strategies for the resolution of the legal problems, issues or questions. The following statement provides an elaboration on these information gathering and problem-solving processes in that:

- I₆: That's coming back to some of the issues you find in the newspaper and whether they be issues about technology, abortion, personal drugs, ... You then have to use your own decision-making processes given your own situation to make a decision on what you want to do. To some degree, I suppose, it may be through the input of some of the friends around you, what they are doing and what they are saying. It still comes back to your view as the ultimate decision maker. (92-93)

Some of them (decisions) are more 'black' and 'white' than others. Some of them are just NO! NO! situations. Others are, you just wonder or not, the experts who are making the decisions are saying you should go a particular pathway whether or not they have got it right. And then you have to make your own decisions. I suppose a lot of people with issues involving contraception and personal drug use, these are two of the important ones, and then you get to issues like adult censorship, whether or not that is correct. (93) ...

Probably having had a number of situations develop where students have been in strife and you've pointed them in the right direction. They've come back with feed-back on how they have gone in relation to their advice gathering, going to the police, went to the court, or they checked it out with their parents or saw Legal Aid or whatever, the advice comes back to you. Then you can see various patterns. The law works in

various patterns. A pattern starts to emerge so when you get a similar situation arising you can say to someone 'in 85% of cases this is what will probably be the pathway you could take'. You have to be very careful with the law because with the law you just never know which one will come out on your side. So this is a probable scenario but you must make sure that you have legal advice so that you are covered from the side. You don't want to be ambushed. But basically it sets up patterns. Say you get someone up on a drink driving charge or assault charge or some being bashed, given certain circumstances you can see the pattern that will emerge and you can use that. People are quite glad to get what to me is very basic information that is drawn from experience. They haven't faced that experience before. I've just been lucky. I don't know whether it was lucky but I have been in a position to learn from the experience. (97)

The education officer of a Queensland law commission (I17) was very sensitive to and aware of the culturally different ways in which alternatives should be considered. His work with Aboriginal women, for example, on the issue of domestic violence, provides insights into a consideration of legal problem-solving strategies that transcend perceived cultural boundaries. These are referred to in the following transcript extract:

I17: I had a good example of that just happen earlier this week. I was at (.....) running a seminar on domestic violence issues with a group of Aboriginal women. In the course of that work I was talking with them about, we were concentrating on domestic violence. I remarked to them that we have very few Aboriginal people coming to us with family law disputes. I said 'Is that because we are unattractive? How is that?' And they simply said 'Oh we prefer to sort these things out ourselves. We'll talk with the families and we'll work out the way to look after the children and the way to care for them and whether the parents have ability to be involved in their lives to whatever extent. So we're not interested in your Family Law because we've got our own'. (276-277) ...

And we see that in other societies that have come from very different backgrounds where they have, it seems to us, totally different ways of analysing problems and deciding what's 'right' or 'wrong' in a legal sense. (279)

R: So this question of thinking legally was posed in a sense to be outside the fishbowl of *legal thinking*? (279)

I17: I think it is! Because, ... off the top of my head, it's to do with analysing the legal ways and using some critical thought into 'Is that the only way to look at legal issues?'.(279)

A representative of the Queensland law reform commission (I23) outlined, in the following dialogue, some current developments in Queensland when he referred to alternate dispute resolution procedures. These procedures were viewed as one of a set of alternatives that was open to those people intent on resolving disputes:

I23: Yes! And that's a basic flaw in the system. I think people are probably now trying to address it by having alternate dispute resolution procedures. (405-406)

- R: So mediation, and all the other strategies, have been part of the repertoire of conflict resolution tactics, haven't they, but they seem to have had a lot more air-play in recent times? (406)
- I23: Yes! It has been formalised a lot more so you have government-sponsored mediation whereas before, as you said, you could always do it. You could always go to your neighbour and say 'I don't want to build a fence. How about we talk about it over a beer? and resolve it'. But now for people who can't do that, there are formal structures in place. (406)
- R: So do you see that the government is taking a much more instrumental and educative role in informing the society about the range of appropriate procedures for resolving disputes if they can't resolve them themselves? (406)
- I23: Yes! There's a lot more to do. We should have neighbourhood resolution centres so you can just go down to your local shopping centre and sit down with someone who can help the parties communicate and just talk through the problem. So there's a better chance of you going out talking to each other afterwards. (406)

In the opinion of the president of a civil liberties organisation in Queensland (I25), the current focus on alternative procedures seems to hinge around the need to keep one's options open so as to maximise the possibility for a successful resolution of the legal problem, the issue or the question being addressed:

- I25: Yes sometimes you can! You are constantly thinking of about 'How can I keep my options as open as possible? How can I within the bounds of what I am trying to achieve at this point, give my client as many alternatives as possible?'. (461)

Consequently, the participants were interested in pursuing the widest range of alternatives possible in any given setting. They expressed a range of concepts and strategies such as the identification of options and alternates for the resolution of disputes. Their focus was on the need to keep one's options open in any given situation.

4.7.6 Logical and procedural clarity

In Sections 4.7.4 and 4.7.5, mention was made of the *analytical procedures* and *alternative strategies* that are essential in the resolution of legal conflicts. Because of the uniqueness and the varying nature and interpretations of the facts of each case, it is essential that one has some degree of surety in the procedures that have been used. Knowledge, experience, skills and abilities are involved in developing these abilities.

The chairman (I₉) of a Queensland ‘watchdog’ organisation, in discussing the detailed cognitive processes used in legal investigations and the application of legal principles and procedures to solving legal problems, commented:

- I₉: In order to think in what I consider to be a legal way, you have to develop a very acute sense of relevance so that you readily sort out the critical material from material of lesser importance. Someone observed I think that ‘the law sharpens the mind while narrowing it’. And I think there is some truth in that because unless you are able to focus narrowly upon a particular aspect or a particular problem you can’t properly represent your client. Cases which are actually litigated represent the ‘application of legal principles’. Where a factual situation is not amenable to resolution simply by the application of a set of principles where it is on the fringe of the principles, it is necessary to argue by analogy from other established principles to cover the case. That’s a familiar mechanism which is applied. You are familiar of course with the notion of precedent and its various mysteries. (147-148)

In a similar manner, a doctoral student (I₁₀) at a Queensland university focused on the philosophical issues involved in a given situation. She reviewed her understandings of the adversarial legal system and her frustrations with these problem-solving processes, with statements such as the following:

- I₁₀: Winners and losers! I think people *thinking legally* in our adversarial legal system that we have. People think somebody’s going to win and somebody’s going to lose and they might be the loser. They don’t see the legal system as a problem-solving process. They see it as a winning and a losing process and there’s the problem. Whereas that is nothing. I see the legal system as a problem-solving process ... (167)

In the following selected passages, I₂₆, a lawyer specialising in custody and migration matters, was able to declare her distinctions between what she referred to as *analytical thinking* and *strategic thinking*, with their related consequences. She was able to achieve this by articulating the distinct, yet complementary, notions of factual analysis, legal analysis and strategic analysis in the following extract from her transcript:

- I₂₆: Oh Yea! Definitely! I guess the thing that you are never taught or you never really understand is that yes as a lawyer you have to *think analytically* but really in practice you have to *think strategically* as well. I mean you just have to think. In everything you have to think ‘What might happen later?’ and ‘What will be the impact of what I am doing now?’ You can’t think for the moment. (478) ...

So I guess if I think about it, if I actually think about it, I do a *factual analysis*. Then I identify my goal. Then I go back and do a superficial legal analysis to work out if it is straight forward or not. If it’s straight forward in my favour, I go back and double check to make sure that it really is. If it is not straight forward in my favour, then I start to think at a more in-depth level about, I guess, ‘Why is it against me? And is it really against me? Is there room for movement here?’ Then I try, I guess to put it in the broader picture which is where *strategic thinking* comes in. Well just looking that

this ...(pause) ... and I guess that is where 'right' and 'wrong' comes in. Often when you are thinking about 'Can you achieve this?' like in that case I just told you about, you just think 'This is wrong! It is just wrong!' and I don't believe that anybody with any power is going to think this is right. (487) ...

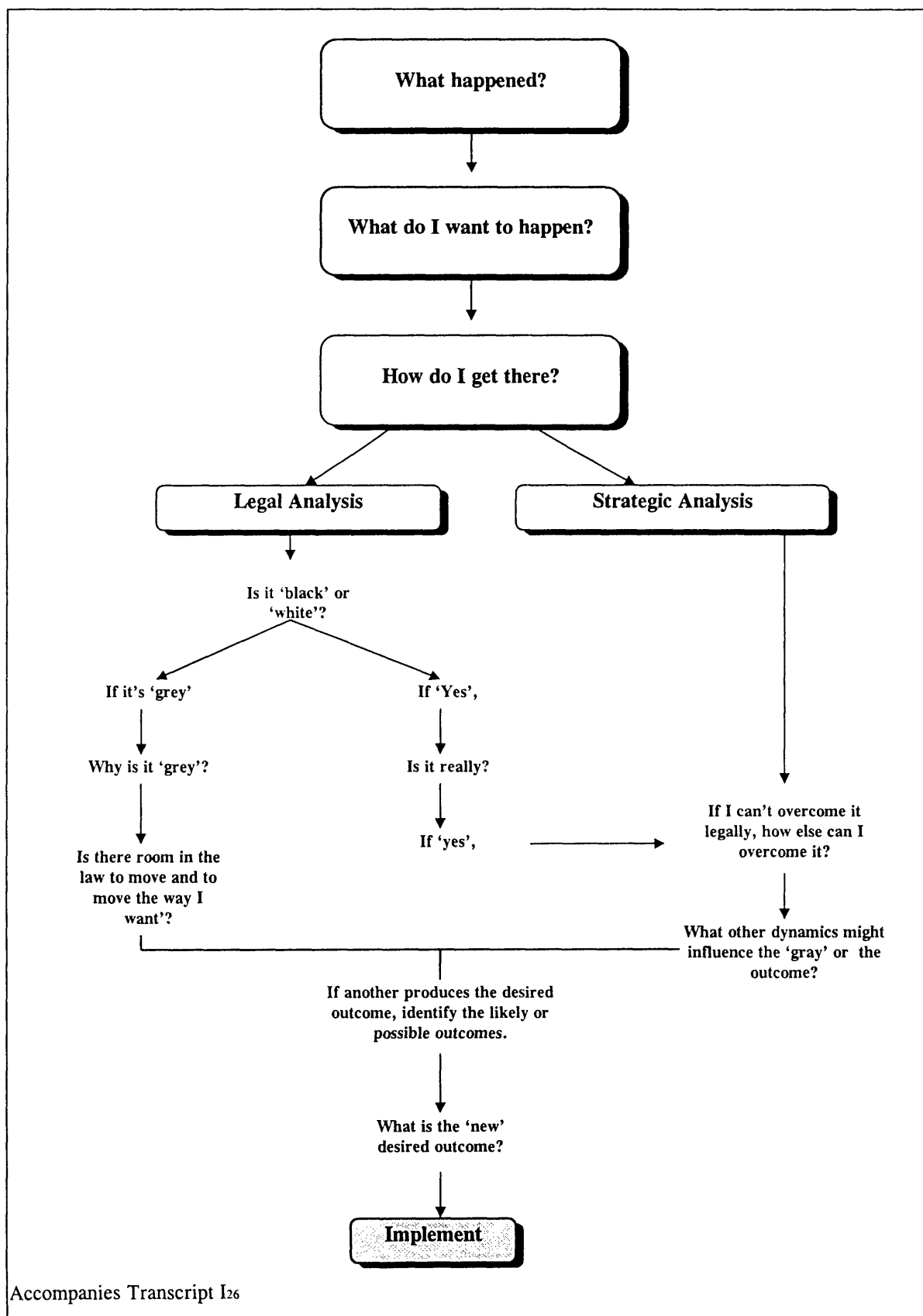
I mean when you are thinking out your initial strategy, you usually have some idea of what you think is going to happen. As you are going along, if it is not happening, you should certainly be questioning whether you made the right sense of it. Lawyers tend to talk in terms of the 'other side'. If you have expected the other side to do something by now and they just haven't done it by now, you have to be worried about whether you've gone off the plot. Then again, you just start the whole process again. There's no point in working out what to change unless you try to work out what has gone wrong because you won't know what to rethink unless you work out what went badly the first time. It's very cerebral I guess. It's not an empirical science that we are dealing with. (489) ...

Well it's funny because some of my closest friends and relatives often laugh at me when they ask me to explain something. It will be something like ...(pause)... like why I chose a certain colour in my house or something like that. They always laugh when I tell them because they always say 'You're a bloody lawyer half the time when you describe why you chose the colour in your house!' (490)

It is really funny because when I explain it they always say things like 'Do you ever do anything that isn't thought out?' I tend to explain what processes I went through to select this colour and why I chose it and what the outcome was that I wanted to achieve and why that colour would achieve it. (Laughter). (490)

Her focus on *factual analyses* and *strategic analyses* are illustrated in the following diagram (see [Figure 4.7.3](#)) which she drew to illustrate the structural and procedural interrelationships among variables such as factual analysis, legal analysis and strategic analysis to which she had referred in her interview.

Figure 4.7.3 - Interviewee I26's view of pathways for *Thinking Legally*.



4.7.7 Negotiation and ownership of the problem-solving processes

The deputy principal of a Queensland State secondary school (I13), when dealing with the resolution of staff related problems and issues, was quite concerned with the processes that enable his staff to understand the situation, to process the alternative pathways that could provide solutions to the issues in question, to consider consequences but more importantly to be involved in the processes of negotiation and ownership of both the strategies and outcomes that lead to a solution. In the following statement, he outlined his approaches to these strategies which included being a good listener, identifying options or alternatives, considering alternatives and their implications, and educating people to investigate implications and likely impacts:

I13: I think my day at school is dealing with the ‘grays’ all the time. I probably deal with it in two ways. The best thing is that you’ve got to become a listener. That is the important thing. You have to listen to all the parties involved. So that is what takes a large amount of time. The second thing is that once you have listened, you have to help people come through to some sort of solution generally in the school. And in many cases in the school it may be more of a bureaucratic or administrative solution rather than a fair or just solution. But what you need to do is talk through that solution with people to explain why that solution was made. So people can begin to understand what you are expecting. So I think that links. It makes people understand. I don’t think all people or administrators make that process clear. Many people would tend to ignore it and they tend to go back to the page 37 decision which I call a Maths teachers decision of ‘right’ and ‘wrong’. That’s where they’re at. (202) ...

R: Do you have an example of how you do that? Can you explicate some sort of stages, processes, key issues or principles? (207)

I13: Probably in terms of school circumstances what I try and look at, is sort of law in general terms like *thinking legally*, I tend to go to the end consequences, the worst case scenario. I look at those consequences and look at the possible enforcement of it and say ‘Is it enforceable at the end? How accessible is the process that you will have to deal with people? How detailed are the circumstances that have led up to it? How does all this fit the general patterns?’ and that sort of thing. ... So the next step is to look at what they say and what you think occurred. What is behind the event that made it happen? (208)

The next step is to really think, to me really thinking about it, what basis does this have in terms of the school’s Code of Conduct or whatever? In other words in terms of the legalities of running the school, what does it have in terms of my legal responsibilities in my job? What does it have in terms of the legal responsibilities for the community or the law as it stands? And then encouraging people to look within that themselves because I’m often not the judge and jury. I am on some issues but not on law issues because they have often gone beyond the parameters of the school. So what we try and say is that we will try to handle and think through the process legally whereas many issues we will think through them and hold them at school for the betterment of the individuals and to involve other groups or the law as such in the enforcement side as few times as possible and only then in major events. For two reasons, one is that I think we can protect and help students at our school level much

better. Secondly I think the system itself is so overloaded that we are not doing anyone a service in the longer term. (208)

In a similar manner, but applied to a completely different context, the senior lecturer (I₂₇) of a legal practice course at a Queensland university focused on the processes involved in lawyer-client negotiations so as to achieve both the outcomes and the objectives of the client. In the following dialogue, he outlined his approach which included negotiating with the client as to objectives and outcomes, considering the legal context of the issue in question, agreeing on the strategies to be used, and negotiating about other variables:

I₂₇: I think in *thinking legally* to me there must be that negotiation with the client about outcomes or objectives. (524)

R: It's related to what are their needs and what are the means of trying to achieve it for them? (524)

I₂₇: Yes. So I suppose it is a process. The first thing that I would ask myself is 'What does the client want?' Then you do that negotiation I was just describing, where you draw on your experience and you are understanding where your client is coming from and you then have a common appreciation of what the client wants and what you can do. There's a contract in effect. 'We can do this'. (524)

Once you've got that. 'We both agree that's the aim'. Then there comes 'Well, how are we going to get there?'. (524)

It all varies because part of what you can achieve is going to depend upon the facts. So it's an ongoing negotiation. (525)

4.7.8 Procedural consequences

Several of the participants in this research study expressed interest in the consequences that follow from the use of legal processes. In the following passage, a senior lecturer in justice studies at a Queensland university expressed his concerns about the clash between what he called *substantive law* and *procedural law*. These related to the question of 'balance' in the use of both substantive and procedural approaches:

I₁₄: It's a question of balance so what tends to happen is that a lot of the substantive issues get lost and law becomes very much procedural. So procedural law becomes unbelievably overweighted. People make all these dichotomous statements about procedural law being fair. But in the process, they lose sight of the larger substantive issues at stake. You see that happening in the whole sort of merit-based idea of key selection criteria for jobs now. It is a favourite pet hate of mine. That you can be so procedurally correct that you can be wrong substantially. (230)

Another participant, a senior partner (I₁₈) of a large Brisbane law firm, expressed, in the following extract, a concern that too many cases were ending up in court because people were not using the full range of conflict-resolution strategies to resolve their differences. The final arbiters, the courts, were in his words ‘a blunt instrument’ which forced solutions where these had not been made by less intrusive strategies:

R: When, in your mind, does for example alternate pathways to resolving the conflict and the consequences of say alternate strategies come up in that setting? (304)

I₁₈: In my view it always comes up and that’s why I’m not particularly sort of taken by the modern sort of rush to suddenly discover alternative dispute resolution procedures. Any lawyer worth their salt has always thought about that particularly because litigation in which I specialise is simply the ultimate blunt instrument. It is the ultimate blunt instrument to force the parties to communicate because they can’t do it in the normal way. They have to take it to court. And if they then can’t do it as a result of being forced into the legal process, they will have somebody determine it for them. A judge simply says ‘You’re right, you’re wrong!’ And it is just the ultimate blunt instrument to dispute resolution. And if you can avoid the cost, the expense and delay involved in it, then you do it. Because 9 times out of 10, it’s in the client’s interests to do that. (304)

Occasionally you’ll get a client whose interest is to use the system. I should say more than occasionally. Quite often you’ll get either one party or the other trying to use the system to get time and you get a question then of whether it is ethically proper to do that. (304)

In a similar manner, a representative (I₂₃) from the Queensland law reform commission commented on the failure of many people to recognise legal consequences. In the following discussion, he suggests that too many individuals take a value position of ‘right’ or ‘wrong’ on a particular issues without considering the legal consequences of that position:

I₂₃: I think many people would not consider the legal consequences of their actions but might notice something ‘right’ or ‘wrong’. So they are prevented from shoplifting because they know it’s ‘wrong’ but they might not be aware of all the consequences at law that would flow from their taking perhaps one sweet from a shop or a bolt from a hardware store. (405)

R: Or a grape from the counter as you pass them in the fruit store? (405)

I₂₃: Yes! Which we have probably all done (Laughter) and felt guilty or not about it. But if you are aware of the consequences, then it might influence your actions. (405)

If I tell someone to *think legally*, I’m probably telling them to be aware of the legal consequences of the situation. (405)

Another consequence is that of *legal costs*. A director (I₂₇) in a law practice course at a Queensland university had the following to say on this matter, especially in relation to issues such as efficiencies, fees and expended effort by lawyers:

I₂₇: Well, you are always looking for efficiency. You are looking for speed and costs. It seems to me that one of the things that people are most sensitive about, particularly with lawyers' fees, is costs. Some people are more sensitive than others. I'm probably not as sensitive as my wife for example. She looks at the fee and says 'I didn't really achieve anything'. But I say 'Yes, but you legitimately engaged on a course of conduct that sadly, as it turned out, fizzed. That's not your fault. That's just the way it was'. But she finds that she has to cut back on a fee when it's a fizzer through no fault of hers. (519)

I₃₀, a lawyer engaged in criminal matters, raised another aspect of this issue which she called the need not just for *after-the-fact-thinking* (i.e. consequential thinking) but *after-the-fact-information*. Her concern here was an educative one so that people, when dealing with the consequences of their actions, would have appropriate information with which to consider their personal implications:

R: I have this notion or sense from our discussion, of *preventative thinking* rather than *consequential* or *after-the-fact thinking*. (607)

I₃₀: Yes, that's true. A lot of it is after the fact, not even *after-the-fact thinking* but *after-the-fact information*. Because it is not like they had the information before and they think 'I had all this information and made the wrong choice'. Most of the time you only find out the information afterwards. The Police are there telling you you don't have to answer any questions but you're thinking 'bloody-hell I'd better answer their questions'. So it's not until afterwards that you get with a lawyer who says 'You know you didn't have to answer these questions'. (607)

R: I read an article from the USA by Dowdy (et al.) on what they describe as *consequential thinking*. As I was reading, I couldn't help but think 'No, there is a step before that which is at an awareness or factual level of thinking!' (607)

I₃₀: Yes, because before you have an ability to think of consequences, you need the awareness and the information. (607)

R: What are the options? (607)

I₃₀: Yes, that's right. (607)

A consideration of the consequences of legal processes that operate in a society is an important factor for people to address. It would be beneficial if people could be made aware of these consequences prior to their becoming involved in any legal conflict resolution process.

4.7.9 Procedural closure

In the following two excerpts, I₁₉, a judge of the Supreme Court of Queensland and I₂₇, a director involved in a law practice course at a Queensland university, commented on the difficulties of deciding the solution to cases, especially when the outcome might not be in your favour. Their concerns were with finding the right answer to the issue in dispute, the uniqueness of each case, professional implications, and personal consequences for the participants in the dispute:

Excerpt 1:

I₁₉: You're faced all the time, with finding out what the right answer is. You know, complex puzzles. If you like doing puzzles, and you'll find the law is a great puzzle. I've been working for days on just one judgment, trying to work out what the right answer is to this most complex proposition. And when finally you say 'That's it!' it's a marvelous feeling. Oh yes, when you finally feel that you have really solved it and you've sorted out everything and you say "That's it", sometimes you are still doubtful but you do your best. But you can say "Ah! That's it!", something that is hidden and people have walked over it 25 times in every different direction and so on, then you've sorted it out and come up with the answer. It's a very good feeling. So it's a matter of delight, constantly interesting because they're rarely two cases that are exactly alike. So you have to sort out the differences and so forth. Some of them are quite difficult. So you have this most interesting sort of intellectual part of it. (323)

Excerpt 2:

R: Does a strategy for handling a case come to you very early in your discussions or do you moderate that as you are working through the case and perhaps change course a little here and there? (519)

I₂₇: You always do. (519)

R: So? (519)

I₂₇: The younger you are like my wife for example. She's had a couple of those cases and then she's taken one on appeal to the Full Court and got knocked over there and so forth. She gets very personally upset. I say 'That's professional life! You win them. You lose them'. So long as you can say in retrospect 'Is there anything I can learn from this? Could I have done this better? Is there any basis that I can identify that was the cause of this wrong result, in my view, coming out? Or could I maximise the result going the other way better than I did? That's all that you learn from. Professionally you just have to accept that personally that's all there is for me to learn from, and move on putting it all behind you and not sort of get yourself upset. (523)

It is easy to say but hard to do. But the thinking professional just accepts that and goes on. Always you want to win, you want to always maximise your client's position. It's not win at all costs but you want to maximise your client's chances of success but within the rules as the game is played. You just accept that sometimes you win and sometimes you lose. Sometimes the facts go your way and sometimes they don't. Sometimes the judge sees it your way, sometimes they don't. There's this lovely notion of 'the court' and so on. All it is is one person who listens to it all and says 'I reckon for this bloke'. (523)

It is important, therefore, for consideration to be taken of both the strategies and the tactics for drawing closure to a particular set of procedures that have been used to resolve a conflict. However, there are cases when it is difficult to ascertain when the conflict has actually been resolved. In some situations, statutes of limitations have been developed to provide adequate time for actions to be initiated but also provide some surety that a particular action will be resolved within a reasonable time-frame.

4.7.10 Conclusion

In this section of Chapter 4, an attempt has been made to explore a range of participants' statements about the nature, scope, consequences and implications of particular courses of legal actions that have been designed to resolve conflict. While there are often many possible '*pathways*' that could lead to successful resolutions of particular cases, the ability both to be aware of these pathways and to anticipate their diverse implications, is an ability that comes with knowledge, personal skill and experience. For example, a lateral strategic legal thinker is likely to be aware of a wider range of possible courses of action than someone who is more conservative, convergent and outcome oriented.

The evaluation of various courses of action prior to and during processes of conflict resolution is an important ability. This identifies the conception:

**Thinking Legally as providing *pathways* for
decision-making.**

4.8 Conception G: Thinking Legally as a *pervasive and comprehensive construct*.

General Description:

The notion of a *pervasive and comprehensive construct* is linked directly to the *aspirations and goals* of a society (4.8.1). These aspirations and goals are expressed often as *values, ethics, morals, beliefs, and the like*, (4.8.2) and evidence of *legal awareness* in a society (4.8.3) through the development and use of *community knowledge and skills* (4.8.4). An important aspect of this knowledge and skill is *logical and critical thinking* (4.8.5) that is developed through a range of personal and professional interactions and experiences including one's *personal involvement in a community* (4.8.6). If a community is to function effectively, its members need to demonstrate various competencies that include congruence amongst their *knowing, being and doing* (4.8.7) as well as being *integrated into all aspects of their society* (4.8.8).

The successful functioning of factors such as those listed above should operate in a manner which is indicative of true integration where the 'whole is more than the sum of the parts'. The interactions among these factors, in relation to the nature of the factors themselves, provide a focus for holism. This enables a society to understand its operations as a community, diagnose its difficulties and initiate remedial activities in order to prevent and/or overcome identified issues of concern.

Discussion:

4.8.1 *What social aspirations and goals?*

One of the many difficulties facing a society is its ability to perceive its nature, scope and functions in holistic ways. Each society is composed of various institutions and power groups who lobby, from particular sets of basic assumptions (often referred to as their *worldviews*), to have their aspirations and goals implemented in the community. It is the sense of *common bonds* that is one of the characteristics and essential features of a healthy community. However, in a complex, pluralistic and multi-cultural society, such as that operating in south-

eastern Queensland in the late twentieth century, there may be some difficulty in deciding the *essential nature, functions, or the core values* that predominate in the community. Concerns such as these were raised by I₁₄, a senior lecturer in justice studies at a Queensland university, when he posed the following questions:

I₁₄: Yes! How does one know what society wants? Do we use opinion polls? Do we survey the interest groups which speak loudly? So much for the typical political ploy 'We're only reflecting what society wants us to do?'. How is that ever known? (229-229)

His strategy here was to raise key questions that would assist a community to identify its worldview, assumptions and perspectives in order to promote the notion that every effort should be made by community members to respond either to these, or to similar, questions. Unless community members attempt to address questions of these kinds, the social cohesion, that is necessary for the building of the *common bonds*, referred to above, will not be developed to the extent that is either possible or desirable.

4.8.2 The role of values, ethics, morals, beliefs

Three of the participants in the research study expressed interest in the relationships between the roles of values, ethics, morals, beliefs, and the like, of a society and the operation of that society's laws. The role of family life and one's personal upbringing were of particular interest to I₆, a male Years 11 and 12 Legal Studies teacher in a Queensland State secondary school. This was because he identified the importance of the influence of the home, social setting and education on his worldview when he said:

I₆: To me there is no doubt that the main point if you look at the diagram as a cycle, coming right back to base level, the primeval stage, is your religion and upbringing. Then that will even influence the way you study law. If you have come from a socio-economic background where you are not very well off, then the way you interpret certain cases perhaps will be determined by that upbringing. You will see it in perhaps a softer light or less clinical, less hard light. We've seen that with Judges and that's one of the criticisms that you get with many of the Judges today in that they are seeing it from their particular background without understanding the socio-economic forces that are operating in some parts of society where these problems perhaps originated from. (102)

The contribution of personal and professional education and training to the development of one's worldview was mentioned by I₁₁, the principal of a Years 4-12 private girls college. He saw it as being a very powerful socialising agent on a person's life. His own legal training

had influenced on his abilities to *think legally*. In the following passage, he was reflecting on his personal and professional background in relation to the mission statement of his College:

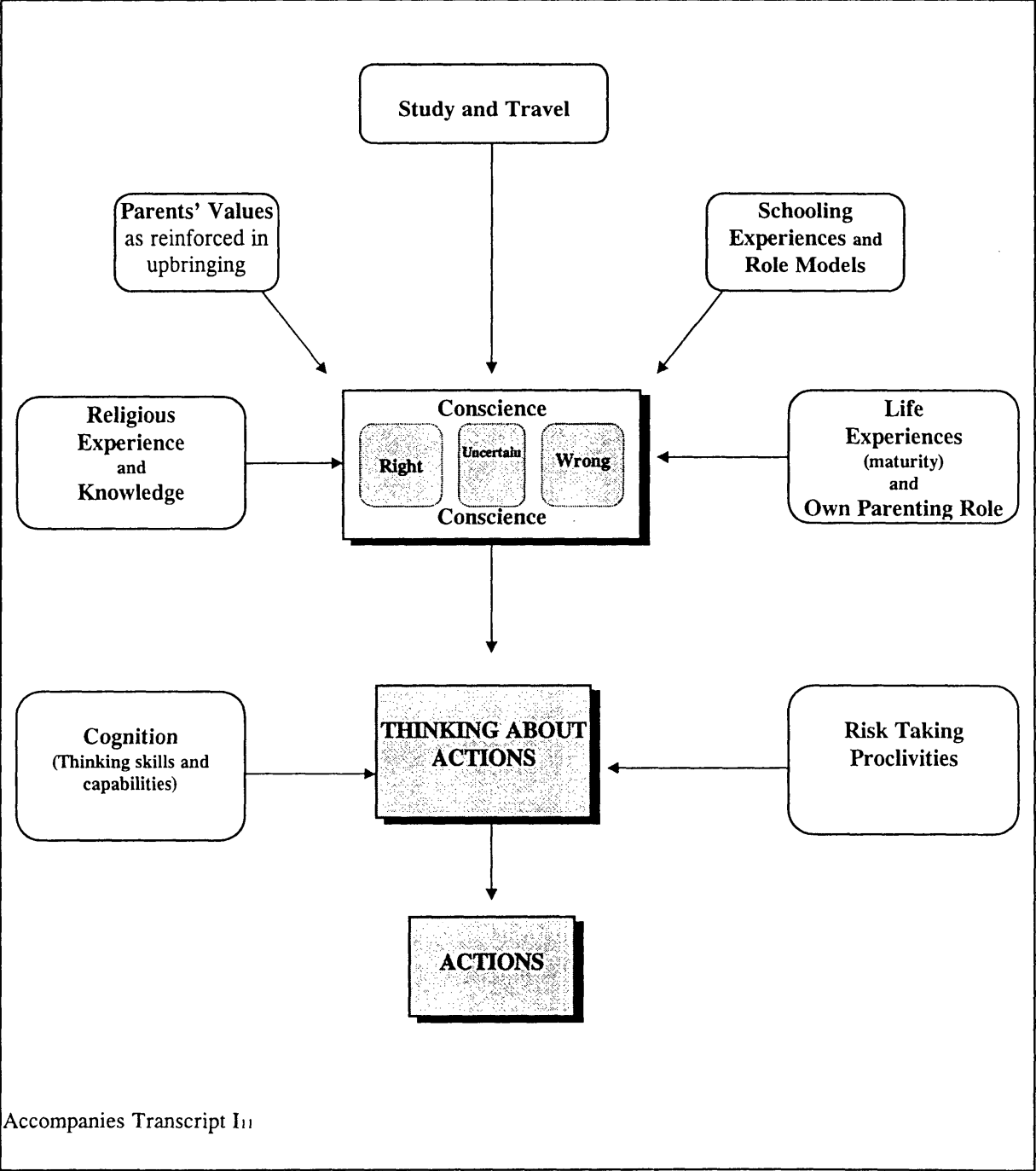
I₁₁: ... And even just to know what areas to be sensitive about. I look back and I think: What are the experiences that led to that? Well obviously, it has been the legal training but it's also my own growth and development. Also this is a Christian School, so the Christian element flows through it. I have all this in my reference framework, all of which is narrowing in along that line or pathway where you become very focused into what you are doing. (185)

I think also, because of my own particular nature, I am a rational and logical thinker. I find it very easy to remain fairly calm and objective in the case of disputations; to see both sides and to try to make some resolution of the thing. (185)

But overarching this is a spiritual dimension of the law which defies logical analysis because God's law is not necessarily the way human reason does things. And so there's both a faith statement and a practical outgrowth which all come to bear on that, you see. (185)

In [Figure 4.8.1](#), I₁₁ outlined some personal perspectives on the factors that have influenced his personal and professional life. His attempt here was to provide holistic yet focused perspectives on this issue. His diagrammatic representation of contextual elements such as cognition, religious experience, parental values, study and travel, schooling experiences and role models, life experiences and risk taking proclivities, together with a focus on conscience, lead to thinking about actions and then, to the very actions themselves. *Thinking legally* was a dynamic part of this schema, as it had been expressed specifically in the interview/discussion. Even though *thinking legally* is not included explicitly in this diagram, his schema was the most comprehensive one which has been developed through this research study.

Figure 4.8.1 - Interviewee I11's view of factors affecting the development of one's worldview and personal practices.



In a similar manner, I₁₈, a senior partner in a large Brisbane law firm, outlined his personal views on the relationships between his worldview and law in a society in the following statement. He was focused on the interrelationships between law and its underlying concepts, issues and procedures which could have been referred to as *worldview*:

- I₁₈: Yes! Once you get to the stage of starting to divorce the law from those underlying concepts, issues and principles then we are lost. Whilst you still have those as your touchstone, and that's a area where the community, society and the churches ... they have a role to play and will always have a role to play. They have had traditionally this role in the past. That's something that seems to be politically not correct to use, the reverse of the current political correctness thing, in terms of being able to stand up and say 'Well it's morally or ethically the right thing to do!' (311)

These three participants provided insights into their perceptions of the relationships between their worldviews and the social applications of law in society. They have provided illustrative examples of the role that they believe values, ethics, morals and beliefs play in society.

4.8.3 A pervading legal awareness

A Years 11 and 12 Legal Studies teacher (I₆) explored differences among (i) *thinking in legal ways*, (ii) *legal thinking* and (iii) *thinking legally* in an attempt to investigate the question of legal awareness in society. In the following passage, he has attempted to provide some of his personal perspectives and definitions on these three different types of thinking:

- I₆: Ahm! *Thinking in legal ways* to me is fairly prescriptive, fairly clinical and arbitrary. It's just as it says thinking in legal ways. You just know how that particular situation operated. *Legal Thinking* to me is what would cause that to occur and that's just what happens. I may be wrong there. (98)

Legal ... What's the last one? (98)

- R: *Thinking Legally*. (98)

- I₆: *Thinking legally* to me is more of an awareness thing and a more global thing. To me without looking at it without a great deal of thought, is a more rounded thing and tends to suggest that there is a web through the everyday processes of our lives. Maybe that is the web that when we get on a strand keeps everyone together. The first two are fairly basic but the third one is a more complex animal. It's higher order. It's got concepts in it whereas legal thinking is just legal thinking. (98)

In a similar manner, the Queensland manager (I₂₁) of a major Australian insurance company offered some suggestions about his understandings of what it means to *think legally*. The

following statement indicates that he had undertaken some reflection on this question prior to the research interview/discussion and, therefore, articulated a reasoned response. His main focus was on interpersonal relationships and the governing principles that both define and regulate these:

I₂₁: I've thought about that. Again, I found that a particularly difficult question. I mean, I have thought about, for example, speaking to my sister who certainly doesn't probably understand one bit about law and if I was explaining to her, what would I say? I think I'd say '*to think legally is to consider what governs or determines our personal relationships with our fellow man*'. (363)

In other words in all that you do, if you want to *think legally*, think of what it might govern. Is it fair? I'm not certain where's this 'right' or 'wrong'? Maybe fair and unfair is tied to 'right' and 'wrong'. (363)

It is evident from these two participants that a pervading legal awareness should be either implicitly or explicitly evident in the lives of every individual in a particular community. This pervading awareness may not be related directly to the nature, extent or complexity within each individual. Evidence of its variable function is a quality that should be both facilitated and developed if a community is to improve the range and quality of its interrelationships.

4.8.4 Community knowledge and skills

If a community is to function effectively, there is a need, at least, for some minimum level of basic knowledge, skills and abilities that provides access to the processes by which that community makes its decisions and implements these through its institutions, systems and culture. This concept of *community knowledge and skills* was raised by I₁, a Years 11 and 12 Legal Studies teacher in a private school. The following excerpt from her transcript of interview/discussion illustrates this. She expressed concern for community members to have knowledge of, and experience in, community skills so that they can appreciate their system and, consequently, change it from the inside out:

R: You give me the impression that everyone should be trained to think legally in an overall set of community 'skills'. (18)

I₁: Yes. In terms of how the law works, problems faced by the law and how they can impact the law. Yes definitely! Because otherwise they can't be effective in making changes that they would like to see made. All they could do is complain about it but then they probably would not know the right ways to do that. (18)

- R: With that comes knowledge, procedures, the place of right action, the appropriate and inappropriate settings for actions etc. Therefore it becomes a much more informed community if they have the abilities to think legally. (18)
- I1: Yes! That's right! Of course they need other skills to go along with these too. When you have better educated people who have a capacity to think legally they can be more pro-active than just re-active to a decision after it has been made. They could be more aware of the avenues for addressing these. (18)

A similar perspective on this issue was voiced by I₃₀, a lawyer involved mainly in criminal matters, when she raised the notion of a 'kitbag of ideas'. Here, she was referring to a whole raft of knowledge, skills and abilities that are essential if an individual is to have successful access to, and purposeful participation, in society:

- R: If we can coin this notion of *thinking legally* to represent that broad sort of concept or question, what do you think it ought to be given your background and experiences? (605)
- I₃₀: The temptation is to often think about criminal matters but that is just what I know. I'll come back to that. (605)
- It's probably what I said earlier because it is a whole 'kit bag' of ideas whatever. (605)
- R: We called it a 'kitbag of survival skills'. (605)

However I₃₀, was not forthcoming in detailing some of the essential ingredients or components of the 'kitbag' to which she had referred. This concept of a 'kitbag of survival skills' is a fragment of an idea that warrants further investigation and elaboration.

4.8.5 Logical and critical thinking

One of the components of the 'kitbag of survival skills', referred to in 4.8.4 above, is that of logical and critical thinking. In the research study, the participants made little mention of this ability except for the following comment made by I₁₄, a senior lecturer in justice studies at a Queensland university. In a discussion related to *thinking legally*, he endeavoured to outline his view that the general public should be able to think critically and logically about matters of interest to them. His plea, in the following extract, is for rational, logical and critical thinking to be an essential component of each individual's 'kitbag of survival skills':

- I₁₄: I don't know if it's a case of trying to replicate what the profession does. I think it's more that people develop the ability generally to think critically and logically about things. If people are thinking critically about things, then they will hopefully start to

question. They will want to know answers and so ... They'll make those sorts of distinctions. I suppose the thing that I would hope for in society is that it becomes a society of thinkers. That people will think about things in a way rather than just because they are emotionally upset or because they don't like somebody or whatever else ... (232)

4.8.6 Personal and community involvement

If community members are both to possess and to exhibit the needed skills and abilities for their effective participation in society, it must have not only the skills and abilities to change but also the will. The principal (I₄) of a Years 6-12 private girls college made specific mention of this will to change:

I₄: The causes are far too hard to deal with! It requires honesty, critical analysis of ourselves, openness to change, ... Many of us are too selfish to want to change. (56)

Her comment here on the basic selfishness of individual community members is one of the contributing reasons, in her view, for the inability of a community to fulfill its key ideals and essential functions.

A senior lecturer (I₄) in justice studies at a Queensland university made mention also of the contribution of particular segments or groups to the functioning of a community. In the following segment, he made a plea for a more comprehensive involvement by members in the life and processes of their community:

I₄: So the police would get incredibly frustrated at how other parts of the system would let them down. So to have a major impact upon that again required concerted effort not just with the police but with all those involved. (222-223)

In a similar manner, the principal (I₁₁) of a Years 4-12 single sex private school viewed the health of a community in relation to the participation of a wide range of individuals and community groups in the ownership, supervision and decision-making about the essential nature and functions of their community:

I₁₁: But whether I went on to study law because I held those values to start with or whether they were simply reinforced or whether indeed it influenced me dramatically, I've never sort of mulled over. But certainly I have great respect for the law partly because I realised that it is inadequate. I have no better answer. I look at it and say 'If in the circumstances, what would you do differently?' And it is hard to come up with alternatives. (183)

Similarly as I was growing up in our local community, the police were very visible. But not only that, so were the citizens. If you were not doing the right thing, you'd get a group of people in the street who'd straighten you out. Today, they just walk by. They don't get involved because they might be charged with assault. (183)

4.8.7 *Knowing, being and doing*

Several participants in the research study (I₆, I₁₄ and I₂₅) expressed interest in the integration of all aspects of society into a coherent and logical whole. Their concern was not for the segmentation of human life into its constituent parts but, in fact, for the reverse. They seemed to be concerned that social life had become so fragmented that community life was being eroded away and being fractured at its seams. They were interested in the interrelationships, or the *common bonds*, as being some of the 'social glue' that would bond a community together.

In the following extract from the transcript of the interview/discussion with I₆, a Years 11 and 12 Legal Studies teacher at a Queensland State secondary school, the notion of the social 'congruence' among what one knows, what one is and what one does, was discussed/:

R: ... There has to be congruence, a good mathematical term, between what we know, who we are and what we do. They've all got to fit together in some way. (103)

I₆: If they don't, then there's going to be dysfunction somewhere and sooner or later, something is going to hiccup and it is not going to run correctly. (103)

R: The rationalist might say 'Yes it's my knowledge-base that drives me'. The Social Scientist could say, 'No! It's my whole social and cultural setting that forms the basis for the nurturing of values ...' The Social Activist would say 'No! No! No! It's got to do with what I do out there'. But, I think, it is a synthesis of all those ideas. (103)

I₆: The activist out there can be doing what he or she can do whatever they like but there are things that are causing him/her to be out there doing those things and it is not activism as such. So they've either sat down and looked at the problems that are there, had a look at what they think is best and then gone forward to promote what they think is best given the rational thought processes and their background etc. (103-104)

No! There were two questions in your list 'What types of experiences have you had with the law' and 'what have you learnt from these experiences?'. (104)

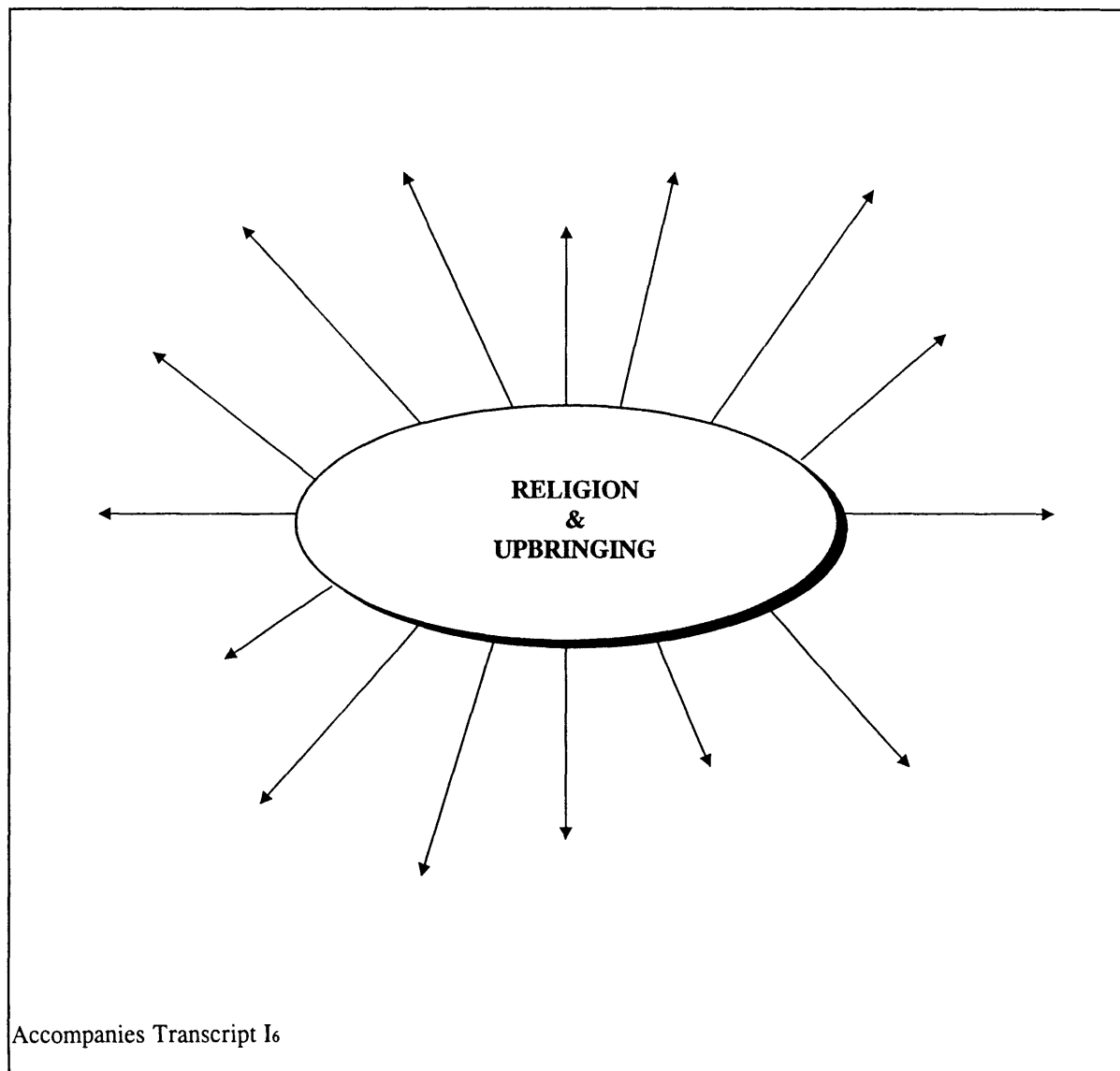
It is probably tied up with some of the things in this diagram (see [Figure 4.8.2](#)), Ahm! you very quickly learn from these experiences where power is and how it influences the decision-making processes. That is important! Perhaps there are many groups in society who never come to grips with where power in the society is. But those people who do have that power, whether it be knowledge of the legal system or how to rationalise a problem through, those people are always going to be far more successful

and have less angst than the people who don't. So it is that power and influence which has been very important. (104)

When you are twenty, you run against the brick wall. As you get a bit older, you decide that there must be a gate in wall or you can climb over it. (104)

In Figure 4.8.2, I₆ outlined his view of the foundational role of religion and personal upbringing in the development of each individual's life. The ellipse represented the boundary between personal and community matters with the arrowhead lines being issues with which one has to deal at the private and the public levels.

Figure 4.8.2 - Interviewee I₆'s view of the nature of *Thinking Legally*.



This notion of *social congruence* was developed further by I₁₄, a senior lecturer in justice studies at a Queensland university. He had, from personal experience, gained first-hand knowledge of some of the inconsistencies that are demonstrated in people's lives. In the following section, his observations are based on the personal and professional aspects of many people's lives:

- I₁₄: Enlightened experience is much wider than reason and intellect. So one can be very intellectual of mind yet lead a very dumb life. I see some very very talented and very very bright and mega-buck people who live incredibly stupid lives. I mean, they only have really developed their brain and as for their emotions, their family life, and whatever else is shot to bits and they wonder why their wives and kids leave them and hate them. It is quite extraordinary that smart people can be so dumb in a holistic sense. That's because they have put all their energy into making money and being brilliant but not being human. So I mean all those things need to be involved. So education to me is a much wider concept than just educating someone to *think in legal ways*, in a rational way that is intellectually smart. (232-233)

A related aspect of this issue was raised by I₂₅, the president of a civil liberties organisation. His focus was on overcoming some of the limitations of his own education. In the following segment, he described his views on the relationship between his own legal education and his involvement with real people with real problems:

- R: If I can use this term *thinking legally* to describe that way of thinking, what might it be? (463)
- I₂₅: Understand the moral and ethical underpinning of the law, have at least a basic understanding of the theories and concepts that underpin the law. Secondly that law is completely and utterly about real people with real problems. That's the only reason that someone comes into real contact with the law or for that matter, the laws are made. They are about governing or adjudicating between real people with real problems. Of course the whole thrust of my legal education was the complete divorce of law from real people with real problems. (463-464)

In above discussion, I₂₃'s proposition of *thinking legally* was not considered to be the only social construct upon which the educative frameworks, processes and sequences were to be developed but merely one possible construct that made a contribution to the overall design of a society's processes. The participants were not articulating a coherent and logical structure for the integration of *knowing, being and doing*. Rather, they were advocating the need for a form of integration which would promote the synthesis of various constituent parts of a community's life into some semblance of a coherent whole.

4.8.8 Integration of all aspects of society: a conclusion

Towards the end of each interview/discussions with the participants in this research study, they were invited to respond to the following research question: *From your experience, what does it mean to think legally?* While a great range of responses was received, four of the participants talked in terms of their interest in holistic perspectives that promoted the integration of diverse aspects of society.

I₁₇, an education officer with a Queensland legal service, proposed a consideration of the context of law within various systems operating in society. While he focused on law as a problem-solving strategy, he was interested in the need for critical fairness in the overall operating system. He saw law also as, but one of the systems, operating in a society that regulates the behaviour of its members using tactics such as precedent or enacted laws, critical fairness, dispute resolution, behaviour modification and establishing boundaries of acceptable community behaviour. This was discussed in the following excerpt from his transcript:

I₁₇: First, Ahm, to put it in context it's looking at law drawn from precedent or enacted law and at least accepting that that exists and that's one of the major means by which our community attempts to resolve disputes, to provide boundaries for behaviour and provide some expectations of what is generally acceptable or unacceptable within the community. (281)

Then I'd say, we need to then look at, with some degree of critical fairness, whether the law is achieving the objects that it claims for itself. Whether there would be different ways to achieve those objects. Whether the processes the law has set up to resolve disputes or moderate behaviour actually seem to work in as far as you can tell empirically. Like does the law change behaviour? Does it effectively resolve disputes? Look at not only changes to the law but what other things we might do to bring about different social circumstances? (281)

I suppose I would be trying to emphasise that the law is just one of the mechanisms we could use to do those things of moderating behaviour and putting boundaries on things. There are a whole lot of other things that influence us and will continue to influence us. Some of those are culturally determined. Some of them are to do with the economic circumstances. Some of them are to do with values, whether they be sort of moral values in the classic Greek sense. Whether they be religious values from whatever religious perspective someone might be coming from. A whole lot of very potent forces affect people about what is 'right' or 'wrong'? What is 'fair'? What is 'reasonable'? other than the law. And it's quite, I mean there are many examples where we can see it's quite possible for people to detest the law. But for other reasons operate in what would be socially acceptable and responsible ways. (281)

R: Tacit systems in a sense rather than formal systems? (281)

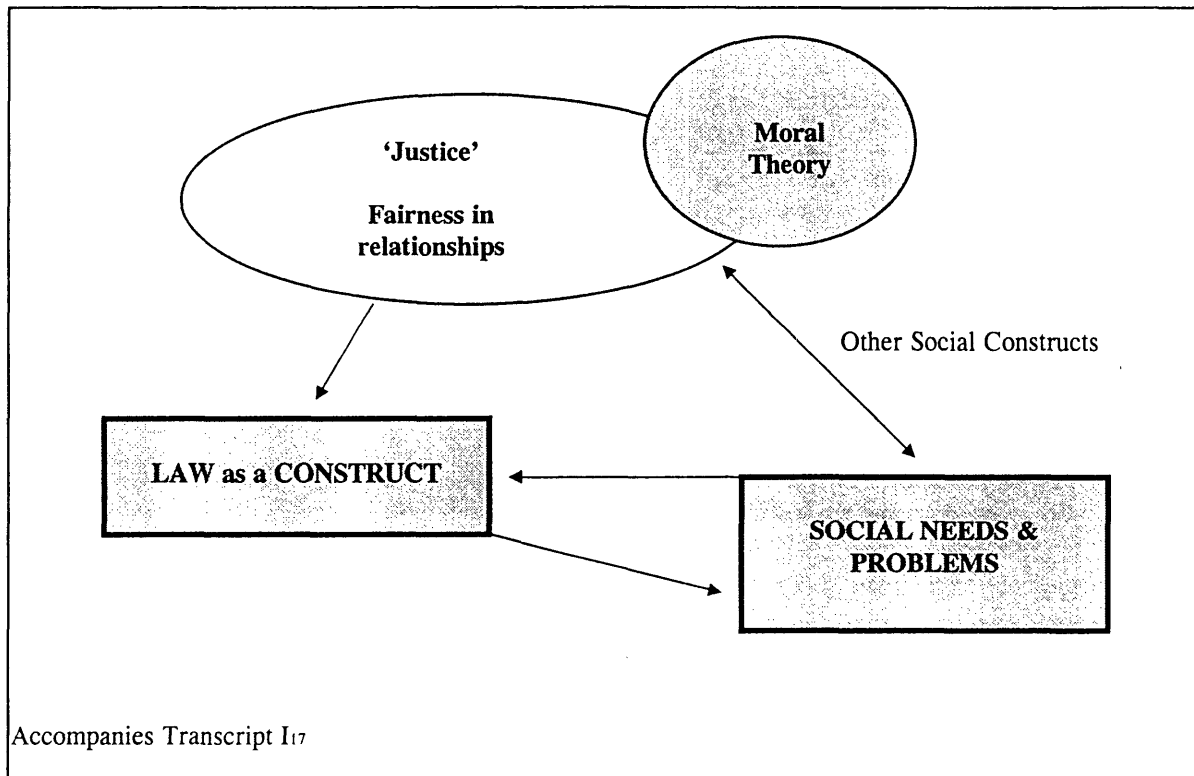
I₁₇: Yes! That's right! So that I guess, I'd be arguing we need to keep the law in perspective as one of the means we have of ordering our society and individual relationships, not the pre-eminent one; one of a range of things and one which is capable of failing. To put it more positively I suppose, to get into more recent management jargon, one which is subject to continuous improvement like everything else. So we should not be accepting what we've got as saying 'Well, it's there'. We should be looking at 'Well how do we change that for the better?'. (281)

So that law then is seen as much more responsive to and dependent on social change and social needs. As our society changes, as we develop more opportunities to different problems, then laws need to change. That copyright example was one. I think many people would be arguing that we're going to confront a whole new set of social, legal, moral and ethical welfare problems as our community ages and more people require care from others. More people might require nursing home care or whatever other inventions we come up with to look after older people in the community. That will expose the community to much more potential for abuse of those people's rights. (281)

Many would argue that we don't have proper legal means in place yet to protect those rights. (281)

I₁₇ expressed some of these ideas in diagrammatic form as he attempted to provide a schematic representation of the key ideas that had been expressed in the interview/discussion. These ideas, expressed in diagrammatic form, centred on the interrelationships of moral theory with justice, and the role of law as a social construct in order to regulate the needs and problems of the society, and are outlined in [Figure 4.8.3](#):

Figure 4.8.3 - Interviewee I17's View of the relationships amongst constituent factors of *Thinking Legally*.



In a similar manner, I13, a deputy principal of a Queensland State secondary school, expressed the need for the integration of interrelationships among the various aspects of the social system in holistic ways. In the following extract from his transcript, he explored these interrelationships, both within the legal system and across the various systems operating in a community, in an attempt to outline his perspectives on this study's *thinking legally* question. He focused on the need for 'core' phenomena, such as legal, health, education and political systems, as well as broader community initiatives including legal education, in the following transcript segment:

- I13: ... So if you had a legal system, a legal framework and a legal education system, what you'd have is some sort of a core. The health system, the education system, the political system, and other systems feed into that process. The law can be seen to drive all those systems effectively. Therefore to *think legally* is really important. Because to be able to do that, you need to make sure that every other system is giving feedback. (211)
- R: So you see the process of helping children and students to *think legally* is the educative way of enabling them to understand the relationships among all the various parts of the system? (211)

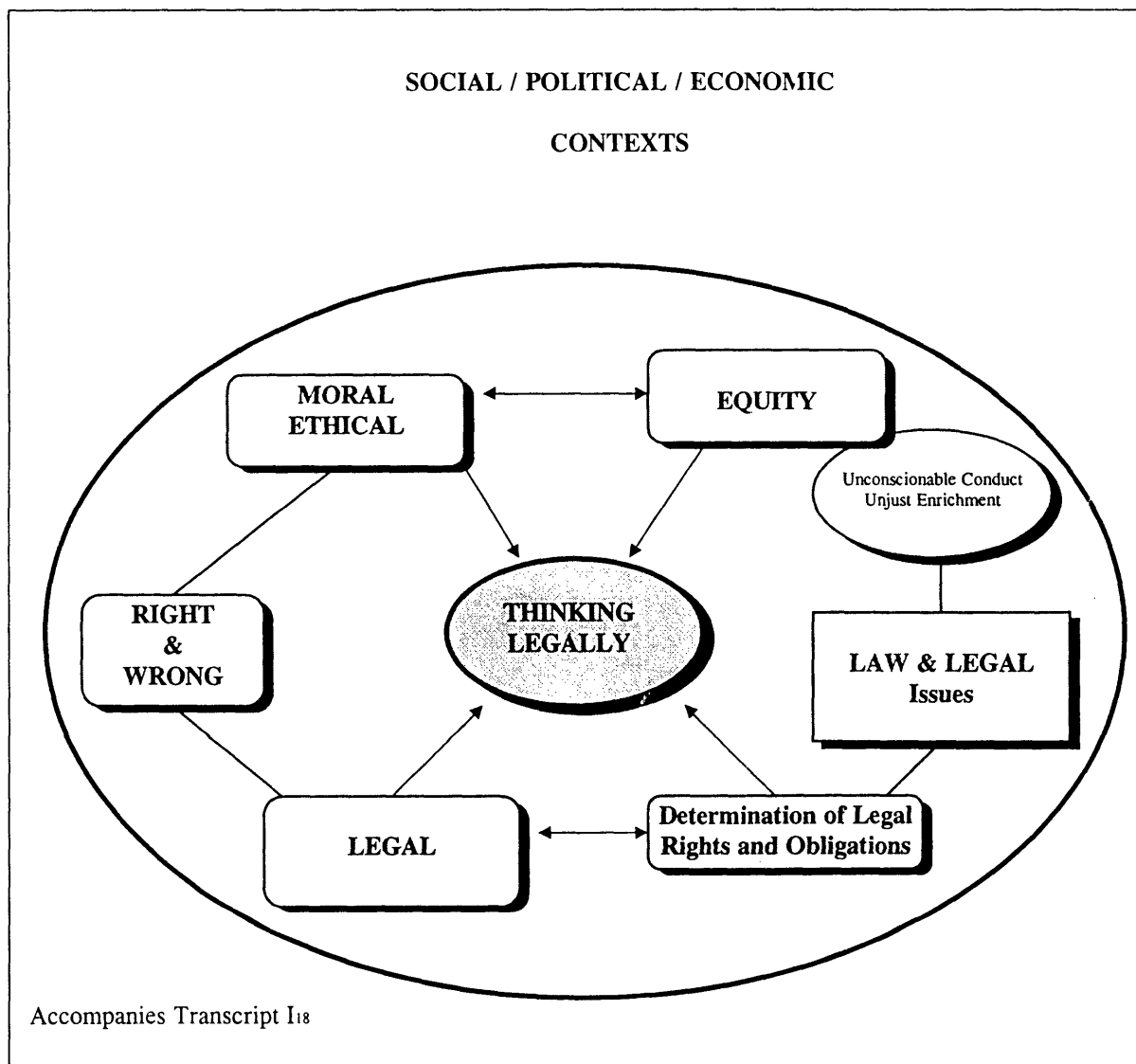
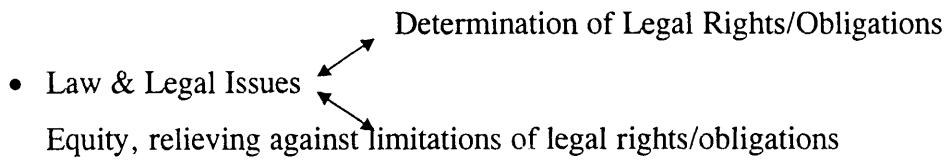
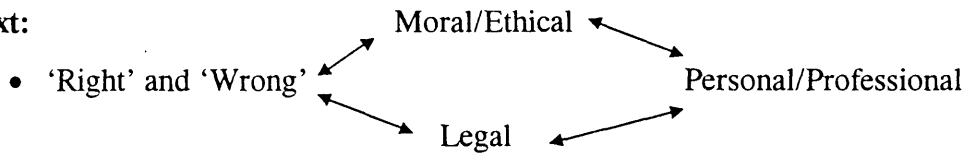
I13: Exactly! And it's also a systemic thing too. It's a broad picture type thing that is working within your community and it is also the practicalities that have to be understood. If they could *think legally*, they haven't got to be involved in the legal situation. What you've got to avoid is the instantaneous reactive type of behaviour in people. So it's also *thinking legally* in order to behave responsibly and to behave thoughtfully. So that you can think before you react in most cases and hopefully in many cases. What we do is encourage students at all levels to do that. At this school there is a big awareness of Legal Studies and it is very popular. (212)

I18, a senior partner in a large Brisbane law firm, in a discussion of his diagrammatic representation (see [Figure 4.8.4](#)) of his responses to the research question of this study, attempted to describe the key interrelationships that he considered were important. These were related to the interplay of moral and ethical thinking, equity, the determination of legal rights and obligations, notions of 'right' and 'wrong', and law and legal issues:

I18: *Thinking legally* ... I think you can put all those concepts you've just mentioned in here although not necessarily synonymous but they are all aspects of *thinking legally*. I mean thinking ethically, thinking judicially, morally, ... and all of those things are ... The moral issue is re-emerging in a different fashion I suppose in what I call the re-emergence of equity. But it is really coming out in what we call the concepts such as unconscionable conduct, unjust enrichment, and reimbursement and things like that. (302)

Figure 4.8.4 - Interviewee I18's personal framework for *Thinking Legally*.

Context:



This schema, provided by I₁₈, complements the views expressed by I₆, a Years 11 and 12 Legal Studies teacher in a Queensland State secondary school. I₁₈'s schema provides a more articulated range of contexts and settings within which religion and upbringing may be placed. It establishes also the relationships, (illustrated by the lines and arrows in [Figure 4.8.4](#)), among a number of key concepts and issues that are, in I₁₈'s opinion, related directly to *thinking legally*. He expressed his thoughts on the question of *thinking legally* in the following extended discussion:

I₆: Rather than purely legal! Because the legal has to sit, and this is where you get injustices, within the total social setting. If the legal just sits by itself making decisions on human activity based on precedent etc., you are going to have more inequitable decisions. You'll get more but you won't necessarily get justice. So and sooner or later, individuals who make it through to that Office (High Court) hopefully will come from a background other than the privileged few. The sooner the country can realise this the better it will be. (99)

But yes! *Legal thinking*, because of the nature of what happens in courts, for example, is only done then by, you want it to be legal and to be without question and litigation, by the experts. And I don't think you can have any more situations. So that in itself is a problem. (99) ...

R: Can you just tease out for me a little the notion of how you see *thinking legally* as being more global, having lots of sub-concepts associated with it ... and what might be some examples of your thinking in that regard? (99)

I₆: I would think that *thinking legally* would be the result of input of a whole range of impulses and processes that are not necessarily legal but include social, cultural, political, economic, ... and therefore making decisions or thinking so that the pathway that you take is directed by the political, cultural, social, ... forces tied in with the law of the land, legislation and common law so that what we come out with is a better and more just society where decisions are balanced rather than skewed. If you just have *legal thinking* you will get to me a skewed result. Whether it be based on precedent or interpretation of a rash piece of legislation ... for *thinking legally* embedded in that are all of the things that act on us as individuals that give us our everyday life. Therefore perhaps we wouldn't have mangroves that have to be cut up at a moment's notice or a Koala habitat that has to be cut down. The more rational, logical, practical and sane decision-making process is to me the important element of thinking legally ... (pause) (99) ...

R: With a wide range of contributors involved in the processes so as to work out the conflict (99) ...

I₆: Yes! This will allow people to get to a point where they can live their everyday life, and that infers conflict resolution etc. *Thinking legally* is to move people forward given whatever problems that face in everyday life. It's no use a harebrained rush off in one direction and all of a sudden say 'Oh we need an extra road here! or I'm in trouble now because I signed that and I shouldn't have signed it. Now I need help.' (99)

Yes it's a more complex way of dealing with society. (100)

This leads to the notion of:

Thinking Legally as a *pervasive and comprehensive construct*.

4.9 CHAPTER CONCLUSION

Consequently, these participants in the research study have expressed a desire for the question of *thinking legally* to be considered in relation to the context or setting of all the social systems that operate in a particular community. They have elaborated a range of conceptions that have been based on their personal life-experiences and worldviews. The seven conceptions outlined in Sections 4.2 to 4.8 of this chapter represent a limited number of qualitatively different ways in which the research participants have perceived *thinking legally*.

They were being non-dualistic in that they perceived the operation of their society in holistic terms. This is an aspect of the research study that is addressed in greater detail in Chapter 5 where deep knowledge and understandings are developed from these surface features.

The seven conceptions discussed in Chapter 4 provide the building blocks of the development of a framework referred to, in phenomenographic terms, as the *outcome space*. A discussion of this outcome space, its implications and of recommendations that flow logically from these is the focus of the final Chapter of this thesis.