Book Reviews

Community Law Reform Committee of the Australian Capital Territory, *Report No. 6: Victims of Crime* (Canberra, August 1993).

The Australian Capital Territory established a Community Law Reform Committee in July 1990 to consider emerging social and legal issues which might call for law reform and to assess the practical impact of any such proposals on the citizens of the Australian Capital Territory. Its sixth report is the result of 2½ years of work on a reference on whether the criminal justice system in the Australian Capital Territory adequately deals with the needs of victims of crime and, in particular, whether victim impact statements should be introduced into judicial proceedings.

In 1985, the United Nations adopted the *Declaration of Principles of Justice Relating to Victims of Crime.* This was directed towards providing victims with redress and compensation for the harm suffered and for allowing their views and interests to be represented at appropriate stages of criminal proceedings.

The needs of victims are many and varied. They include the need for counselling to overcome the emotional effect of the crime; the desire for information on the stage reached in the investigation and prosecution; and the need for clarification of their role in it, particularly in respect of such matters as arrest, bail and the preferring of charges. Normally, on guilty pleas, victims are not called as witnesses. Yet their presence at the hearing to observe whether justice is being done in their case may be an important part of their own rehabilitation and possible reconciliation with the offender. If a custodial sentence has been imposed, the victim might be keen to know the release date of the offender in order to be forewarned of the possibility of encountering the offender.

These considerations are all addressed in this Report. It recommends that the Australian Capital Territory adopt a declaration of victims' rights to be enshrined in legislation. It calls for them to be reinforced by guidelines regarding the provision of counselling services and assistance to victims to help them navigate their way through the criminal justice system and to aid their own restoration. Some 22 victim's 'rights' are identified as deserving legislative recognition.

More controversial, however, is the recommendation that a legislative framework be established for the preparation and use of victim impact statements in the Australian Capital Territory. Victim impact statements are now politically correct. Though they are already mandated in South Australia under s 7 *Criminal Law (Sentencing) Act* 1988 (SA), in New South Wales under s 447C *Crimes Act* 1900 (NSW) and, most recently, in Victoria under

the *Sentencing (Victim Impact Statement) Act* 1994 (Vic).[1] The Victorian Parliamentary Legal and Constitutional Committee,[2] the Victorian Sentencing Committee[3] and the Australian Law Reform Commission,[4] are all on record as having recommended that victim impact statements not be adopted. Their opposition was based on the view that there were broader issues at stake in the sentencing process than represented by the interests of the victim alone. Victims have never been direct parties to criminal proceedings even though they have an interest in the case which goes far beyond that of the general public. The sentencing of offenders takes place in a more extensive legal and social context than is defined by the needs of the victim to be consulted, heard and compensated.

Though information on the physical, psychological and financial harm suffered by a victim of crime is relevant to an assessment of the gravity of the offence committed, the victim's personal preferences regarding the appropriate sentence to be imposed is irrelevant to the judicial function of sentencing. Putting aside the issue of whether the opinion is based on a sound understanding of the law of sentencing, giving weight to it threatens to produce emotional distortions of the legal sentence in favour of vengeance. The courts have consistently counselled that vengeance is not to be equated with justice and that the understandable feelings of the victim or relative of a victim must not be allowed to move the court beyond what is required by way of punishment according to law. The criminality of the particular offender before the court has to be placed both within the legislative framework of available sentencing options and the range of punishment acceptable for offences of a similar type and gravity.

Another concern relates to the veracity of the information supplied to the sentencer via a victim impact statement. In all of the legislative schemes for receipt of victim impact statements, and in the recommendations of the Australian Capital Territory Community Law Reform Committee, allowance is made for counsel for the defendant to cross-examine the victim on his or her impact statement. While the Committee hopes that, requiring the victim impact statement to be supplied to defence counsel prior to hearing will allow for resolution of any disputes regarding its content by informal negotiation prior to sentence, it accepts that, fairness to the accused requires that the victim be prepared to be subject to examination and proof of its contents. While this is at odds with other simplifications of criminal procedure to save victims from being traumatised by the trial process, the Committee recognised that the right of cross-examination on the factual basis of sentencing had to be preserved. It did, however, recommend that the victim should be given an opportunity at any time until tender of the victim impact statement in

[1] Inserting new ss 95A–95E in the *Sentencing Act* 1991 (Vic) and a new s 136A in the *Children and Young Persons Act* 1989 (Vic).

[2] Victorian Parliament, Legal and Constitutional Committee, *Report Upon Support Services for Victims of Crime*, Victorian Parliament, Melbourne, November 1987, 98–9.

[3] Victorian Sentencing Committee, *Report: Sentencing*, Melbourne, Victorian Attorney-General's Department, 1988, para 13.4.3.

[4] Australian Law Reform Commission, *Report No 44: Sentencing*, Canberra, Australian Government Publishing Service, 1988, para 192.

court, to withdraw it rather than face the possibility of cross-examination upon it.

It is a measure of the anxiety which the Australian Capital Territory Committee felt regarding the introduction of these statements that it called for the use of victim impact statements and their effect on sentences to be evaluated over a 12 month trial period. If that assessment revealed an aberrant result, their continued use should be reconsidered.[5] This is sound advice which could be heeded as well in Victoria.

The Report, which runs to some 167 pages, also suggests that the Australian Capital Territory trial a project to attempt reconciliation between offenders and their victims. It is to concentrate on juvenile offenders who, on volunteering for the PAR Scheme (Process of Attempted Reconciliation), would be diverted from court once found guilty. If both the prosecution and defence agree that the matter is suitable for PAR, the offender will be invited to mediation and reconciliation sessions with the victim. A major section of the Report is given to formulating the aims of that process, how they are to be measured, and the extent to which any elements of the process should be made compulsory. It is an area fraught with difficulty and the Committee is to be commended for its willingness to test its viability in a controlled fashion. The criminal justice system can benefit from experiments of this nature in searching for alternative and more humane and effective sanction systems.

The Report ends with coverage of criminal injuries compensation arrangements and the special situation of intellectually impaired persons. While the Report specifically describes the problem of children as victims, there is no recognition that corporate entities (including government agencies) can also be the victims of crime. While their claims for recognition and compensation for trauma are not so obvious, those for reparation and restitution can be just as real as for natural persons. The new Victorian legislation for victim impact statements defines 'victim' as including corporate as well as natural legal persons.[6] The Australian Capital Territory recommendations make no such concession.

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[5] Community Law Reform Committee of the Australian Capital Territory, *Report No 6: Victims of Crime*, Canberra, August 1993, para 195.

[6] *Sentencing Act* 1991 (Vic), s 3(1) as amended by the *Sentencing (Victim Impact Statement) Act* 1994 (Vic).

Playing By the Rules: A Philosophical Examination of Rule Based Decision-Making in Law and Life by FREDERICK SCHAUER (Oxford, Clarendon Law Series, 1991) pp xvii, 254.

Interpretation and Legal Theory by ANDREI MARMOR (Oxford, Clarendon Law Series, 1992) pp viii, 193.

The Clarendon Law Series has recently added many fine books to its distinguished list of publications, including a number dealing with the nature of rules and of interpretation. Since publication of the two books reviewed here, others by Kent Greenawalt and Brian Bix have appeared which may also be essential reading for those interested in these subjects.

Schauer's primary concern is with the nature of rules, in life generally as well as in law, but he necessarily deals with the meaning and interpretation of rules as well. Marmor, conversely, is interested mainly in interpretation, but his analysis illuminates the nature of rules. There is therefore a substantial overlap in the coverage of the two books, which will be the focus of my review. Before turning to that overlap, I will briefly summarise the other subjects treated by them.

Schauer's analysis of rules and of rule based decision-making is primarily analytical rather than normative, but he does discuss normative issues in chapter seven. His purpose is to clarify the phenomena in order to dispel confusions which often mar normative argument. His descriptive analysis appears to be quite comprehensive. After a first chapter in which the issues are carefully delineated, he introduces in chapter two the 'central theme of the book, the importance of seeing rules as crude probabilistic generalisations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous' (p xv). In chapter three he distinguishes two different types of decision-making which are both to differentextents guided by rules. In the first type, which he calls 'conversational', rules are not followed in particular cases if they are deemed to have suboptimal or erroneous results. In the second type, which he calls 'entrenchment', rules have more binding force: they are often followed even when they do not serve the purposes which motivated their creation. Only the latter is truly 'rule based' decision-making. The former is based on the underlying purposes of rules. In the fourth chapter he explains how this kind of entrenchment is possible, which is to say, how language enables rules to be understood independently of those motivating purposes. In the sixth chapter he compares his account with those of David Lyons and Joseph Raz. He applies his analysis to common law and to statute law in chapters eight and nine respectively, dealing with interpretation in chapter nine. Normative issues are explored in chapters seven and ten.

Marmor deals with interpretation in legal theory at more than one level. One of his primary aims is to defend legal positivism against Dworkin's interpretative theory of law, and in chapters one, three and four, he brings great acuity to the question of the role of 'interpretation' in theories of law. In

chapters five and six he criticises Michael Moore's 'realist' theory of meaning, and discusses Joseph Raz's theory of authority.

Turning to the areas of overlap between the two books, concerning the nature and meaning of rules and their interpretation, both take a similar approach which I believe is mistaken. Both over-emphasise semantics and syntax at the expense of pragmatics. Let me explain.

As I use these terms, semantics and syntax refer, respectively, to the 'dictionary' meanings of words, and the grammatical rules which govern their combination in meaningful sentences. Pragmatics refers to the contribution to meaning of extra-linguistic factors, such as the context in which utterances are made, knowledge of the speaker's beliefs and purposes in speaking, and so on. Semantics and syntax are governed by social rules or conventions, but pragmatics is not: it is 'situational', in the sense that how extra-linguistic factors contribute to meaning varies from one situation to another. This is because they contribute to meaning by providing evidence of the communicative intentions of the particular speaker in question, and those intentions cannot be fixed by social rules or conventions.

Both Schauer and Marmor analyse the meanings of rules in terms of semantics and syntax. In both cases, this leads to the conclusion that what a rule means — that is, what a rule is — is largely independent of the purpose which lies behind it. To know what a rule is, one only needs to know the social rules or conventions which govern verbal meaning (see Schauer, ch 4, and Marmor, ch 2). If, on the other hand, what a rule means, and therefore is, depends partly on pragmatics as well, then it is partly dependent on the purpose behind it, since pragmatics in this case concerns evidence of the intentions of the rule-maker. This bears on the famous debate between H L A Hart and Lon Fuller, over Fuller's claim that all interpretation is necessarily 'purposive'. Both Schauer and Marmor defend Hart against Fuller (Schauer, ch 9, and Marmor, ch 7). It also bears on the equally famous debate over the relevance of 'original intentions' in constitutional interpretation. Both authors are, broadly speaking, unsympathetic to 'originalism' (Schauer, ch 9, and Marmor, ch 8).

It seems to me that it is a major error to exclude pragmatics in any analysis of the meaning of legal rules, at least in common law legal systems, and an error with considerable consequences for the operation of those systems. It is a mistake because the relevance of pragmatics has always been recognised by common law courts. They have often said that statutes should be interpreted according to the intentions which they convey, either expressly, or by implication, given common knowledge of the context in which they were enacted and what they were intended to achieve.

The mistake has considerable consequences because if pragmatics are ignored, then the meanings of legal rules are much less substantial and determinate than they are usually taken to be. This is obvious given the broader range of factors which pragmatics brings to bear on questions of meaning. Purely verbal or literal meanings are much more prone to ambiguity, vagueness and absurdity then the richer meanings informed by pragmatics as well as semantics and syntax. (See J Goldsworthy, 'Implications in Language, Law

and the Constitution', in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 150.)

Schauer and Marmor both deal with this problem in the same way. According to them, the fact that legal rules when understood literally are often absurd or unreasonable does not show that they should be understood in some other way, informed by purposive considerations. Rather, it shows that judges should sometimes decide to change legal rules rather than simply apply them (Schauer, 212–14, Marmor, 136–7). Schauer calls this 'presumptive positivism': there is a presumption that legal rules ought to be faithfully obeyed by judges, but the presumption can be overcome (Shauer, 196–206).

But this solution is more problematic than Schauer and Marmor appear to recognise: it seems incompatible with accepted constitutional norms. It is surely better, if possible, to avoid placing courts in the predicament of having to change legal rules which are supposed to be binding on them. That is one benefit of acknowledging that legal rules are best understood in the light of their purpose, as revealed by the contextual evidence which is the concern of pragmatics. In other words, there is much more to be said for Fuller's side of the debate with Hart than either Schauer or Marmor recognise. There is also much more to be said for a modest version of originalism, in constitutional interpretation, than they acknowledge. In fairness, I should add that Schauer's theory of the meaning of rules could probably be modified to incorporate pragmatics without too much difficulty, and most of the other positions he defends could be maintained after suitable adjustments. But I am not sure about Marmor's theory.

Notwithstanding my criticism, there is much of value in both books, especially in the many chapters which are not discussed here. In particular, Marmor's analysis of Dworkin's 'interpretative' legal theory, and Schauer's exposition of the many virtues of rule based decision-making, are very illuminating. As far as style is concerned, both authors are admirably clear. Schauer's prose is particularly clear, although his constant repetition of his main distinctions and conclusions is sometimes excessive. I warmly recommend both books.

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An Australian Charter of Rights? by JUSTICE MURRAY WILCOX (Sydney, The Law Book Co, 1993) pp xxvi, 298.

An Australian Charter of Rights? by Justice Murray Wilcox is a serious attempt to revitalise the debate on whether Australia should entrench certain human rights in its Constitution. The book does not attempt to be the definitive work on a Charter of Rights for Australia; instead it aims to set the

groundwork of a more intelligent debate on the topic than we have seen to date in this country. In particular, it aims to relaunch the Constitutional Commission's draft Bill for an Australian Charter of Rights and Freedoms.

Based on original research conducted at Harvard Law School during 1991, the book offers a comparative analysis of the human rights jurisprudence of the United States, Canada and Australia. Part One gives a brief historical background to the US Bill of Rights and surveys the pre 1937 and post 1937 'New' Supreme Court's approach to interpreting the US Bill of Rights. Wilcox draws some significant lessons from the American experience but concludes that the model is too out of date to be of great use in the development of an Australian Charter.

In Part Two he provides a detailed description, rather than a critique, of the jurisprudence of the Canadian Charter. Wilcox has chosen to emphasise the Canadian experience, as it is the State which most closely resembles Australia in terms of its political history, legal system, geographical conditions and population. Canada is also an interesting case study of a western country whose experience with constitutional rights jurisprudence is relatively recent. Canada achieved constitutional entrenchment of the Charter of Rights in 1982, a step preceded by two decades of dissatisfaction with a statutory Bill of Rights enacted in 1960.

Part Three is an analysis of the Australian position and includes a section on the most significant recent High Court cases which evidence a shift by the Court towards a rights analysis and the evolution of what might loosely be called an implied Bill of Rights. It is a sign of the topical relevance of the book that this section is rapidly becoming out of date. The draft Bill of the Constitutional Commission for an Australian Charter of Rights and Freedoms appears as Appendix C.

This book is not a polemic on human rights issues or a philosophical treatise on liberty in the modern democratic state. As the work of a practising judge it is not surprising that his style falls within the boundaries of traditional legal discourse. It approaches the subject through case analysis and will serve as a useful resource for students of rights jurisprudence in the US, Canada and Australia. Unfortunately, however, Justice Wilcox has avoided some of the more controversial and interesting issues and mainly confines himself to the traditional territory of civil and political rights. While he invites us to consider developing a modern Bill of Rights based on the principles of non-discrimination and equality, he does not explore the outer parameters of the concepts.

Feminists, labour activists and indigenous peoples will find little in this text which strengthens their own claims for recognition of specific rights. The discussion of the equality guarantee under s 15 of the Charter is detailed but quite uncritical. The right of women to personal safety and security of person, and workers' right to strike are conspicuously absent. Similarly, the subject of indigenous rights to self determination is missing from the text. Given Canada's own experience with the recognition of indigenous rights, it is particularly surprising that no space is given to the evolving concept of self

determination and the possibility of constitutional entrenchment of Aboriginal rights in an Australian Charter.

Like most Australian judges, Wilcox reaches for the decisions of his judicial colleagues, rather than Australia's own international human rights obligations, as the source of guiding principle. He makes a passing reference to international legal developments but does not draw upon international human rights law in general to develop his discussion on the content of a future Charter, relying instead on the Commission's proposal.

Nor is there any discussion on existing federal and state legislation. Given that, in addition to the federal human rights regime, every state and territory has some form of anti-discrimination or equal opportunity legislation, some discussion on the relationship between a Charter and existing legislation would have been useful.

Finally, Queensland, Victoria and the Australian Capital Territory have produced extensive discussion papers on Bills of Rights and some mention of the role of the states in the evolution of an Australian Charter of Rights would have been welcome. Given the historical failure of federal attempts to enact a statutory Bill of Rights or secure constitutional reforms, it may well be the states and the Australian Capital Territory that lead the way on this issue.

For many practising lawyers and activists in the human rights movement the lack of discussion on these important areas will be a major shortcoming. However, no text can satisfy all demands and the nature and scope of the book achieved what it set out to do. Although somewhat conservative for my liking, it is well pitched to the current political climate and an audience, the majority of whom are conservative. Judging by public comments from the former Chief Justice, Sir Anthony Mason, to the Sydney Institute last year, Wilcox may also represent a growing trend amongst some of his judicial colleagues.[1] His Honour reminded the conference that Australia and the UK are the only common law countries without such an instrument. His comments were regarded as an expression of support for a Bill of Rights for Australia, and the lack thereof as something of an anachronism in a modern democratic state.

Indeed, the High Court, the Federal Court and some state Supreme Court judges are clearly prepared to adopt a more rigorous human rights analysis in their day to day judging.[2] A string of recent High Court cases reveals the Court's willingness to draw implied rights out of the existing Constitution and make reference to international human rights law where relevant.[3] These new developments make the publication of Justice Wilcox's book and the reopen-

[1] The Honourable Sir A Mason, AC, KBE, 'The Australian Judiciary in the 1990's' An Address to the Sydney Institute, 15 March 1994, unpublished.

[2] *Jago* v *District Court of NSW* (1989) 168 CLR 23; *Minister for Foreign Affairs and Trade* v *Magno* (1992) 112 ALR 529; *Teoh* v *Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 436 (Fed Ct).

[3] *Davis* v *The Commonwealth* (1988) 166 CLR 79; *Nationwide News Pty Ltd* v *Wills* (1992) 108 ALR 681; *Dietrich* v *R* (1992) 109 ALR 385; *Leeth* v *The Commonwealth* (1992) 174 CLR 455; *Australian Capital Television Pty Ltd* v *The Commonwealth* (No 2) (1992) 109 ALR 577; *Mabo* v *Queensland* (No 2) (1992) 175 CLR 1; *Teoh* v *Minister for Immigration and Ethnic Affairs* (1995) 128 ALR 353.

ing of the debate on a Charter of Rights and Freedoms for Australia all the more timely and relevant.

Nonetheless, a modern Charter of Rights and Freedoms must be capable of protecting the interest of the most disempowered groups whose legitimate claims have been increasingly articulated in the last two decades. Their interests are an integral part of worthwhile and comprehensive debate on the topic. It would be sad if the conservatism represented by this book were to dominate any future debate on the subject. A more comprehensive text on the subject is clearly called for.

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Australian Law Schools After the 1987 Pearce Report by C McINNIS and S MARGINSON with A MORRIS, (Canberra, Australian Government Publishing Service, 1994) pp 503.

In 1987 the release of the Commonwealth Tertiary Education Commission Report into the discipline of law, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*[1] (the 'Pearce Report') was a cause for celebration — and considerable consternation and angst — amongst legal academics in Australia. The four volume and one summary overview by legal academics Dennis Pearce, Enid Campbell and Dennis Harding made detailed as well as sweeping recommendations for the improvement of legal education in Australia. Although the Report acted as a catalyst for reflection and change in many Australian law schools, as the McInnis and Marginson survey *Australian Law Schools After the 1987 Pearce Report* reveals, not all of the suggestions made by the Committee were widely embraced by all law teachers. Academic staff at some of the older law schools and at Macquarie University Law School, in particular, were troubled by the Pearce Committee's observations and conclusions.

Eight years have passed since the furore over the Pearce Report erupted. In the interim, legal education in this country has changed in ways which were anticipated and directed by the Pearce Report. It has also changed unpredictably: the number of programs and the number of law schools offering law degrees has increased despite the Pearce Report's recommendations to the contrary; the type of degrees in law has expanded;[2] and the extent of government intervention in higher education has been unprecedented.

Despite the breadth and detailed nature of some of the comments made by the Pearce Committee and the controversy that has ensued, no study has been undertaken which attempts to survey and catalogue the impact of the Pearce Report on legal education until the Department of Employment, Education

[1] Canberra, Australian Government Publishing Service, 1987.
[2] Combined degrees are now common fare. In addition in 1991 Griffith University Law School offered the first *integrated* law degree, which idea has been adopted elsewhere in Australia.

and Training commissioned the McInnis and Marginson impact study in 1992.

The McInnis and Marginson report of the post-Pearce period is not intended to be a second review of the law schools in Australia. Rather, the authors attempt to trace the recommendations of the Pearce Committee by considering the effects, efficiency, and effectiveness of both the process and outcomes of the Pearce review to inform the direction of law schools' policies and practices within the context of the broader changes in higher education. More generally, McInnis and Marginson discuss the function of evaluation and review in higher education as part of their brief.

The authors base their conclusions on relevant literature and documents, statistical data, case studies of 11 selected law schools, and responses by deans and law librarians in particular to questionnaires.

In part one of chapter one, which lays the context for the study, the authors ably outline some of the changes in higher education since 1987, cataloguing the growth in student numbers in law, the end of the binary divide, the decline in funding by government, the deterioration in staff/student ratios, and the increasing reliance on non-government funding. They discuss the increasingly instrumental, vocational view of education and consider the effect of changes in the practice of law, the organisation and content of academic knowledge, the 'corporatisation' of academic management, and the pressures of evaluation and review.

In part two of chapter two, McInnis and Marginson narrow their focus on context as they consider aspects of the debate about legal education as reflected in part in the scholarly publications, conference papers, and commissioned reports to which they referred. The authors briefly consider: the problem of what it means to 'teach law from theoretical and critical perspectives'; the (narrow) nature of traditional legal research and scholarship; issues of curriculum direction and content; teaching, skills training, and assessment; and admission to practice and employment after law school. This chapter is essential if one is to understand the milieu of legal education post-Pearce. In some ways, this chapter may prove disappointing to a reader who wishes to grasp fully the debate about legal education in Australia. Although statements made in this chapter are generally well supported by references to an annotated bibliography (as is the rest of the impact study), some of the text appears to be comprised of paragraphs of ideas which appear related but which, nevertheless, lack impact because the themes which connect the ideas are lacking or insufficiently emphasised. This weakness may not be surprising, given that the study has been written by individuals who are not as fully conversant with the inter-connectedness of the issues raised in this part of chapter two as are many legal academics.

Case studies of 11 law schools: the Universities of Adelaide, Melbourne, New South Wales, Queensland, and Sydney; Queensland University of Technology; Bond, Griffith, LaTrobe, Macquarie, and Monash Universities, occupy chapter three. The initial plans to present five case studies were changed when the authors realised the significance that the case studies might hold for their analysis of the impact of the Pearce Report. The case studies

vary in their compass, although most consider curriculum, teaching, assessment and library facilities.

In chapter four, McInnis and Marginson outline the specific findings of the impact study in terms of aims and curriculum, teaching practices and standards, postgraduate education, research, library facilities, student selection, resources and staffing, management and efficiency, continuing legal education, and law schools in general, while the final comments of the review are reported in chapter five. These conclusions were conceived on two levels: one in terms of expectations at the time the Pearce review began; the second in the light of issues relevant in 1993, eight years after it was first commissioned.

According to McInnis and Marginson, the Pearce Report, when viewed from the perspective of a critic in 1993, created a culture in which law schools could reflect, review, and effectuate change, thus allowing them to compete with — and even surpass — the older, well established law schools. The accolades bestowed upon Monash University law school and the University of New South Wales law school reflected the importance that the Committee accorded to interdisciplinarity, small group teaching, a mix of assessment tasks, a 'law in context' approach, and a strong, professional orientation, even though the Report did not describe a particular model of an undergraduate law course.

Moreover, the Pearce Report provided standards on staff/student ratios, minimum library holdings and acquisitions, and established the need to teach 'contextually'.[3] These standards themselves have become 'generative of a range of effects'[4] and appear to be part of the everyday vocabulary of law deans and administrators. In this respect, the Pearce Report did succeed in terms of its original terms of reference by assuming a leading role in the development of aims and objectives for law schools in Australia.

Despite these, not inconsiderable, achievements, the Pearce Report was not wholly successful in achieving its stated objectives, according to McInnis and Marginson. The authors focused on nine areas where they believe the Pearce Report fell short:[5]

- The reform that it had hoped to encourage in some of the older law schools did not eventuate.
- The Pearce Committee's recommendation to consider closing Macquarie Law School was not only inconsistent with the Committee's own commitment to diversity as an educational value, it has proved to be ill-conceived.
- Some of the lasting changes which would have been achieved had levels

[3] The standards are that: a desirable staff/student ratio be 1:15; minimum law library holdings be 100,000 volumes with acquisitions of 3000 to 4000 per year (this placed considerable — and timely — emphasis on the role of law libraries in legal education); and the importance of teaching law both theoretically and critically.

[4] C McInnis and S Marginson with A Morris, *Australian Law Schools After the Pearce Report* (Canberra, Australian Government Publishing Service, 1994) 241.

[5] Again when one is assessing its influence from the vantage point of 1993.

of funding been increased, have not (admittedly, however, not as a result of the Pearce Committee's work).

- Recommendations on postgraduate education became 'largely irrelevant'[6] with the growth in postgraduate education.
- Intervention into matters of management and efficiency did not occur.
- The opportunity to describe how a firm working relationship could be developed between the legal profession and the university was missed. McInnis and Marginson did feel, though, that the Pearce Report had contributed to a more congenial relationship between practitioners and legal academics.
- Although the Pearce Committee did repeatedly emphasise the importance of teaching quality, its claims remained abstract and theoretical. Thus, it missed an opportunity to provide models of, and approaches to, teaching.
- In the area of research, outcomes were mixed. For example, although a basis for research activities has now been established in some institutions with the provision of computers, the introduction of research committees and the like, resources for legal scholarship have fallen nevertheless.
- Finally, even though the Pearce Committee was eager to open law school doors to students from a variety of socio-economic backgrounds, its recommendations regarding the relationship between admission and socio-economic outcomes of selection were 'weak'.[7]

The impact study which DEET commissioned does not conclude with a summary of the impact of Pearce on legal education by McInnis and Marginson, however. McInnis and Marginson go on to consider the discipline review process itself, concluding from their own experience that,

> the base level data for a study of Australian law schools can be collected in eight months, and a team of three people (with assistance from two or more) can write a long report about law in four months, working hard.[8]

The authors do concede, nevertheless, that the comparison should not be 'pushed too far'.[9] It is in this last chapter, and to some extent in part two of chapter two, that one can feel the distance that can separate legal academics from scholars in other disciplines. It is this gulf — and perhaps a lack of insight into the psyche of many legal academics — that is evident in this final chapter.

Some of McInnis and Marginson's observations seem caustic, perhaps unnecessarily so, as they comment about the text of the Pearce Report, claiming the writing is prolix, circumlocutory, and over-substantiated, and the like.[10] What the authors do not appear to understand sufficiently is that the

[6] McInnis, op cit (fn 4) 250.
[7] Id 253.
[8] Id 265.
[9] Ibid.
[10] Id 258.

Pearce Report was written primarily for legal academics, not educationists or linguists. As such, the Committee adopted, and I feel quite rightly, a style which is acceptable to the readership it is most likely to influence: law teachers. This review is not, however, the place to engage in debates about legal writing styles. Many legal academics would agree with McInnis and Marginson that some writing in law is turgid and unnecessarily indirect. Sadly though, I fear that some of McInnis and Marginson's comments may alienate a law readership. Educationists and legal academics in Australia are (finally) slowly beginning to work co-operatively and productively together. Seemingly gratuitous comments by one 'side' about the other's discipline may prove destructive.

Moreover, the authors complain that the Pearce Committee did not go to establish first principles. They did not 'rule on forms of teaching, or research, or collegiality . . . (even though it is clear that they) *did* have views on these matters which informed their deliberations. . .'.[11] The fact that the Pearce Committee did not is to their credit. They were not specifically asked to do so, as McInnis and Marginson admit. Lawyers learn well and early in their education to stay within the bounds of authority given to them. To have strayed from their terms of reference into this specific item might well have undermined the many useful conclusions that the Pearce Committee drew.

Despite these concerns, the impact study of the Pearce Report makes for enlightening reading for anyone interested in the state of legal education in Australia. The review conducted by McInnis and Marginson (as the Pearce Report before it) adds to our information about law schools in Australia. The statistical data that has been collected provides new insight into levels and sources of funding, staff/student ratios, library holdings, the composition of academic staff, and the like,[12] which law teachers, law students, and prospective law students might find of interest.

Nevertheless, like the Pearce Report, the impact study will have its critics. Some individuals will wonder why particular law schools were featured in the case studies, particularly as no criterion for selection was apparent in the study, and given that, arguably, the Queensland law schools were well (overly?) represented. Despite the legitimacy of this concern, the study does attempt to put the Pearce Report into perspective. Perhaps it even manages to smooth some of the feathers which were ruffled by the Pearce Committee eight years ago.

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[11] Id 259.

[12] In order to give a fuller picture of the teaching initiatives, perhaps some complete data on the grants available or awarded to each law school by the Centre for the Advancement of University Teaching could have been included in the body of the text.

The Roman Law Tradition by A D E LEWIS and D J IBBETSON (editors), (Cambridge University Press, 1994) pp xiii, 234.

Why bother nowadays with Roman Law? There are at least three justifications which appeal in turn to different interests. First, for the jurist, the story of Roman Law from the Twelve Tables to Justinian is one against which to compare the past and the future directions of our own law and perhaps to shed some light on what makes legal systems work and change.

For the legal historian, there is the role of the Roman Law, as revived in the medieval law schools, as an influence on the laws of every European jurisdiction, some taking it as their common law, others using it to supplement and organise their native customs and all of them, even England, coming to make use of its essential classifications: persons, property, contract, tort and actions.

Lastly the historian of politics and of ideas, remarking the debates that raged for centuries over the relevance of Roman Law in medieval and early modern times, will see how Roman Law was used in the enduring controversies of the continent, between the unity and diversity of its peoples, between the authority of its rulers and the liberty of their subjects.[1]

This book of thirteen essays by leading scholars, published in honour of Peter Stein on his retirement from the Regius Chair of Civil Law at Cambridge, offers the reader illustrations of these three fields.

The first essay, written by the editors and entitled the 'Roman Law Tradition', outlines the story of the revival of the study of Roman Law, its reception in varying degrees in different jurisdictions and its influence on international law, on theories of natural law, on legal reasoning and on political theories. It also makes reference, by way of footnote, to each of the essays which follow. This is the least successful part of the book. Much of the material will be familiar to anyone who has read an introduction to the subject. Further it does not provide background which would aid the reader's appreciation of the essays which follow. In fact they often turn out not to be about what this essay leads one to expect. For example, the late sixteenth century Oxford professor Gentilis is mentioned for his contribution to international law and reference is made to J L Barton's essay 'Gentilis and the *interpretatio duplex*'. Yet this essay is nothing to do with international law, but with Gentilis' disdain for the humanist legal tendency.[2]

The remaining essays cover a diverse range of quite specific topics. They assume an already interested reader with some knowledge of Latin and an appreciation of at least the rudiments of Roman private law and European legal history.

First, in 'Labeo and the Fraudulent Slave', the only essay devoted solely to the exegesis of a Roman text, Alan Rodger gives a new explanation of a passage in the *Digest* on the *Lex Aquilia*, D9.2.23.4. This deals with the measure of damages recoverable by a master when someone has murdered a fraudulent

[1] See Sir Isaiah Berlin, 'Alleged Relativism in Eighteenth Century European Thought' in *The Crooked Timber of Humanity* (1990), 83.

[2] 7. Similarly with the reference to Peter Birks' essay on 10.

slave before the master has had a chance to put the slave to torture. The subject matter is mercifully obsolete, but the essay gives a useful insight into the Roman conception of damages.

After that come two essays in comparative law. 'Doing and Causing to be Done', by Peter Birks, compares the development of Roman and English Law in relation to causation in tort. The English distinction between claims for direct damage, which sounded in trespass, with damage caused indirectly, which sounded in case, is compared with the statutory action and the *actio in factum* on the *Lex Aquilia*. Birks argues persuasively that the restrictions on trespass and the Roman statutory action derived from the use of active verb forms in the writ and the statute respectively. Further, in both Roman Law and English Law the two actions came into existence before there crystallised a conceptual distinction as to the type of case to which each applied. In Roman Law, the distinction was that the statutory action could only be brought where the defendant had inflicted the damage *corpore suo*[3], in English Law it was between direct and indirect damage as in *Scott* v *Shepherd*.[4] In the second of these comparative essays, David Ibbetson deals with the difficulties of defining *furtum* in Roman Law and theft in English law by reference to an act of appropriation (*contrectatio*).

Next are two historical essays, most useful for those who want to grapple with medieval and humanist sources in the original Latin. W M Gordon describes and publishes a section of commentary on part of the Digest title on acquiring and losing possession[5] by the thirteenth century Frenchman Jacques de Revigny. Michael Crawford publishes a curious decree of the Senate of Renaissance Rome apparently written by Cardinal Bembo and later remarked by the humanist lawyers Agustin and Matal.

There follow two essays on different aspects of the civil law in England around 1600. J L Barton's essay on Gentilis has been mentioned already. It explains Gentilis' poor reputation with his academic contemporaries. He adhered to the Italian school (*mos italicus*), which focused on the exposition of the Roman texts as enacted by Justinian, in contrast to the French humanist fashion (*mos gallicus*) for an historical analysis which sought to recover a pure classical Roman Law free from the interpolations of Justinian's compilers and the barbarous accretions of the medieval schools. The controversy was and is important, as it leads straight to the issue of the relevance and authority of Roman Law and the distinction today between the provinces of law and legal history. Its treatment in this essay is most scholarly, but the reader may be deterred by the author's allusive style and somewhat oblique presentation.

The next essay takes the reader to the courts, as Alain Wiffels explores the usage of '*ius gentium*' in the Court of Admiralty, based on the notes of Sir Julius Caesar, an Admiralty Judge and later Master of the Rolls. Counsel relied mainly on writings in the tradition of the *mos italicus* and appealed to

[3] Gaius 3.219.
[4] (1773) 2 WL BL 892.
[5] *Dig* 41.2.6.1–7.

ius gentium as part of a common law of Europe, rather than in the modern sense of the law which obtains between nation states.

Three essays then treat of Roman Law in Scotland, though from quite different perpectives. John D Ford considers the title 'Of Liberty and Servitude' in Stair's *The Institutions of the Laws of Scotland.* This leads him to discuss the influence of political theory and the tension between burgeoning natural rights theories and Calvinist principles on the structure of Stair's account of private law. Geoffrey MacCormack considers the extent to which the Roman action for the partition of jointly owned property (*actio communi dividundo*) has influenced the law relating to common ownership in Scotland. David Johnston then contrasts sale and transfer of title in Roman and Scots law. Both these latter essays make clear how inaccurate is the proposition that 'Scots law is based on Roman law'. Rather Roman Law is but one of the sources to which Scottish jurists and courts have turned from time to time for solutions, particularly in the absence of any contrary native custom.

A return to England is made by Andrew Lewis' 'What Marcellus Says is Against You'. The title, a neat combination of the idioms of the civil and the common law, comes from an exchange between counsel and Bench in *Acton* v *Blundell*[6] and prompts a discussion of the extent to which Roman Law furnished a model for the exposition of English common law in the early modern period. This leads to a description of institutional writings on English law from Cowell to Blackstone and some thoughts on why the citation of Roman Law in the English courts declined in the second half of the nineteenth century.

Finally, Daan Asser in '*Audi et alteram partem*' discusses the basic principle of natural justice that both sides must be heard with reference to English and modern civil law jurisdictions. This is the only essay concerned with procedure and not surprisingly has the least Roman Law in it. It also does not discuss the history of the principle and for that reason it sits perhaps uneasily with the rest of the book.

Most readers of this book will prefer to browse selectively in accordance with their levels of knowledge and reason for interest. The eager student will find here well written examples of modern scholarship on Roman Law which will put some flesh on the outlines provided by introductory works on Roman Law and European legal history. Specialists can quickly find whether particular texts or subjects are treated with the help of the good index of sources and names.

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[6] (1843) 12 M & W 324.

Legal Problem Solving: A Guide for Law Students by PATRICK KEYZER (Sydney, Butterworths, 1994) pp x, 149.

In the preface, Keyser explains that many law students are not fulfilling their potential due to a lack of explicit instruction in problem solving techniques. Surprisingly, many law students apparently finish final year without fully acquiring these skills, which are the tools of trade of lawyers. Perhaps the fault lies in a lack of resources; so that tutorials are crowded or not frequent enough (or are not offered at all). Skills teaching in law schools is also sometimes ad hoc. However, students can, and should be proactive. Keyser explains that his aim is to provide an introductory guide to problem solving by outlining a method which students can develop themselves through revision and by attempting past examination papers and tutorial assignments. Tutors and lecturers are generally willing to read and discuss students' written answers to problems. Informal study groups can also provide feedback.

There are other publications, including others from the same publisher, which deal with problem solving techniques. What does this book specially have to offer? It is very short, succinct and uncomplicated, produced in a handy pocket book size and it is relatively inexpensive. It is easy to read because it is well paragraphed and makes extensive use of point form and bullets. Explanations are usually illustrated by actual examples. There are introductions and summaries which can seem repetitious when reading the book from cover to cover but facilitate use of the book on an ongoing basis as a manual. The typeface and layout are clear and attractive, with bold headings. All these features mean that it provides a good starting point for students who might be put off by longer, more complex or more expensive texts.

As well as chapters outlining the problem solving method described by Keyser, the book contains sample problems in contracts, torts, criminal law, real property, equity, succession, constitutional law, administrative law, evidence, law of associations (corporations law) and family law. These are drawn from examinations conducted by the Barristers and Solicitors Admission Boards of New South Wales and tutorial classes and exams conducted at the University of Sydney. The problems are relevant to law students in other states and do not depend on a knowledge of specific New South Wales legislation or case law.

These problems are accompanied by sample answers prepared by students, described as 'flagged examples'. This means that the text is boxed and annotated. Using obviously real student work is very helpful because it has immediate relevance to other students who write in similar ways. The comments in the margin illustrate points about problem solving technique made in the preceding chapters, such as 'avoid unstated premises — where possible refer directly to the facts'; 'example of precedent on similar facts'. They also suggests ways in which the answer could be improved, such as 'authority?', 'poor expression', 'the argument begs the question'. The reader can therefore look at the answer with these comments alongside to gain an understanding of its strengths and weaknesses without having to refer to separate commentary.

This format also allows the author to draw attention to small but significant matters of style, such as pointing out that using 'basically' at the beginning of a sentence is too vague or that tenses should agree. In the chapter on contract, Keyser also uses a 'flagged question' to illustrate how a student might plan an exam answer during reading time by annotating the paper.

Keyser's problem solving method comprises four general steps: (1) identifying the issue; (2) stating the relevant legal authorities; (3) applying the law to the facts and developing an argument; and (4) reaching a conclusion. However, he alerts students to more sophisticated approaches by noting the work of several academic writers who have considered skills training in general or problem solving techniques in particular.

In relation to identifying the issues, Keyser discusses statute reading and analysis, highlighting jurisdictional questions and rules of statutory interpretation. He also refers to case reading and analysis, using the matters usually found in a headnote as a guide to what should be included in a case summary. Whilst Keyser makes it clear that the summary should be prepared by the student and incorporate the points emphasised by the lecturer, students may infer, wrongly, that they can use the headnote of the reported case. Copying amounts to plagiarism and actual headnotes are sometimes irrelevant or misleading. It would have been helpful to have pointed these things out. Keyser shows how to develop a case summary, a summary of lecture notes and how to prepare background commentary. He makes the valuable suggestion that in some areas, summaries could be transformed into flow charts and illustrates this with an extended example. It would have been useful here to have noted other works which discuss flow charts and the use of algorithims in more depth. Flash cards, which are useful when the exam is closed book, are depicted.

Keyser deals with the next step, *stating* the *relevant* legal *authority*, by breaking this into its three components. The first two are self evident, if sometimes overlooked in practice. In relation to the last, he deals with precedent and its weight, including a simple diagram of the hierarchy of Australian courts. The next step is perhaps the most useful of all. In chapter 4 'Developing an Argument', Keyser discusses reasoning and logic, (premises and conclusions), basic forms of valid and invalid arguments, proof, relevance, weaker forms of argument (personal attack) and strategies for developing good arguments. Throughout he illustrates the points with weli chosen examples, usually short but in the case of relevance, with a sample question, student response and a rewritten version. 'Step 4, Reaching a Conclusion' contrasts the needs of the client for a useful answer with writing an exam answer where a tentative conclusion is acceptable.

This book therefore functions well as a very basic introduction to problem solving but students who are teaching themselves may need to go beyond it. Although flagged examples are drawn from the core subjects, Keyser does not highlight the ways in which different subjects raise particular issues of problem solving. For example, law of associations will require an understanding of the relationship *between* statute and the general law. Some subjects will depend on an ability to deal clearly with interrelated issues (such as trustees'

liability to third parties). How to describe and apply differing approaches by members of the High Court to an issue is also highly relevant to Equity problems. The casenote Keyser gives in the Evidence chapter is a lengthy example of divergent judicial views but it is virtually unannotated and there is no follow up linking the discussion to problem solving. The text on 'The Authority of Courts' does not give any guide to the student in this respect, assuming that there will either be unanimity in the court or that 'a majority judgment of 5:2 will be of greater authority than a majority judgment of 4:3'. The role of an influential dissent is also overlooked.

Unfortunately, the usefulness of the book is jeopardised by carelessness in its production. Many cross references are incorrect so that students are directed to the wrong paragraph. In some cases, it is difficult to locate the issue or argument referred to because only a paragraph number is given although the text is long, covers many related points and there is no corresponding cross reference back. These errors and omissions are confusing and time consuming. Incidentally, there is also an unacceptably high level of typographical errors and in one instance (see [4.8]-[4.9] and [8.2]-[8.3]) a question and answer are repeated, an unnecessary luxury in such a small book where cross referencing would have been quite adequate. Hopefully, these matters can be rectified on its next appearance.

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