

WRITING THESES AND REPORTS - AN ACRONYM FOR STRUCTURE IN THE WILDERNESS: TCAGONARM

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‘I have never come across any topic which with detailed study does not become infinitely complex.’

‘To every question there is a simple answer: and it is wrong.’

Introduction

The aim of this article is to describe a model for structuring analytical writing on ‘social’ and ‘legal’ topics. The model is designated by the acronym TCAGONARM.¹ There is an emerging debate on what the various sub-cultures of people called ‘lawyers’ actually do, and whether they do anything different from other groups of workers (such as ‘managers’, ‘accountants’, or ‘professional advisers’).² Nevertheless, it is clear that lawyers working in many diverse careers are asked occasionally, regularly or frequently are asked as problem solvers and wordsmiths to write an analysis of current events with recommendations for changes.

This writing task is hidden within a variety of labels such as: *exam questions* for law students; *theses* by PhD students; *management reports* by consultants; *investigative inquiries* by tribunals or commissions; *law reform commission reports* by law reform bodies; ‘*papers*’ for governmental departments; or *action-plans* for large corporations.

The writer struggled in the early 1980s with the apparent absence of structural guidelines for law students writing essays or theses; for law reform commissions writing reports on major ‘social’ questions; and for law-firm partners asked to write a discussion paper to guide organisational change in the chaotic legal market.³

* This paper was foreshadowed in, and is a belated sequel to, J H Wade, ‘Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks’ (1991) 2 *Legal Education Review* 283. Thanks to Ross Buckley for comments and encouragement.

1 For a proliferation of acronyms, see now Hammond JS, Keeney RL, Rafia H, *Smart Choices*, Boston: Harvard Business School Press (1999). This acclaimed book sets out an analogous process for making life and business decisions by use of yet another acronym – PROACT. The letters stand for Problems, Objectives, Alternatives, Consequences and Tradeoffs.

2 See for example Nathanson S, ‘The Role of Problem - Solving in Legal Education’ (1989) *J of Legal Ed* 167; ABA, *Legal Education and Professional Development – An Educational Continuum* (MacCrate, 1992); Twining W, *Law in Context* Oxford, Clarendon (1997).

3 There continue to be few helpful guides on the process of wise decision-making for lawyers and their clients. Compare now *Smart Choices* see above n 1.

The structure of TCAGONARM was devised at that time from anecdotal observation of the behaviour of various law reform commissions. This has provided a template for many reports and student essays ever since. Judging by anecdotal student and organisational feedback, the nine headings have created at least a helpful checklist to avoid serious analytical omissions. Some have called the structure ‘useful’; or even a ‘lifesaver’. Nevertheless, this model for writing, like all models, has limitations and needs to be developed, tried, critiqued and modified.

I am encouraged to set out this model as lawyers and academics are overjoyed by well-structured writing – and yet, arguably, are receiving a diminishing quota of joy.

This paper contains various illustrations drawn primarily from family law reform. The reader is encouraged to transpose illustrations from his or her life and interests.

Genres of ‘Legal’ Writing

A variety of types of writing can be observed amongst the assorted tribes of workers called lawyers. No doubt these types substantially overlap with writing genres used by other working groups including politicians, economists and other problem solvers.

These types include:

Strategic advice is a form of risk analysis for a particular client which attempts to guess at a range of conflict outcomes, risks and transaction costs if a particular conflict is continued and to give strategic options in the light of such guessed outcome ranges, risks, and transaction costs.

Rule-oriented strategic advice for particular clients which attempts to guess at future umpire/judicial behaviour by setting out material facts, narrow legal issues or questions, statutory or precedent rules, arguments routinely used on both sides of each question, and guessed possible or probable conclusions of future umpires on each question. This style of writing is often described by the acronyms IRAC, MIRAC, MIRAT or MEIRAT⁴ and has been the traditional fare of law school exams in many countries for over a century. (Rule-oriented strategic advice is only one necessary element of broader ‘strategic advice’).

Contracts which record with different levels of detail an agreement on *who* does *what*, *when*, and with what consequences if *default* occurs.

4 The acronym MEIRAT stands for Material facts, Evidence of those alleged facts, Issues, Rules possibly applicable to the situation, Arguments one each side of the issue, Tentative conclusion. See generally Wade JH, ‘Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks’ (1991) 2 *Legal Education Review* 283.

Case analysis or ‘brief’ which is an attempt to summarise and use inductive logic to extract principles at different levels of generality from the decision of a boss, umpire or judge.

Case (or statutory) critique which is a commentary on a particular decision or statute critically evaluating a situation from the perspective of logic, ethics, sociology, economics, consistency or a version of efficiency.

Technical documentation which consists of converting ordinary language into the specialised jargon of the trade - for example court pleadings.

Advocate’s arguments which consist of lengthy to very short (eg a one page summary) presentations of arguments why a decision-maker should reach a conclusion desired by a particular client.

Report or essay writing consists of trying to identify *what is happening*, then *critiquing* those current events from the perspectives of ethics, sociology, economics and/or psychology, and finally *recommending* a course of action from a range of alternatives.

It is this last form of writing which is given a recommended framework in this paper.⁵

T is for Topic, Terminology or Thesis

The importance of beginning with descriptions or definitions of terminology and topic cannot be overstated. Careful definition of terms and topics has many benefits including:

- A growing acknowledgment of what the report *cannot* and does not intend to cover. This induces a degree of humility which is essential to all discussions involving values, change, human behaviour and predicting the future. For example, a commission may be directed to study ‘The incidence of unfair leases in shopping malls in Melbourne and how to reduce exploitative practices by landlords’. This topic obviously begs long discussion of (a) leases over what period of time? Eg 1995-1998; (b) what is a ‘shopping mall’? (c) why restrict the discussion to a certain category of shops? (d) what are the boundaries of Melbourne? (e) what are the possible

5 This paper itself could well be presented in the TCAGONARM format - for example ‘In what form are reports currently being written in various parts of the legal and reform industries, and how could that form of writing be improved?’ However, the paper is limited to one small element of the TCAGONARM model - namely one possible option for reform of writing methods. The paper is in the genre of a short ‘how to...’ skills guide, such as (1) How to *interview* a client using the Price and Binder model; (2) How to *negotiate* using Fisher and Ury’s model; (3) How to *write* a client advice using the MEIRAT model; (4) How to *write* a change analysis using the TCAGONARM model. Like all models, this one should be eventually put through a TCAGONARM analysis itself to identify strengths and weaknesses as compared to other methods of writing change analysis and reform papers.

meanings of 'unfair'? - price, supervision, terms for eviction, absence of options to renew, linguistic ability of tenants, absence of independent advice, gross inequality of bargaining power, misrepresentations, began 'fair' but predictable or unpredictable changes led to losses? The topic has prematurely suggested that the causes of 'exploitation' is the behaviour of (some) landlords. Inevitably the researcher will discover that there are many cause for people entering high risk leases (or doing anything). Therefore either the topic will have to be redefined to something like - 'How to reduce the incidence of unfair leases in shopping malls in Melbourne?' or the writer will need to state and restate that (s)he is *not* discussing a range of reasons why tenants enter 'unfair' leases such as risk preference, family pressure, unrealistic retirement dreams, false gossip, ignorance about an industry, undulating market prices in the whole retail sector, unexpected redirection of traffic, etc.

- The writer will need to return to this definitional section regularly to re-define the topic and emerging new concepts. An essential part of report writing is to discover regularly that as we search for answers, we have asked the wrong questions.
- The gradual and circulatory tightening of a topic and terminology necessarily means that suggested solutions will also become more precise.
- Precision of definition is also some protection against a thesis marker, scolding boss or impatient Attorney-General. These people may well give you sloppy question language, but they penalise you whenever sloppy solution language is given back to them.

The inevitable complexity of describing any aspect of life need not freeze a writer into dysfunctional paralysis - forever jammed on the introduction. One or several alternative careful working or dictionary definitions, brainstormed with several colleagues (preferably outside group-think conformity), or with a learned researcher for 15 minutes, can provide the foundations to begin work on the next step.

C is for Current Events

In order to discuss possible *changes* to police arrest practices, division of matrimonial property, behaviour of Supreme Court judges, morale in accountancy or legal firms, investment behaviour of Australians and other innumerable important topics, it is vital to *attempt* to discover what is currently happening.

From my anecdotal experience, many students, researchers, Law Reform Commissioners and government working papers *assume* they know what is currently happening in area 'X', and jump quickly to proposing a list of changes. This produces a massively flawed piece of analytical writing. It may inspire some inglorious charges at windmills.

**WRITING THESES AND REPORTS - AN ACRONYM FOR
STRUCTURE IN THE WILDERNESS: TCAGONARM**

One classic current example of this leap in the dark are the proposals to reform the legal profession and courts in Australia (and elsewhere). Allegedly, these groups encourage human beings to engage in ‘aggressive’ or ‘adversarial’ behaviour. However, it is clear that we have little or no idea how the many sub-cultures of lawyers, registrars, counter clerks, brokers, magistrates and judges currently ‘handle’ conflict. Certainly, lawyers have little idea how colleagues outside their own field of specialty actually behave. Instead there is a host of ethnocentric anecdotes, gossip, stories (both horror and wonder stories), mythologies and doctored statistics.⁶

Discovering what is or might be happening in a particular area of society in behaviour, beliefs and emotions is not the specialised work of lawyers. It involves the specialised disciplines of sociologists, anthropologists, psychologists and economists.

For example,

| Anecdote and mythology may tell us that: | While other systematic collection of ‘facts’ suggests: |
|--|---|
| 1. Too many disputes ‘go to court’ | 1. Very few disputes in our society are decided by umpires |
| 2. Judges dispense justice | 2. Most customers do not feel they receive ‘justice’ in a courtroom |
| 3. Violence in families is a problem for the poor | 3. Violence in families is apparently common across all classes |
| 4. Adultery is the major cause of marriage breakdown | 4. Poverty, youthfulness and unemployment are the major causes of marriage breakdown |
| 5. Morale is low in the legal profession | 5. Not in boutique and multinational law firms; and not compared to other workers in professional groups such as university teachers, architects, etc |
| 6. Australians tend to look after the underdog | 6. Australians give less money per head of population to charities than most wealthy industrialised countries |

Report writers should make it clear by careful use of language that facts are fragile. ‘Assuming that this is the current situation...’; ‘I begin with the tentative

6 Legal ‘scholarship’ at Western universities has fundamentally failed, for over a century with very few exceptions, to investigate what lawyers and courts actually do. Law school culture has easily fallen prey to legal mythology, comfortable law library research, unionism and habit. Glimmers of dissent occurred via movements such as legal realism, law in context, critical legal studies and latterly the ‘skills’ and dispute resolution ‘movements’. See above n 2, MacCrate Report and Twining.

presumption that these anecdotes suggest a more widespread pattern...'. 'Assuming that these 1996 surveys are accurate, at least in the Gold Coast area...'. 'The only evidence for this problem which currently exists, is the random complaints of six customers as reported in the Australian newspaper on...'

Many reports, essays and theses will have to begin on the basis of *assumed* current events. This is inevitable as the writers have neither time, resources or expertise to create a more stable or credible version of current events. The essential point is that the factual assumptions and limited supporting evidence should be overtly and loudly identified in this second stage.

A report can set out at this second stage a list of factual questions for which it would be helpful to have tentative or probable answers. Thereby the writer can demonstrate that

- there are many vital missing pieces in the jigsaw of 'current events'.
- analysis and reform must go on by guesses and acts of faith as no one can fund or wait for research on all the important facts.

Under the chapter on *current events*, some report writers also set out a version of *history* which led up to the present. This is sometimes very useful as it helps to understand cultural values, competing social interests, the normalcy of this social 'problem' and reasons for current anomalies. Such preliminary understanding foreshadows the analysis which will occur later in the report under categories such as alleged defects in the current situation, options for change and alleged side-effects when change is attempted. Thereby a historical overview encourages again that necessary element of humility (it has all been tried before), possible timeliness for reform, and foreshadows repetitive themes which will occur later in the report, essay, or thesis.

Additionally under the chapter on current events or background history, some report or thesis writers also assemble a *literature review*. This can be a useful historical glimpse of the views of many researchers from different disciplines on what *has* happened, *is* happening and what options for change have been tried or suggested historically. Like the historical review, a literature review tends to induce respect and humility, and foreshadow the repetitive themes of the whole thesis.

For example, any history or literature review of dispute resolution will produce recycled themes of:

- consumer pressure for cheaper and faster processes
- inadequate diagnostic tools for conflict management
- uncertainty on the meaning of 'success'
- turf wars by providers of different services
- uncertainty about what different services even exist
- inability to compare 'success' rates of different services

**WRITING THESES AND REPORTS - AN ACRONYM FOR
STRUCTURE IN THE WILDERNESS: TCAGONARM**

- fudged statistics and mythology on ‘success’
- stress and burnout
- more for less

Unless alleged *current events* are identified in the context of ‘grand historical themes’, then the essay or report risks identifying false ‘crises’ or reinventing bent wheels.

A for Alleged Defects in the Current Situation

Having described current events (eg distribution of profits in a business; judicial patterns of sentencing for public drunkenness; reported and unreported cases on damages for negligent driving etc), the next step is to collect systematically the alleged defects or critiques of the current situation from different interest groups. Such is the iconoclastic thrill of demolition that many writers love to leap to this stage - scarcely touching the foundation stones of T and C. Additionally, the rush is often unrepresentative. The critique pours out from the perspective of *one* interest group - wealthy males, poor females, city dwellers, Polish migrants, middle-ranking teachers, the highly educated, the long-term unemployed, the squeaky wheel.

The aim of this stage is to collect critiques, whether ‘informed’ or not, from many interest groups or individuals who might otherwise be silent. Thus the current settlement practices and case law on the division of property within families needs to be criticised during and after disputes, by wealthy, middle-class, and poor disputants; farmers, small businesses and cross-cultural families; department of social security and legal aid officers; male and female lawyers in city, country and suburban specialist and generalist practices; city and country judges, liberal and conservative; economists and ethicists of various categories.

The alleged defects in the current situation can be categorised in many ways including:

- lack of consistency of treatment - random outcomes
- inconsistent treatment based on distinctions considered to be unfair - race, gender, disability, wealth, educational levels
- outcomes or processes which result in psychological trauma
- outcomes which have hidden or obvious unfair or one-sided distribution of money or resources

The lenses of different schools of economics, ethics, logic, sociology and psychology will each bring a different swag of alleged defects. Collecting a representative sample of critiques may reduce the tendency of proposed reforms to swing from one extreme to another.

G is for Goals of Desirable System

The previous step of alleging defects necessarily begins to hint at the values behind those critiques. Thus the flip-side of negative criticism is a murky set of positive values or goals. For example in the area of taxation reform:

| ALLEGED DEFECT | GOAL |
|--|--|
| <i>Current taxation laws:</i> 1. Provide a disincentive to work for single parents | <i>Future taxation laws should:</i> 1. Provide incentives to work for all people |
| 2. Can be readily evaded by wealthy people | 2. Have means to control excessive tax minimisation |
| 3. Are clumsy and expensive to enforce | 3. Have efficient collection mechanisms |
| 4. Discourage foreign investment in Australian businesses | 4. Encourage foreign investment in Australia |
| 5. Are incomprehensible to anyone but a specialist | 5. Be capable of being understood by the vast majority of citizens |

Many of the goals of a desirable system will sound like banal parenthood statements. Additionally, some of the goals will necessarily stand in tension or contradiction. For example, the desirable goals of a dispute resolution system include being ‘accessible, fast and inexpensive’; but also having the protections of ‘due process’ – and hence, increasingly inaccessible, slow and expensive.

Nevertheless, it is essential to unearth and clarify the multiple generalised *goals* and *values* to be balanced in a desirable system. Otherwise the writer is critiquing from unclear premises; aiming for a mysterious reform arena; and has no broad measuring sticks for monitoring the reforms finally recommended.

O is for Options for Change

The fifth step in this law reform model attempts to catalogue the particular options for change (without yet attempting to *evaluate* the strengths and weaknesses of each option).

This is sometimes called the ‘field of choice’ by law reformers. It amounts to a lengthy list of detailed schemes which attempt to balance the more general goals and values spelled out in the previous step. Developing the list of options often involves comparative studies of other corporations, universities, schools, legal systems, forms of transport or cultures. Unearthing the field of choice tends to involve air travel, and the ubiquitous perils of cross-cultural observation.

For example, the apparent current world-wide epidemic of post-divorce poverty for women has a range of optional responses including:

- enforceable marriage contracts
- marriage insurance
- increased public housing
- increased accessibility to pensions
- increased child care facilities
- encouraging more flexible part-time jobs
- accessible retraining facilities
- higher property division percentages for homemakers
- capitalising earning capacities in property settlements
- formula child support amounts, collected by the tax office
- more spousal maintenance awards
- prohibiting 'young' marriages
- requiring invested dowries from males
- education in schools about economic risks of marriage and responses thereto
- etc etc

Once again, there is an anecdotally observed tendency for writers to miss this step of cataloguing options, or to address it superficially. Instead they rush to a single quick-fix solution (which is allegedly fashionable in New Zealand, California, Sweden or some other distant Nirvana).

N Stands for Necessary Action to Move from the Current Situation to Each of the Options

This 'N' stage of any analysis involves identifying actions probably necessary to achieve each of the options identified in the previous step. (Judgment is deferred until the next stage on the benefit/detriment analysis of each option).

For example, as previously mentioned, the options for reducing post-divorce poverty of women include increased pension accessibility, wider range of part-time employment, access to retraining schemes, more public housing, increased use of and enforceability of marriage contracts, more legal aid, increased percentages in property settlements, more and higher spousal maintenance awards etc.

Taking one of these options, namely 'more spousal maintenance awards' - what actions would probably be necessary to effect this change? These actions include:

- Find groups of zealous reform advocates who will provide the engine room of publicity, flair, story telling, power and persistence to press for change.
- Legislative change to direct judges to make more awards.
- Judicial education on the desirability of more spousal maintenance.
- Department of Social Security systematically pressuring recipients of social security to apply for spousal maintenance.

- Education of specialist and generalist lawyers, mediators and counsellors about the 'new law'.
- Legal Aid for spousal maintenance applications.
- Several land-mark theatrical judicial precedents.
- Educational material on buses, T.V., radio, video, do-it-yourself kits.
- Publicised accessibility to the Tax Office to assist with *collection* of spousal support.
- Tax deductibility of part or all of spousal support payments.
- Statistical measurement of patterns of spousal maintenance awards and payments to provide encouragement to persist with the reform (etc).

This exercise can be repeated in any proposed area of 'legal' or 'social' change. Effective reform may require action at multiple levels - rule, process, education of various interest groups, diversion of resources, measurement and persistence.

A stands for Alleged Benefits and Disadvantages of each of the Possible Options for Change

This stage of writing involves a cost-benefit analysis of each option for change. Once again, A is for 'alleged' in order to reinforce the humility which is needed in this area of guesswork. Writers have a predictable tendency to gush with enthusiasm about their preferred option and dismiss alleged disadvantages with impatience, insult, doubt and 'the devil is in the detail' (alias for 'the reform is a failure').

There is an interesting argument that change needs to be driven by fashion, fads, fraud, faith, enthusiasm and lack of analysis. Careful analysis of possible costs and benefits tends to dampen messianic urges. Does the successful *launching* of reform normally require zealous advocates who brush 'doubters' and careful analysis aside?

Single-minded zealots may be necessary to launch any reform including mandatory sentencing, facilitative mediation, formulaic child support, decreased income tax, liability of company directors, native land rights, expansion of promissory estoppel and liability for nervous shock.

Nevertheless, analysts attempting to investigate truth beyond the initial short term launching of a reform, must sit through the 'death by a thousand cuts' involved in alleging costs and benefits of each reform option.

For example, when responding to the post divorce poverty of females, one option is to move the rules of property division from discretion towards rule (a predictable reform pendulum in most areas of legal regulation). Usually, this would involve modifying matrimonial property legislation to state that normally

**WRITING THESES AND REPORTS - AN ACRONYM FOR
STRUCTURE IN THE WILDERNESS: TCAGONARM**

matrimonial property will be divided *equally* rather than according to judicial discretion to divide according to 'justice and equity'. The probable advantages and disadvantages of a rule based reform (given the goals of the reform) can and should be tabulated as follows:

| <i>Alleged Advantages of Rule-based Matrimonial Property Option</i> | <i>Alleged Disadvantages of a Rule-Based Matrimonial Property Option</i> |
|---|---|
| 1. Provides a clear shadow in which settlements can be negotiated | 1. Requires ten years of new litigation test cases to clarify the exceptions to the rule |
| 2. Reduces transaction costs of negotiation | 2. Increases transaction costs of negotiation for at least ten years while new precedents stabilise and are publicised |
| 3. Increases probability that all homemaker/parenting spouses will receive at least half the property | 3. Decreases awards to the many poor and middle class women who are already receiving between 60-90% under current discretionary awards and settlements |
| 4. Will help wealthy homemakers raise their shares from about 40% to 50% | 4. Will help wealthy homemakers raise their shares from about 40% to 50% |
| 5. Operates in some other countries | 5. Operates in some other countries subject to constant critique that 'rule equality is not result equality' |
| 6. Is simple for the giving of legal advice. Most people can divide by two. | 6. Is complicated for giving legal advice as the new rules require complex definition of 'property' and a list of exceptions |
| 7. Married people have a degree of certainty on what they 'own' | 7. Loses the perception that results are 'custom-built' for each client based on discretion |
| 8. Encourages the use of marriage contracts | 8. Encourages the use of marriage contracts |
| 9. This is 'cheap' reform as it only requires some changes in legislative wording; without a new bureaucracy, or allocation of resources | 9. Will require a large amount of money to educate the public and professional advisers about the reform; and will have other impoverishment costs – see 4. |
| 10. Politically, this is a change relatively easy to pass through Parliament as it can be sold easily with slogans such as 'simple', 'fair', 'reduce legal costs' | 10. Will probably result in an increase of applications for spousal maintenance and child support in an endeavour to 'top up' 50% property shares |

R Stands for Recommending the Most Advantageous or Least Detrimental Option

This is the stage of analysis that we are all tempted to leap to prematurely. An 'executive summary' may skate to the 'bottom line' recommendation without the agony and volume involved in the building blocks. A recommendation is always an act of faith and guesswork. The vague elements of risk, expenditure, cost-benefit analysis, political will and unexpected side effects of any change mean that a recommendation is itself a risk. It should be identified as such if writing is to be less than propaganda.

Once again, for those looking for a best-selling novel, or a messianic movement, or a re-election wave, this last step in 'truth-seeking' writing will rarely have sufficient punch or inspiration. It will be a rough road into the wilderness.

M Stands for Monitoring or Measuring the Outcome of the Recommended Change (or Recommended Status Quo)

This final stage of the acronym follows naturally from the necessary guesswork attached to any recommended change. Is the change better or worse than the status quo? Does the recommended change live up to its list of alleged benefits? What foreseen or unforeseen side effects have eventuated?

This final stage of analysis is particularly notable by its absence or superficiality in writing undertaken by politicians and lawyers - amongst others. Its absence is understandable as a chapter on measurement and monitoring:

- Immediately implies (justifiably) that the recommendation might be wrong or a 'mistake'. This is anti-climactic for a stylish ending to a report, and politically unacceptable in a culture where power-brokers need to sell cheap or fashionable solutions and are reluctant to admit the possibility of error.
- Requires the expensive and labour intensive establishment of measurement criteria, control groups and long term highly skilled survey staff. It also inevitably leads to a future debate on the validity of surveys, control groups and other measurement processes. The reform budget is often exhausted just in selling and implementing the change, and will have little left to measure its consequences other than in a superficial or self-serving manner.
- Raises the uncomfortable spectre that if the reform or change is measured as 'unsuccessful' (based on the objective criteria set up by 'goals'), how will the change be deconstructed? At what cost? With what consequence to those then in power? With what rewriting of the history books, bronze plaques, board minutes and web-sites which glorified the reform?

Despite the strong temptation to abbreviate or excise this last measurement chapter, its inclusion is essential to move the analysis beyond propaganda.

**WRITING THESES AND REPORTS - AN ACRONYM FOR
STRUCTURE IN THE WILDERNESS: TCAGONARM**

This stage is particularly important for writers who may have become culturally isolated in a law reform commission or university. Measurement requires the isolated to prove their recommended solutions in a sceptical or conservative outside world. Monitoring tends to bring many a grand solution tumbling down.

Conclusion

Many people working in the environments of politics, social science, law or management are required to write reports or theses analysing proposals for change. This is never an easy task. However, the discipline of the TCAGONARM acronym provides a useful checklist and even a structure, to reduce the chance of major errors, oversights and pontificating propaganda in such writing.

In the fullness of time to complete the circle, the analytical structure of TCAGONARM needs to be turned upon itself. How are reports and theses currently being structured in(pick a suitable geographical location and discipline), and what changes are desirable?