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VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

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Announcements

Victoria University of Wellington Student and Alumni Subseries Issue XIX: Issues in Public Law

Issues in Public Law is the second in 2017 of several issues of The Student/Alumni sub-Series of the VUW Legal Research Papers.

The Student/Alumni sub-Series was launched in 2015. It publishes a selection of honours and postgraduate papers from Victoria University of Wellington Law School.

The sub-Series includes both general and thematic issues.

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"'Well-Meaning, but without Understanding': Are Warrantless Police Information Requests to Third Parties Contrary to Section 21 of the New Zealand Bill of Rights Act 1990?"
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 4/2017.

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Early in their investigations, it is common practice for police to make warrantless requests to banks, telecommunications providers, power companies and other service providers. In making these requests, the police hope to obtain information about their suspect (such as financial transaction records or call records) which will assist the police in obtaining search warrants. New Zealand courts have dismissed claims that requests constitute an unreasonable search or seizure per s 21 of the New Zealand Bill of Rights Act 1990, holding that principle 11(e)(i) of the Privacy Act 1993 authorises both the disclosure and use of information. This paper argues that such an approach does not reflect the first principles approach advocated in Hamed v R and by the Canadian Supreme Court because it gives insufficient weight to privacy interests, to the fact that disclosure of personal information is often compulsory when using services and to the nature of the information sought. It concludes that such requests are thus searches or seizures and, not being authorised by any positive law (the Privacy Act in particular), will be unreasonable in most cases. This paper argues that police should instead utilise the production order regime in the Search and Surveillance Act 2012.

"Absolute Discretion and the Rule of Law: Uneasy Bedfellows"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 5/2017.

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"Absolute discretion" in decision-making under the Immigration Act 2009 is intended to generate administrative efficiency and balance individual and national interests. While New Zealand courts have reached a consensus that the use of absolute discretion does not create ouster clauses and Immigration New Zealand's internal instructions have also eroded the absolute nature, each of them have differed their definitions of the scope of absolute discretion over time, within the same sections and over the whole Act.

This paper proposes that the uncertainty surrounding absolute discretion's precise meaning—both within and between the varying definitions provided by the Legislature, Judiciary and Executive—threatens the vital rule of law concept of legal certainty. Considering the potential encroachment of unrestrained absolute discretion on international obligations, human rights and access to information, clarity is essential. Two steps could be taken to enhance clarity, with minimal impingement on the Act's policy: removal of the descriptive "absolute"; and clarification, in regulations, of the mandatory considerations, recording standards and extra-legislative factors to which must be given effect within each decision made in absolute discretion.

"Questions Concerning Consultation with Maori: What is Required from a Treaty Perspective?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 6/2017.

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The New Zealand case law and Waitangi Tribunal jurisprudence have developed the meaning of consultation in the Treaty context. Recently, this has been informed by UNDRIP. Overall, New Zealand has always had substantive consultation obligations in certain circumstances but the duty has been interpreted too narrowly. Purely procedural consultation in some situations is insufficient to discharge the Crown's duty to actively protect Maori or to discharge their duty of partnership. The level of consultation required is directly correlated to the taonga (interest) at stake, and interests in land are sufficient to trigger a substantive duty. The fears espoused in the SOE case have impeded the development of a substantive duty; however, the Canadian duty to accommodate and their spectrum analysis (shared by the Waitangi Tribunal) demonstrates that fear of creating an onerous duty is inflated and consultation can be developed in a way that balances the partnership between Maori and the Crown, as well as allowing a duly elected government to govern as it sees fit.

"Battison v Melloy: An Aberration in the Judicial Review of School Discipline Decisions"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 7/2017.

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This paper analyses the decision of Battison v Melloy. Lucan Battison was suspended from St John's College after he failed to comply with a request from principal to cut his hair in accordance with school

rules. Lucan sought to have this decision judicially reviewed.
Justice Collins made two significant rulings: first, the suspension was quashed as it did not comply with s 14(1)(a) of the Education Act 1989; and secondly, the school's hair rule was ultra vires because it breached the common law requirement of certainty, and was therefore contrary to s 72 of the Education Act.

This paper argues that while the judge's reasoning on the hair rule was underdeveloped, the ruling has net benefits with regards to vague school uniform rules. The judge's reasoning on the school discipline issue was more troubling. It is argued that Collins J's expansive, rights-based approach is contrary to authority. Stronger arguments for the judge's conclusion are suggested.

This paper closes by addressing the perception that courts are now more willing to review school discipline decisions on their merits. After comparing the approach in Battison to other recent decisions, it is suggested that this perception is not well founded.

"Universal Basic Income: Providing a Foundation for the Citizen's Exercise of Democratic Rights"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 8/2017.

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The concept of a Universal Basic Income, an unconditional payment to all citizens without means test or a work requirement, is a contemporary idea aimed at addressing poverty and wider societal inequalities. Though much research has been dedicated to political and economic aspects of the concept, the arguments within this paper start earlier, focusing on core, rights-based justifications for the implementation of a basic income scheme. This paper argues, in the context of growing inequality in New Zealand, a basic income is capable of advancing the exercise of democratic rights within the public and private spheres.

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About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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