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Victoria University of Wellington Student and Alumni Subseries Issue VIII: The Judiciary

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

- "The Implications of A Supreme Law Bill of Rights for New Zealand Judicial Appointments"** 
Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 35

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The enactment of a supreme law Bill of Rights in New Zealand would have significant implications for

the process of appointing judges. This essay contends that the present judicial appointments system is insufficiently transparent and offers too few safeguards to prevent judicial appointments from becoming politicised. It draws on Canada's experience after enacting the Canadian Charter of Rights and Freedoms to illustrate why reform is needed. Ultimately, it is contended that the adoption of a supreme law Bill of Rights in New Zealand should be accompanied by the creation of a judicial appointments commission.

"Judicial Recusal in New Zealand: Looking to Procedure as the Principled Way Forward"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 36

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The well-documented Wool Board Disestablishment Co v Saxmere Co litigation thrust the often dormant issue of conflicts of interest between a judge and a litigant into the limelight. Now that the dust has settled on the controversy that culminated in Wilson J's resignation, it is pertinent to question the status quo and investigate the potential cause of the events and, more importantly, whether measures need to be taken to prevent another such occurrence.

This paper takes a principled approach to analysing judicial recusal law in New Zealand, with a particular focus on procedure. In doing so, a mismatch between process theory and the reality of haphazard self-regulation highlights the procedural shortcomings of the current recusal paradigm. To remedy this, the author applies aspects of process theory to reform judicial recusal procedure and bring it in line with general civil litigation practice. The proposed reform instills some fundamental practices that are presently absent in recusal procedure. To contextualise the paper's findings, the author revisits the Saxmere saga to first posit that a lack of procedural safeguards may have contributed to the saga and two, to suggest that had the procedural safeguards proposed by this paper been in place, the controversy could have been mitigated, if not avoided.

"Judicial Discretion in Sentencing: A Justice System that is No Longer Just?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 37

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One of the fundamental principles of the criminal law is consistency: like offenders must be treated alike. However, research has shown that when it comes to sentencing in New Zealand, there is in fact substantial regional disparity in the penalty imposed on similarly situated offenders. The situation is unacceptable, and undermines the integrity of the criminal justice system. This article will explore three different mechanisms for guiding judicial discretion in the pursuit of sentencing consistency. It will undertake an analysis of mandatory sentences and the "instinctive synthesis" approach, both of which will be shown to be unsatisfactory. Instead, the article will argue that the establishment of a Sentencing Council with a mandate to draft presumptively binding guidelines is the most appropriate way forward for New Zealand. This option finds the correct equilibrium between giving a judge sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases.

"The Price We Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 38

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In recent years, a review of the Judicature Act 1908 and the introduction of the Judicature Modernisation Bill have enlivened the debate over the structure and character of the New Zealand court system. A key issue that the recent review and reforms have brought to the fore is whether greater judicial specialisation is advantageous at the High Court level. This article considers whether tax cases, in particular, warrant greater judicial specialisation. The article draws from experiences of specialised tax adjudication in foreign jurisdictions and evaluates the efficacy of existing specialisation in the New Zealand system, as well as considering whether the nature of tax law lends itself to specialisation. The conclusion is that greater judicial specialisation in respect of tax cases is undesirable.

"Courting Controversy: The Problems Caused by Extrajudicial Speech and Writing"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 39

This paper explores the problems for judicial impartiality that a judge's extrajudicial speaking or writing on academic matters may create. Examples from New Zealand and abroad demonstrate such extrajudicial commentary may lead to a finding of apparent bias or require that a judge recuse himself from hearing a case. The current regulation of extrajudicial speech, as ascertained from judicial conduct codes and case law, provides that judges can speak and write extrajudicially on such matters but must exercise caution in the tone and language they use. The paper concludes that this is an appropriate approach and that a solution of judicial silence is undesirable. This conclusion is supported by empirical research conducted by the author which shows that the incidence of extrajudicial writing in New Zealand is low.

"Judicial Specialisation in a Generalist Jurisdiction: Is Commercial Specialisation within the High Court Justified?"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 40

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In November 2013, after a series of Law Commission reports and years of academic, professional and judicial discussion, the government introduced legislation to Parliament to replace the existing High Court commercial list with a specialist commercial panel. Whilst this panel would bring New Zealand into line with many comparable common law jurisdictions, this paper argues that the case for specialisation has not been established. In particular, it notes that there is no publicly available evidence to support the claim that the High Court is losing its commercial jurisdiction, or that commercial parties are choosing to resolve their disputes offshore or through alternative dispute resolution. Accordingly, this paper argues that future research by the Law Commission, or other research agency, is required before specialisation can be justified. In reaching this conclusion it also examines the issues that may arise if the government decides to continue with its proposed reform under clause 18 of the Judicature Modernisation Bill 2013, suggesting changes along the way.

"Appointment, Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 41

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This paper gives an overview of the legal system of Switzerland and then compares the judiciaries of Switzerland and New Zealand. As far as Switzerland is concerned, it covers both the system of the Swiss Federation and the systems in the Cantons. After analysing the powers enjoyed by the judiciary via the legislature, the paper examines the appointment of judges in detail. The author explains how in Switzerland openly political and other considerations are weighed in the course of electing judges and how the appointment of lay judges is balanced with an active role of law clerks. In contrast, New Zealand has a proud tradition of apolitical judicial appointments that are made solely based on merit. The author criticises that Swiss judges are elected for a term of office, whereas New Zealand judges enjoy the security of tenure and thus, a greater judicial independence. Lastly, the paper covers the removal and discipline of judges, where the author, while he commends the recent reform in New Zealand, speaks out for a system where the ultimate decision is given to an independent judicial body rather than a parliament.

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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 Massachusetts 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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